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**Northwestern University School of Law**

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THE  
FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 188  
PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE  
CIRCUIT COURTS OF APPEALS, CIRCUIT  
AND DISTRICT COURTS, AND COMMERCE  
COURT OF THE UNITED STATES

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN  
GRANTED OR DENIED

AUGUST—OCTOBER, 1911

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1911



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RULES  
OF THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE  
EIGHTH CIRCUIT

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ADOPTED MARCH 30, 1911

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UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

Thursday, March 30, 1911.

It is now here ordered that the following rules be and the same are hereby adopted as the rules of practice of this court, to be in force and effect from and after this date.

It is further ordered that where the District Court is specifically named in any rule, the provisions thereof shall also apply to the Circuit Court, so far as the same may be applicable, until such Circuit Courts shall be abolished by operation of law.

Said rules are in the words and figures following, to-wit:

RULES<sup>1</sup>

1.

NAME.

The court adopts "United States Circuit Court of Appeals for the Eighth Circuit" as the title of the court.

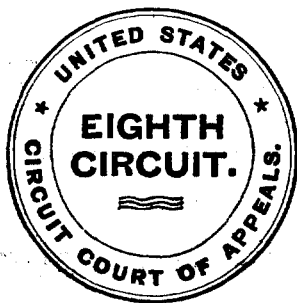
2.

SEAL.

The seal shall contain the words, "United States," on the upper part of the outer edge; and the words, "Circuit Court of Appeals,"

<sup>1</sup> For rules as originally adopted, see 150 Fed. xxv.

on the lower part of the outer edge, running from left to right; and the words, "Eighth Circuit" in two lines, in the center, with a dash beneath. (See specimen of seal below.)



### 3.

#### TERMS.

1. Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver on the first Monday of September and one at the city of St. Louis on the first Monday of December.

2. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of April, and cases from Colorado, Utah, Wyoming and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the May term in St. Paul are filed on or before the 1st day of April, and those only, will be heard at the succeeding May term of the court in St. Paul.

3. Cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of July and cases from the remainder of the circuit in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or

admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the September term in Denver are filed on or before the 1st day of July, and those only, will be heard at the succeeding September term in Denver.

4. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas and Oklahoma in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, are filed on or before the 1st day of October, and cases from Colorado, Wyoming, Utah and New Mexico in which transcripts to be printed under the supervision of the clerk of this court are filed, or transcripts printed before certification by the clerk of the lower court and proof by affidavit or admission that three copies of the printed transcripts have been served on the defendants in error or appellees, or their counsel, and stipulations of the parties for their hearing at the December term in St. Louis are filed on or before the 1st day of October, and those only, will be heard at the succeeding December term in St. Louis.

5. These terms of the court may be adjourned to such times and places as the court may from time to time designate.

#### 4.

#### QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

#### 5.

#### CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court, at which a term shall be held annually.

2. The clerk shall not practice, either as attorney or counsellor, in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Stat-

utes, and shall give bond in a sum to be fixed, and with sureties to be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court.

## 6.

### MARSHAL, CRIER, AND OTHER OFFICERS.

1. The marshal of the district in which a term or session of the court is held and the crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

## 7.

### ATTORNEYS AND COUNSELLORS.

1. All attorneys and counsellors, admitted to practice in the Supreme Court of the United States or in any Circuit Court or District Court of the United States, or in the Supreme Court of any state in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

2. And any attorney and counsellor admitted to practice in the Supreme Court of the United States or in the Supreme Court of any state or in the District or Circuit Courts of the United States for this circuit, may be admitted by order of this court to practice and may be enrolled as an attorney and counsellor of this court, thirty days after he furnishes to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts; and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of the Circuit Court of Appeals for the Eighth Circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

## 8.

### PRACTICE.

The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

## 9.

## PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

## 10.

## BILL OF EXCEPTIONS.

The judges of the District Courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

## 11.

## ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned.

## 12.

## OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.



**13.**

**SUPERSEDEAS AND COST BONDS.**

1. Supersedeas bonds in the District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree of a district court, or a judge thereof, granting, continuing, refusing, dissolving or refusing to dissolve an injunction or appointing a receiver, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal. ("The Judicial Code," section 128, Act of March 3, 1911.)

**14.**

**WRITS OF ERROR, APPEALS, RETURN, AND RECORD.**

1. The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the court to the jury.

3. No case will be heard until twenty-five copies of the printed transcript of the record, containing in themselves, and not by reference, all the papers, exhibits, depositions, sketches, drawings, photographs, maps, blue prints and other proceedings, which are necessary to the hearing in this court, printed title pages in the form prescribed in section five of rule 26, chronological printed indexes of each and every item of their contents specifying the pages where evidence, testimony and exhibits including those in the body of any pleading, order or bill of exceptions may be found

and briefly naming or describing each exhibit in addition to its number together with a statement of the numbers, names and dates of issue of any patents, shall have been filed in this court.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding sixty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the Supreme Court.

## 15.

### TRANSLATIONS.

Whenever any transcript transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony or other proceeding in a foreign language, and the transcript does not also contain a translation of such document, paper, testimony or other proceeding made under the authority of the inferior court, or admitted to be correct, the transcript shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, and if the record is to be printed in the court below, it shall be reported to that court by its clerk, in order that a translation may be there supplied and inserted in the record.

## 16.

### DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in er-

ror or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee, may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

**NOTE.**—A deposit of thirty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed.

## 17.

### DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term, except cases from the districts of Colorado, Utah, Wyoming and New Mexico which cases shall only be called at the September term unless counsel otherwise stipulate as provided in rule 3; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

## 18.

### CERTIORARI.

No certiorari for diminution of the record will be awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

## 19.

### DEATH OF A PARTY.

Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and

thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: Provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a District Court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the District Court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the state or territory or district in which such representative resides; and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally, or by being left at his residence, at least thirty days before the expiration of such ninety days: Provided, also, that in every such case, if the representa-

tive of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed and be heard and determined as in other cases.

## 20.

### DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk seasonably to present such agreement to the court for its consideration and determination.

## 21.

### MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

## 22.

### PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff in error or appellant called and the writ of error or appeal dismissed.

2. Where the defendant in error or appellee fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

## 23.

## PRINTING RECORDS.

1. In cases brought to this court in which the plaintiff in error or appellant elects to waive the printing of the record under the provisions of the act of Congress, entitled "An act to diminish the expense of proceedings on appeal and writ of error or of certiorari," approved February 13, 1911, and file a typewritten or manuscript transcript of the record in this court, such plaintiff in error or appellant may within twenty days from and after the date of the filing and docketing of the record in this court, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

2. On the filing of the transcript in every such case the clerk shall cause thirty copies of the same, or the parts thereof designated under this rule, to be printed, and such additional number of copies as counsel for either of the parties may direct, and shall furnish three copies of the record so printed to each party at least sixty days before the argument.

3. In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing the record for the printer, indexing same, supervising the printing and distributing the copies, shall be computed as if said record so furnished had been printed under his supervision.

4. The clerk shall be entitled to demand of the plaintiff in error or appellant the cost of printing the record before ordering the same to be done.

5. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed.

6. In case of reversal, affirmance or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

7. In any cause brought to this court, in which the record has been printed, in which a writ of certiorari shall be granted under the provision of rule 18 of this court the return to such writ of certiorari shall be printed in the same manner as the record was.

8. If in any cause in which the record or a portion thereof has been printed it shall be made to appear to this court that the printed transcript does not substantially conform to the requirements of the rules of this court, it may be rejected and stricken from the files and such order relative thereto may be entered as the court shall deem proper.

## 24.

### BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least forty days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall be printed on unglazed paper, and it and all quotations contained therein shall be in substantial conformity with the size and type prescribed by rule 26 for the printing of records and shall contain, in order here stated—

First. A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

Second. A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master the specification shall state the exception to the report and the action of the court upon it.

Third. A brief of the argument exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty copies of his brief printed on unglazed paper and in substantial conformity with the size and type prescrib-

ed by rule 26 for the printing of records, at least ten days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

## 25.

### ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

## 26.

### FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS

1. All transcripts of record, arguments and briefs for the use of this court, except in patent causes as hereinafter provided, shall be printed on unglazed paper not less than  $6\frac{1}{4}$  inches in width by  $9\frac{1}{2}$  inches in length, including a sufficient margin so that they can be conveniently trimmed and bound in volumes. The paper should equal a weight of 80 pounds per ream on basis of size of sheet 25 by 38 inches.



2. All records and briefs in patent causes may be printed on unglazed paper, of the weight as provided in section one of this rule, of such size that copies of letters patent may be inserted therein without folding, but the size of such records and briefs in patent causes shall not be less than  $7\frac{1}{2}$  inches wide and  $9\frac{1}{2}$  inches long so that the records and briefs can be conveniently trimmed and bound in volumes.

3. All records, briefs, supplemental transcripts and returns to writs of certiorari shall be printed in clear eleven point or small pica type (never smaller than ten point), of 26 pica or 28 small pica ems to a line and 52 lines, including running head, solid, per printed page, containing substantially 1400 small pica ems. Where testimony or depositions by question and answer are printed the answer shall follow on same line as the question whenever the same can be done.

4. All indexes to records and tabular exhibits, which from their nature require smaller type, may be printed in eight point or brevier type.

5. All covers for records shall be printed in a neat and workmanlike manner on substantial paper equal to a weight of 96 pounds per ream on the basis of a sheet 25 by 40 inches, and shall contain in conspicuous type the following matter, viz.:

#### TRANSCRIPT OF RECORD.

*First.*

*Second.*

#### UNITED STATES CIRCUIT COURT OF APPEALS EIGHTH CIRCUIT.

*Third.* The abbreviation for number "No." followed by a blank line  $\frac{3}{4}$  of an inch in length.

*Fourth.* The title of the cause as it will be docketed in this court, viz.:

....., Appellant (or Plaintiff in Error) as the case may be, vs. ...., Appellee (or Defendant in Error).

*Fifth.* The words "In Error to" (or "Appeal from") as the nature of the case may require, followed by the correct title of the trial court.

6. Unless otherwise expressly directed by counsel, the full titles of the court and cause once correctly shown in the printed transcript shall not be repeated when unchanged. There shall be placed at the head of each subsequent pleading, etc., a brief designation of its character.

Unless otherwise expressly directed by counsel, the indorsements on pleadings, etc., shall not be printed in full; it shall be sufficient to print: "Filed in the ..... Court on ....., " giving the correct date and name of the court.

The date of all orders and decrees and the name of the judge or judges making them shall always appear.

In printed transcripts the pleadings, orders, testimony of witnesses etc., shall be separated by a face rule three inches long. The clerk shall indicate to the printer the appropriate places therefor.

When inserts are folded several times to conform to the size of the printed record, stubs should be inserted at the binding side of the record to equalize the space occupied by the folds. Unmounted photographs should be used when copies of such are required in printed records.

As this rule is intended primarily for the guidance of the printer his attention should be directed thereto before the record or brief is printed.

A sample copy of a printed record will be furnished by the clerk of this court on application therefor.

Records and briefs not printed in substantial conformity with the provisions of this rule will not be accepted or filed.

## 27.

### COPIES OF RECORDS AND BRIEFS.

The clerk shall cause to be bound in volumes in a substantial manner and shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

## 28.

### OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed or prepared under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed or original opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

## 29.

### REHEARING.

1. A petition for rehearing may be presented and filed within sixty days after the date of the judgment or decree, and jurisdiction to hear and decide the questions presented thereby is reserved, notwithstanding the lapse of the term within the sixty days.

2. Such petition for rehearing must be printed and twenty copies

thereof filed with the clerk and must briefly and distinctly state its grounds, and be supported by a certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

### 30.

#### INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

### 31.

#### COSTS.

1. In all cases where any suit shall be dismissed in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. Where the record has been printed in this court under the provisions of sections one and two of rule 23, the cost of printing thirty copies of the transcript of record from the court below shall be taxed as costs in the case, unless otherwise ordered by this court, but no allowance shall be made for the amount paid to the clerk of the court below for the written or typewritten transcript of the record. Where the record has been printed in the court below and a copy of such printed record certified to this court the cost of printing twenty-five copies of such record or portion thereof shall be taxable as costs in the case in the court below, unless otherwise ordered by this court.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed there-to by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court, except that no fee shall be charged or collected for any printed record or portion thereof, required by law to be used by the clerk in the preparation of such transcript of the record.

### 32.

#### MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

[Note.—By an order entered March 30, 1911, the clerk is directed to issue a mandate or other proper process, to the court below, in all cases, 60 days after the final disposition thereof, except in cases where it shall be otherwise expressly ordered.]

### 33.

#### CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as herein-after provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

### 34.

#### MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

### 35.

#### WRITS OF ERROR IN CRIMINAL CASES.

1. Writs of error to review criminal cases tried in any District Court of the United States within this circuit, which may be reviewed under the provisions of "The Judicial Code," approved March 3, 1911, may be allowed in term time or in vacation by the Circuit Justice assigned to this circuit, or by either of the Circuit Judges within the circuit, or by any District Judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error.

2. Where such writ of error is allowed in the criminal cases aforesaid, the District Court before which the accused was tried, or the District Judge of the district wherein he was tried, within the district, or the Circuit Justice assigned to the circuit, or either of the Circuit Judges within the circuit, shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

### 36.

#### PETITIONS TO REVISE.

A petition to revise, under the provisions of section 24b, of the bankruptcy law, approved July 1, 1898, shall be filed and docketed as an original action in this court, and be entitled "....., Petitioner, v. ...., Respondent," and shall specifically designate the respondent or respondents upon whom the petitioner desires notice to be served, and a sufficient number of copies of such petition shall be furnished the clerk at the time of filing so that a copy may be served upon each of the respondents.

### 37.

#### ORDER OF COURT.

1. Before the filing of a petition to revise, the same shall be presented to the court, or one of the circuit judges, for leave to file

same and for an order fixing the return day to the notice required by law.

2. When such petition is accompanied by a written consent that the petition to revise may be filed and a waiver by the respondent or respondents, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk.

### 38.

#### NOTICE.

The notice to be given, as provided by law, shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the respondent or respondents and be served by the marshal, unless an acknowledgment or acceptance of service thereof is made by the respondent or respondents, or their counsel.

### 39.

#### RESPONSE.

The response to the petition, when the respondent elects to make a written response, shall be filed within thirty days after the service of the notice or the filing of a waiver thereof.

### 40.

#### PRINTING OF RECORD.

1. The clerk shall cause the petition and exhibits thereto, if any, and the order, notice and response, if any, to be printed as soon as convenient after the response is filed or the time for filing such response has expired and shall distribute the printed copies of same to counsel for the respective parties, as soon as the same are printed.

### 41.

#### BRIEFS AND ARGUMENTS.

Twenty copies of the brief and argument in behalf of petitioner shall be printed and filed twenty days before the day set for the hearing and twenty copies of the brief and argument for the respondent or respondents shall be printed and filed eight days before the day of hearing.

### 42.

#### HEARING.

1. Petitions to revise filed in vacation, shall be assigned by the clerk for hearing in their regular order at the next session or term

of the court in the same manner as appeals and writs of error in other cases.

2. Petitions to revise filed during a session of the court, when a sufficient showing of urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct.

3. Petitions to revise assigned by the clerk in their regular order as provided in section one of this rule, when such assignment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties.

#### 43.

##### COSTS.

1. The costs and fees now provided by law in cases upon appeal or writ of error, shall, so far as the same are applicable, be taxed on petitions to revise.

2. Upon the determination of a petition to revise such order as to costs will be made as the court may deem necessary.

#### 44.

##### PROCEDENDO.

1. In all cases on a petition to revise wherein the action or decree of the district court, complained of, is disapproved by this court, the clerk shall, at the expiration of thirty days from and after the date of entering the decree in this court, issue process in the nature of a procedendo to the said district court for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such district court in conformity with the decree of this court.

2. In all cases on petition to revise, wherein the action or decree of the district court, complained of, is approved and confirmed, or said petition dismissed, by this court the clerk shall, at the expiration of thirty days certify a copy of such decree to the district court.

#### 45.

##### APPEALS AND WRITS OF ERROR IN BANKRUPTCY CASES.

1. The appeals and writs of error provided for by section 25 of the bankruptcy law, approved July 1, 1898, shall be governed by the same rules and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases.

## ADDENDA.

[Form of Writ of Error for Use in the United States Circuit Court of Appeals, Eighth Circuit.]

United States of America, ss.

The President of the United States of America,

To the Honorable Judges of the (1).....

..... Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said.....Court, before you, at the.....Term, 19..., thereof, between (2).....

..... a manifest error hath happened, to the great damage of the said (3).... as by ..... complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the (4).....day of.....19..., to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this.....day of .....in the year of our Lord one thousand nine hundred.....

Issued at office in.....with the seal of the (5)..... and dated as aforesaid.

..... Clerk of.....

Allowed by

..... Judge.

[Form of Return to be Endorsed on Writ of Error by the Clerk of the Court to Which the Writ is Addressed.]

United States of America, } ss.  
..... }

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified trans-



script of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of (6).....

Clerk of.....

Notes.—(1) Here insert correct name of the court to which the writ is addressed and whose judgment is to be reviewed.

(2) Here insert correct style of cause showing who was plaintiff and who defendant in court below.

(3) Here insert name of party who sues out writ of error.

(4) Rule XIV, subdivision 5, requires writs of error and appeals to be made returnable sixty days after citation is signed.

This blank must be filled accordingly, naming a day not more than sixty days after the date of the citation.

(5) This blank should be so filled as to show whether the writ is issued by the clerk of a United States District Court or by the clerk of the Circuit Court of Appeals.

(6) Here describe the court to which the writ is addressed.

[Form of Citation.]

United States of America,

To..... Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to (1).....filed in the Clerk's Office of the (2).....wherein.....is (3).....and you are (4)....., to show cause, if any there be, why the (5).....rendered against the said (6).....as in said (7).....mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable.....  
Judge of.....this.....day of  
.....A. D. 19....

Judge of.....

Notes.—(1) Insert (a writ of error) or (an appeal allowed and).

(2) Insert name of court to which writ of error is addressed, or from which appeal is allowed.

(3) Insert plaintiff in error or appellant.

(4) Insert defendant in error or appellee.

(5) Insert judgment or decree.

(6) Insert plaintiff in error or appellant.

(7) Insert writ of error or appeal.

[Form of Supersedeas or Cost Bond.]

Know All Men By These Presents,

That we,.....  
are held and firmly bound unto.....  
in the full and just sum of.....to be  
paid to the said.....heirs,  
executors, administrators, successors or assigns, to which payment  
well and truly to be made, we bind ourselves, our heirs, executors and

administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this.....day of....., in the year of our Lord one thousand nine hundred.....

Whereas, lately at the.....term of the.....  
.....in a suit depending in said Court  
between....., plaintiff, and.....  
....., defendant,.....was rendered  
against the said.....and the said.....  
.....has obtained.....  
of the said Court to reverse the.....in the aforesaid suit,  
and a citation directed to the said.....citing  
and admonishing.....to be and appear in the United States  
Circuit Court of Appeals for the Eighth Circuit, at the City of St.  
Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said  
.....shall prosecute said.....  
.....to effect, and answer all damages and costs if  
.....fail to make good.....plea, then the above  
obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

.....[Seal.]  
.....[Seal.]  
.....[Seal.]

Approved by

.....

[The foregoing bond and citation is adapted for appeals in equity cases as well as in cases of writs of error in actions at law.]

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know All Men By These Presents,

That we,.....  
as principal, and.....  
as sureties, are held and firmly bound unto the United States of America in the full and just sum of.....Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this.....day of.....  
in the year of our Lord, One Thousand Nine Hundred.....

Whereas, lately at the.....Term, A. D. 190...., of the.....  
.....Court of the United States for the.....District  
of....., in a suit depending in said Court between  
the United States of America, plaintiff, and.....  
.....defendant.....  
a judgment and sentence was rendered against the said.....  
.....and the said.....

ha obtained a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States

of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said .....

..... shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the writ of error or appeal is dismissed; and if he shall appear for trial in the.....

..... Court of the United States for the..... District of.....

on such day or days as may be appointed for a retrial by said.....

..... Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit; then the above obligation to be void, otherwise to remain in full force, virtue and effect.

..... [Seal.]  
 ..... [Seal.]  
 ..... [Seal.]

Approved:

.....  
 Judge of the.....

# JUDGES

OF THE

## UNITED STATES CIRCUIT COURTS OF APPEALS THE CIRCUIT AND DISTRICT COURTS, AND THE COMMERCE COURT

### FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice..... Washington, D. C.  
Hon. LE BARON B. COLT, Circuit Judge..... Providence, R. I.  
Hon. WILLIAM L. PUTNAM, Circuit Judge..... Portland, Me.  
Hon. WILLIAM SCHOFIELD, Circuit Judge..... Malden, Mass.  
Hon. CLARENCE HALE, District Judge, Maine..... Portland, Me.  
Hon. FREDERIC DODGE, District Judge, Massachusetts..... Boston, Mass.  
Hon. EDGAR ALDRICH, District Judge, New Hampshire..... Littleton, N. H.  
Hon. ARTHUR L. BROWN, District Judge, Rhode Island..... Providence, R. I.

### SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice..... Washington, D. C.  
Hon. E. HENRY LACOMBE, Circuit Judge..... New York, N. Y.  
Hon. ALFRED C. COXE, Circuit Judge..... Utica, N. Y.  
Hon. HENRY G. WARD, Circuit Judge..... New York, N. Y.  
Hon. WALTER C. NOYES, Circuit Judge..... New Haven, Conn.  
Hon. MARTIN A. KNAPP, Circuit Judge<sup>1</sup>..... Washington, D. C.  
Hon. JAMES P. PLATT, District Judge, Connecticut..... Hartford, Conn.  
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York..... Brooklyn, N. Y.  
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York..... Brooklyn, N. Y.  
Hon. GEORGE W. RAY, District Judge, N. D. New York..... Norwich, N. Y.  
Hon. GEORGE B. ADAMS, District Judge, S. D. New York..... New York, N. Y.  
Hon. GEORGE C. HOLT, District Judge, S. D. New York..... New York, N. Y.  
Hon. CHARLES M. HOUGH, District Judge, S. D. New York..... New York, N. Y.  
Hon. LEARNED HAND, District Judge, S. D. New York..... New York, N. Y.  
Hon. JOHN R. HAZEL, District Judge, W. D. New York..... Buffalo, N. Y.  
Hon. JAMES L. MARTIN, District Judge, Vermont..... Brattleboro, Vt.

### THIRD CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice..... Washington, D. C.  
Hon. WILLIAM M. LANNING, Circuit Judge..... Trenton, N. J.  
Hon. GEORGE GRAY, Circuit Judge..... Wilmington, Del.  
Hon. JOSEPH BUFFINGTON, Circuit Judge..... Pittsburg, Pa.  
Hon. ROBERT WODROW ARCHBALD, Circuit Judge<sup>2</sup>..... Washington, D. C.

<sup>1</sup> Appointed December 20, 1910. Designated to serve five years in Commerce Court.

<sup>2</sup> Appointed January 31, 1911. Designated to serve four years in Commerce Court.

Hon. EDWARD G. BRADFORD, District Judge, Delaware.....	Wilmington, Del.
Hon. JOHN RELLSTAB, District Judge, New Jersey.....	Trenton, N. J.
Hon. JOSEPH CROSS, District Judge, New Jersey.....	Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....	Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....	Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....	Sunbury, Pa.
Hon. JAMES S. YOUNG, District Judge, W. D. Pennsylvania.....	Pittsburg, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....	Pittsburg, Pa.

## FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....	Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....	Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....	Asheville, N. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....	Baltimore, Md.
Hon. JOHN C. ROSE, District Judge, Maryland.....	Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....	Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....	Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. and W. D. S. C.....	Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....	Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....	Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....	Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....	Charleston, W. Va.

## FIFTH CIRCUIT

Hon. JOSEPH R. LAMAR, Circuit Justice.....	Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....	Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....	Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....	Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....	Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....	Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....	Mobile, Ala.
Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....	Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....	Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....	Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....	Macon, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....	New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....	Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....	Kosciusko, Miss.
Hon. GORDON RUSSELL, District Judge, E. D. Texas.....	Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....	Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....	Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....	Austin, Tex.

## SIXTH CIRCUIT

Hon. JOHN M. HARLAN, Circuit Justice.....	Washington, D. C.
Hon. HENRY F. SEVERENS, Circuit Judge <sup>3</sup> .....	Kalamazoo, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge <sup>4</sup> .....	Kalamazoo, Mich.
Hon. JOHN W. WARRINGTON, Circuit Judge.....	Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....	Grand Rapids, Mich.

<sup>3</sup> Resigned to take effect October 3, 1911.

<sup>4</sup> Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.

Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....	Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....	Louisville, Ky.
Hon. ALEXIS C. ANGELL, District Judge, E. D. Michigan.....	Detroit, Mich.
Hon. ARTHUR C. DENISON, District Judge, W. D. Michigan <sup>4</sup> .....	Grand Rapids, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan <sup>5</sup> .....	Muskegon, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....	Toledo, Ohio.
Hon. WM. L. DAY, District Judge, N. D. Ohio.....	Cleveland, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....	Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....	Columbus, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee.....	Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....	Memphis, Tenn.

## SEVENTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....	Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....	Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....	Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....	Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....	Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge <sup>6</sup> .....	Washington, D. C.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....	Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....	Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....	Urbana, Ill.
Hon. J. OTIS HUMPRHEY, District Judge, S. D. Illinois.....	Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....	Indianapolis, Ind.
Hon. JOSEPH V. QUARLES, District Judge, E. D. Wisconsin.....	Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....	Madison, Wis.

## EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....	Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....	St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....	Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....	St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge.....	Council Bluffs, Iowa.
Hon. JOHN E. CARLAND, Circuit Judge <sup>7</sup> .....	Washington, D. C.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. F. A. YOUNG, District Judge, W. D. Arkansas.....	Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....	Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....	Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....	Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....	Topeka, Kan.
Hon. CHAS. A. WILLARD, District Judge, Minnesota.....	Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....	Duluth, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....	St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri.....	Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....	Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....	Lincoln, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....	Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. Oklahoma.....	Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. Oklahoma.....	Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....	Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....	Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....	Cheyenne, Wyo.

<sup>4</sup> Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.

<sup>5</sup> Appointment effective October 3, 1911, in place of Arthur C. Denison, District Judge.

<sup>6</sup> Appointed January 31, 1911. Designated to serve one year in Commerce Court.

<sup>7</sup> Appointed January 31, 1911. Designated to serve two years in Commerce Court.

## NINTH CIRCUIT

Hon. JOSEPH McKENNA, Circuit Justice.....	Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....	Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....	Los Angeles, Cal.
Hon. WM. W. MORROW, Circuit Judge.....	San Francisco, Cal.
Hon. WILLIAM H. HUNT, Circuit Judge <sup>a</sup> .....	Washington, D. C.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington....	Seattle, Wash.
Hon. OLIN WELLBORN, District Judge, S. D. California.....	Los Angeles, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....	San Francisco, Cal.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....	Spokane, Wash.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....	Portland, Or.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....	Carson City, Nev.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....	Boise, Idaho.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....	San Francisco, Cal.
Hon. ROBERT S. BEAN, District Judge, Oregon.....	Portland, Or.
Hon. GEORGE DONWORTH, District Judge, W. D. Washington.....	Seattle, Wash.
Hon. CARL RASCH, District Judge, Montana <sup>a</sup> .....	Helena, Mont.

## COMMERCE COURT

Hon. MARTIN A. KNAPP, Presiding Judge.....	Washington, D. C.
Hon. ROBERT W. ARCHBALD, Associate Judge.....	Washington, D. C.
Hon. WILLIAM H. HUNT, Associate Judge.....	Washington, D. C.
Hon. JOHN E. CARLAND, Associate Judge.....	Washington, D. C.
Hon. JULIAN W. MACK, Associate Judge.....	Washington, D. C.

<sup>a</sup> Appointed January 31, 1911. Designated to serve three years in Commerce Court.

<sup>a</sup> Resignation effective October 15, 1911.

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TOWNSEND v. BEATRICE CEMETERY ASS'N.

(Circuit Court of Appeals, Eighth Circuit. June 20, 1911.)

No. 2,932.

**CEMETERIES (§ 5\*)—ASSETS EXEMPT FROM EXECUTION—PURCHASE OF LAND—PURCHASE PRICE—TRANSFER OF DEBT—EFFECT.**

Cobbey's Ann. St. Neb. 1907, § 4227, declares that land appropriated for a cemetery shall be exempt from execution, and section 4223 provides that, after paying for such land, all future receipts and income shall be devoted exclusively to improving the cemetery, that no debts shall be contracted in anticipation of future receipts except for originally purchasing, laying out, inclosing, and embellishing the grounds and avenues and erecting buildings, etc., for which debts may be contracted not exceeding \$35,000 in the whole to be paid out of future receipts. *Held* that, under such sections, the receipts from sales of lots were first subject to the payment of any debt contracted for the purchase price of the cemetery property, and hence where a cemetery association borrowed money from plaintiff with which to take up purchase-money notes, executed to its vendor of the cemetery land, and the money so borrowed was used for that purpose, the liability of the receipts followed the debt, and plaintiff was entitled to have them applied to the payment of his notes.

[Ed. Note.—For other cases, see Cemeteries, Dec. Dig. § 5.\*]

In Error to the Circuit Court of the United States for the District of Nebraska.

Action by W. J. Townsend against the Beatrice Cemetery Association. Judgment for defendant, and plaintiff brings error. Reversed.

Richard S. Horton (Hugh J. Dobbs, on the brief), for plaintiff in error.

E. O. Kretsinger, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. The parties are arranged in this court as they were in the court below, the plaintiff in error being the plaintiff in the Circuit Court, and the defendant in error being the defendant

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the Circuit Court, and they will hereafter be referred to as plaintiff and defendant, respectively.

March 20, 1889, the plaintiff recovered a judgment in the Circuit Court for the District of Nebraska against the defendant for the sum of \$5,082.66 upon a promissory note executed by the defendant and by it delivered to the plaintiff. An execution was issued upon the judgment and returned "unsatisfied for want of property whereon to levy." Subsequently the plaintiff, as authorized by section 916 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 684), instituted, pursuant to the laws of Nebraska, proceedings in aid of execution in the Circuit Court. A jury was waived by stipulation in writing, and upon issue framed the case was tried to the court, resulting in a judgment dismissing the proceedings in aid of execution at plaintiff's cost. The present writ of error challenges the correctness of that judgment.

The record discloses that the defendant is a corporation organized under the laws of Nebraska as a cemetery association; that as such corporation it became the owner, by conveyance to it in fee, of two tracts of land near the city of Beatrice, Neb., one containing 6 acres, the other 80 acres. These tracts of land were surveyed, platted, and dedicated to the public use as cemeteries, and have since been devoted to such use.

The 80-acre tract was purchased in April, 1887, from the heirs of Hugh N. Cross. The association, in addition to a cash payment at the time of the purchase, executed two promissory notes to A. W. Cross, representing the heirs of Hugh N. Cross, for the balance of the purchase price. Two years later, these notes were renewed. August 14, 1891, the association took up these renewal notes held by Cross; the money for that purpose having been procured from the plaintiff. The association at the same time executed and delivered to the plaintiff the promissory note upon which the judgment was obtained.

By the laws of Nebraska (Cobbey's Annotated Statutes 1907, § 4227), it is declared that lands appropriated and set apart for burial grounds shall not be subject to sale on execution. Another statute of that state (Cobbey's Annotated Statutes 1907, § 4223), relating to the formation and powers of cemetery associations, declares:

"Such associations shall be authorized to purchase or take, by gift or devise, and hold lands exempt from execution and from any appropriation to public purposes, for the sole purpose of a cemetery, not exceeding three hundred and twenty (320) acres, which shall be exempt from taxation if used exclusively for burial purposes, and in no wise with a view to profit. After paying for such land, all the future receipts and income of such association, whether from the sale of lots, from donations, or otherwise, shall be applied exclusively to laying out, protecting, preserving and embellishing the cemetery and the avenues leading thereto, and to the erection of such building or buildings, vault or vaults, as may be necessary for the cemetery purposes, and to paying the necessary expenses of the association. No debts shall be contracted in the anticipation of future receipts except for originally purchasing, laying out, inclosing and embellishing the grounds and avenues and erecting buildings and vaults for which a debt or debts may be contracted, not exceeding thirty-five (\$35,000.00) thousand dollars in the whole, to be paid out of future receipts."



The defendant contends that the money in its possession received from the sale of lots is exempt under the statutes above referred to, and cannot be taken under execution or by proceedings in aid of execution. The court made special findings of fact, and, as the case is here presented, the question to be decided is whether the facts specially found by the court supported the judgment.

Without repeating the findings at length, it is sufficient to say that the matters admitted in the pleadings, and those specially found by the court, present a case where the cemetery association, as it was authorized to do, bought land for a cemetery and gave its notes for the purchase price; that the cemetery is used solely as such, and in no wise with a view to profit. As proceeds of lots sold, there is now in the hands of the association a fund amounting to the sum of \$2,209.22.

The sole controversy relates to the right of Townsend to have the proceeds of sales of lots in the cemetery applied to the satisfaction of his judgment, for the lands themselves are clearly exempt under the statute above mentioned. If the statute contained no provision upon the subject, it might perhaps be argued that the proceeds of the sale of lots would so far stand in the place of land as to be exempt. The statute, however, does not leave the matter to implication, but makes direct and complete provision in regard to the disposition to be made of all future receipts. Following the declaration that the land should be exempt, the statute contains two closely associated provisions. The first of these provisions is that, "after paying for such lands," all the future receipts, whether from the sale of lots or otherwise, "shall be applied exclusively" to the improvement and embellishment of the cemetery, etc. We think it entirely clear that these provisions contemplate that the first or preferred call upon the receipts shall be the payment for the land. In other words, it crystallizes into law two sound business principles: One, that, as the acquisition of land for a cemetery comes before its improvement and embellishment, the cost of this acquisition comes before the cost of improving and embellishing; and, the other, that, after the land is paid for, the receipts from the sale of lots shall be applied exclusively to paying for improvements and embellishment—that is to say, shall be exempt from all other application.

The next closely associated provision declares that no debts shall be contracted in anticipation of future receipts, "except for originally purchasing," improvement, and embellishment, "for which a debt or debts may be contracted not exceeding \$35,000.00 in the whole, to be paid out of future receipts." This is plainly a limitation upon the power of the association to contract debts except for the purposes named, and is also a grant of power to contract debts for those purposes, and to do so in anticipation of future receipts, and to pay such debts out of those receipts. Taking the two provisions together, it is quite clear, we think, that the receipts from the sale of lots, unlike the land itself, are not wholly exempt, but are to be applied in paying debts contracted for the purposes named in the statute. The question, therefore, is: Is the debt here in question one of those which the statute contemplates shall be paid out of the receipts? It is in-

sisted that, as the money secured from Townsend was received and used by the association to pay the purchase price notes for the land, the debt to him is a purchase price debt within the meaning of the statute, and therefore is one which is payable out of the receipts. There can be no doubt, we think, that Cross, the original purchase price creditor, could have compelled the satisfaction of his claim out of the proceeds of the sale of lots. Nor can there be any question that an assignee of that claim would have the same right. As already suggested, the statute clearly makes the payment of the purchase price a lawful call, and a first call, upon the receipts, and, in our view, this incident of the debt is one which would pass with it to whomsoever succeeded to its ownership.

If Cross, the owner of the land, had refused to sell it otherwise than for cash, and the association had borrowed the necessary purchase money from Townsend, and therewith made the purchase price, there can be no doubt that such debt would be one contracted for the purchase price within the meaning of the statute, and would be payable out of future receipts in like manner as if the owner of the land had sold it on credit. When it is recalled that such an association has no capital stock, is not maintained for profit, and can acquire and hold property only for cemetery purposes, it would seem that the authority to contract debts for the purchase of the site and for its improvement and embellishment ought to be so interpreted as reasonably to admit of the accomplishment of these purposes. We may reasonably assume that the Legislature must have been cognizant of the fact that owners of land are sometimes unwilling to sell on credit, and are sometimes unable to do so by reason of having immediate use for the purchase price. The Legislature also must have known that materialmen and laborers would not infrequently be unwilling or unable to engage in the work of improvement or embellishment of a cemetery if they had to wait for their money. In the light, therefore, of the character of such an association, and its probable original lack of funds, and in the light of the object to be attained, we think the provision respecting the contracting of debts, when properly construed, includes the borrowing of money to pay the purchase price, or to pay for improvements quite as much as it does the incurring of obligations directly to the seller, materialmen, and laborers. And, if this be so, then where notes, duebills, or kindred obligations are at first given to the vendor, the materialmen, or the laborers, and the association is unable to meet them when due, why may it not borrow money to pay them in like manner as it could have done in the first instance? Is it not in substance and effect dealing with the same matter and in substantially the same way? Is its situation or its duty to the public, or to the owners of lots, affected injuriously because it arranges to have its lawful obligations carried by one instead of another, or by one instead of many? Or because it relieves itself from the immediate application of receipts for payment of existing obligations where there is need for the use of such receipts in the proper care, preservation, and improvement of the cemetery? And, in this case, had Cross chosen so to do, he doubtless could have enforced the payment of his

purchase price notes out of the receipts of the sale of lots; but, had he done so, the improvement of the property would necessarily have been suspended altogether, or at least greatly delayed. We have already seen that the purchase price debt, under the statute, is given the first call upon the receipts. That being true, is it reasonable to hold that the Legislature meant to say, if Cross was unwilling or unable to carry the debt after it became due, that the association could not arrange with another to carry the debt until it could be paid, without injury to the cemetery or the lot holders? It is not at all likely that such an arrangement could be made, if the one whose aid was sought would have no right to enforce his claim, and it seems to us an unwarranted construction of the statute to hold that the caretaker could enforce payment out of the receipts of the sale of lots of his pay for the last month, or year, but that one who advanced the money to tide the matter over for another month, or year, in order that necessary improvements might be made, should be without right to secure its repayment out of the receipts. As we view it, the position insisted upon by the association, that the receipts cannot be subjected to the payment of such a debt, would defeat the very object of its existence, or, in any event, greatly imperil or impair the attainment of that object.

But it is insisted that Townsend did not furnish the money for the distinct purpose of paying Cross' demand, and that there was no arrangement that it should be so applied. The special finding does not so state. On the contrary, it does state, not only that the money obtained from Townsend's note was so used by the association on the very day that it was borrowed and the note given, but also that in the judgment on the note it was expressly found and adjudicated that such proceeds were received by the association for that purpose, as well as actually used therefor. Such a finding, in an action where the validity of the note was necessarily in question, reasonably means that the money was solicited and obtained for that purpose. Moreover, that judgment stands as a conclusive adjudication that that was a lawful purpose within the meaning of the statute, and, if it was a lawful purpose within the restrictions of the statute, it is payable out of the receipts from the sale of lots.

We do not think the doctrine of subrogation need be here invoked, because, as we view it, the debt in question is a "purchase price" debt within the meaning of the statute; that is, it is entirely founded upon the original purchase of the land, and is, in substance and effect, a prolongation of the obligation then incurred. In morals it stands upon the same footing, in law it ought to do so, and in our view the statute so declares when it is interpreted in a way which is essential to the attainment of its object.

The judgment of the Circuit Court must be reversed.

## BALTIMORE &amp; O. R. CO. v. EVANS.

(Circuit Court of Appeals, Third Circuit. June 9, 1911.)

No. 11.

**1. EXECUTORS AND ADMINISTRATORS (§ 518\*)—PRIMARY ADMINISTRATION—DOMICILE OF DECEDENT.**

A domiciliary administration is the primary and controlling one, and any other is treated as ancillary, and generally subordinate thereto.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2299-2309; Dec. Dig. § 518.\*]

**2. DEATH (§ 31\*)—RIGHT OF ACTION FOR WRONGFUL DEATH—WEST VIRGINIA STATUTE—RELEASE BY ANCILLARY ADMINISTRATOR.**

Under Code W. Va. 1906, c. 103, § 6, which provides that an action for wrongful death "shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate," the administrator in such an action is a mere formal party, suing on behalf of the real parties in interest, who are the widow and children of the deceased; and when an administrator has been appointed in another state, where decedent has his domicile, the right of action vests in him, and cannot be defeated by a release executed by an administrator subsequently appointed in West Virginia.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 38, 39; Dec. Dig. § 31.\*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action at law by Bertha M. Evans, administratrix, against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

McCleave & Cecil, for plaintiff in error.

Frank W. Guffey and J. M. Stoner, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Mrs. Bertha M. Evans, administratrix of Daniel D. Evans, recovered a verdict against the Baltimore & Ohio Railroad Company for damages caused by the latter's negligence, whereby the decedent was killed. On entry of judgment thereon, the railroad sued out this writ.

The decedent, while working for the defendant, on December 22, 1906, was killed in the state of West Virginia. By virtue of a statute of that state (Code of 1906, c. 103, § 6), the right of action herein sued upon was created. That statute provided:

"Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate."

Evans left to survive him a widow and three minor children. His domicile was in Fayette county, Pa., and on January 7, 1907, letters of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

administration upon his estate were duly granted by the register of that county to the plaintiff. On the trial of the cause the plaintiff gave evidence tending to show that the negligence of the defendant caused the decedent's death while he was working for it in West Virginia, his earning capacity, and that he had left a widow and minor children. The defendant on its part sought to defeat the action, inter alia, by virtue of a release of the right of action, executed by one M. H. Zinn, as administrator of the decedent, who was appointed such on February 25, 1907, by the county court of Marion county, W. Va. At the close of the testimony the court refused the defendant's third point, which asked the court to charge:

"That [M. H. Zinn], the said personal representative of D. D. Evans, deceased, by virtue of his appointment, was invested with full power to prosecute, compromise, release, or refuse to prosecute the alleged claim against the Baltimore & Ohio Railroad Company on behalf of the widow and children of said decedent upon such terms or as he might deem best, and his act in compromising or releasing or refusing to prosecute the alleged claim against the Baltimore & Ohio Railroad Company on account of the death of the said decedent is binding upon the beneficiaries of such claim until by appropriate judicial proceedings and upon sufficient ground such release, compromise, or settlement of said claim is annulled and made void"

and its fifth point, asking for binding instructions in its favor. Subsequently the court denied defendant's motion for judgment non obstante veredicto, and its action in so doing is assigned for error.

After argument and due consideration, we think the court committed no error. As we have seen, the statute of West Virginia which created the right of action did not confer its benefits upon Daniel Evans' estate, but on his widow and minor children. The domicile of Evans being in Pennsylvania, and letters of administration being duly granted therein to the plaintiff, a right of action for the enforcement of the liability created by the West Virginia statute was vested in the Pennsylvania administratrix. *Dennick v. Railroad Company*, 103 U. S. 11, 26 L. Ed. 439. But toward a suit brought by an administrator to enforce this statutory right it will be observed such administrator has a different status from that of an administrator who is suing as representative of an estate. In the former case he is a mere formal party, and the real parties in interest are the widow and minor children. Thus, under a statute of New Jersey substantially the same as that of West Virginia it has been held by the courts of the former state—*Pisano v. Shanley*, 66 N. J. Law, 1, 48 Atl. 618—that the statutory suit is brought—

"for the benefit of the widow and next of kin, and is a suit wholly for the benefit of those persons. *Cooper v. Shore Electric Company*, 63 N. J. Law, 558, 44 Atl. 633. The administrator upon the record, whoever he is, is a formal party for the maintenance of the action."

[1] Now, the formal requirements of the act having been complied with by the widow and heirs, causing a suit to be brought in their interests by an administrator duly appointed in the decedent's domicile, the pertinent question arises: What authority had an administrator, appointed in West Virginia after the domiciliary appointment in Pennsylvania, to release the claim of such widow and children and

defeat their action? That a domiciliary administration is the primary and controlling one, and that any other is treated as ancillary and generally subordinate thereto, is a recognized principle. Woerner on Executors and Administrators, p. 360; Wilkins v. Ellett, Adm'r, 76 U. S. 740, 19 L. Ed. 586; Luce v. Railroad, 63 N. H. 588, 3 Atl. 618; Pisano v. Shanley, supra; Harvey v. Richards, 1 Mason, 381, Fed. Cas. No. 6,184. Indeed, in a late case arising under the New Jersey statute it was held by the Supreme Court of Pennsylvania—Boulden v. Penna. R. R. Co., 205 Pa. 264, 54 Atl. 906—that a domiciliary administrator appointed in New Jersey could maintain such an action in Pennsylvania and the appointment of an ancillary administrator was not necessary.

[2] The right of action in the present case being vested in the domiciliary administrator, and the parties in interest being the widow and minor children of the decedent, it follows that the release of the right of action by an administrator subsequently appointed in West Virginia cannot avail to extinguish such right. The court below, therefore, rightly held that such release of the ancillary West Virginia administrator would not avail to defeat an action brought by the domiciliary administrator.

This conclusion renders unnecessary a discussion in this opinion of the question involved in an equity case (*infra*) wherein the court below set aside such release, and which we decide simultaneously with the present case.

The judgment of the court below in the present action is affirmed.

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#### BALTIMORE & O. R. CO. v. EVANS.

(Circuit Court of Appeals, Third Circuit. June 9, 1911.)

No. 12.

#### CANCELLATION OF INSTRUMENTS (§ 4\*)—RIGHT TO CANCELLATION—RELEASE.

A release of all claims arising out of the death of a railroad employé, given to the railroad company and signed by the widow of such employé and an ancillary administrator, for which no consideration was received, held properly canceled at suit of the widow.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 4\*]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Suit in equity by Bertha M. Evans against the Baltimore & Ohio Railroad Company. Decree for complainant, and defendant appeals. Affirmed.

McCleave & Cecil (William B. Linn, of counsel), for appellant.  
Frank W. Guffey and J. M. Stoner, for appellee.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Mrs. Bertha M. Evans, a citizen of Pennsylvania, filed a bill in equity against the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Baltimore & Ohio Railroad Company, a corporation of Maryland, praying to set aside, as to her, a certain instrument of release signed by her and by M. H. Zinn, administrator of Daniel D. Evans by appointment in West Virginia. On hearing the court below decreed cancellation as prayed for, whereupon the railroad appealed to this court.

The general facts pertinent to the case are recited in an opinion simultaneously filed in an action at law between Bertha M. Evans, administrator of Daniel D. Evans, and the Baltimore & Ohio Railroad Company, at No. 11, March term, 1911, and to which reference is made. 188 Fed. 6. In the present case it appears that Daniel D. Evans, a brakeman in the employ of the railroad, was killed in its service. He was a contributor to the relief fund of that railroad, and on his death his widow, Mrs. Bertha M. Evans, became entitled as his sole beneficiary to receive \$1,000 from such fund. Mrs. Evans took out letters of administration in Fayette county, Pa., but for some reason the railroad required that additional letters be taken out in West Virginia, where Evans had been killed, and that the release in question, which had been signed by Mrs. Evans, the beneficiary, should also be executed by the West Virginia administrator. Mrs. Evans seems to have acceded to that request, and went to West Virginia to herself take out such letters, although she expressly insisted at the time, under the advice of counsel, that under the provisions of the employer's liability act, which had not yet been held unconstitutional by the Supreme Court, she intended to bring suit for damages, and that the release desired would not preclude her from so doing. When she went to West Virginia, it was found that letters could not be issued to a nonresident. Letters were therefore taken out there by one Zinn, an employé of the railroad.

While Mrs. Evans had signed the release, not as administratrix, but as widow and beneficiary, and it was in possession of the railroad, she has received no part of the \$1,000 of relief funds. Subsequent to the appointment of Zinn as administrator, he signed the release in question, by which he not only receipted for and released the \$1,000 under the relief fund, but acknowledged its receipt as "in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased." At the time of executing said instrument Zinn received no consideration for decedent's estate, or for the widow or minor children of the decedent, who, under the West Virginia statute, were the beneficiaries in a claim for damages against the railroad for negligence in causing the death of Daniel Evans. Mrs. Evans, as domiciliary administrator, brought suit on such claim, and, having thereafter learned that Zinn had signed this release as administrator, tendered to the railroad the funeral expenses of her husband, which the railroad had voluntarily paid, and which it seems Mrs. Evans was to reimburse from the relief fund. She then filed the bill to cancel the release as to her. On final hearing the court decreed such cancellation.

The bill was evidently filed as a precautionary measure, lest the release might defeat her action at law. Such, however, was not its

effect, as we have shown in the opinion in that case. The question in this equity case, therefore, becomes academic; for its disposition can in no way affect the rights of the parties. Treating the case, however, as one material to the determination of the rights of the parties, we are not satisfied the court committed any error in the conclusion it reached.

In view of the fact that the question has now become of no moment in determining the law case, we refrain from a discussion of the grounds leading to that conclusion, and content ourselves with simply stating our conclusion, which is that the decree below should be affirmed.

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FARR et al. v. HOBE-PETERS LAND CO.

(Circuit Court of Appeals, Seventh Circuit. October 18, 1910. Rehearing Denied April 11, 1911.)

No. 1,634.

1. COURTS (§ 312\*)—JURISDICTION OF FEDERAL COURTS—SUITS BY ASSIGNEE.

A suit to quiet title to land and for the cancellation of tax deeds under which defendants claim, where complainant sues as assignee of a mortgage and of a certificate of purchase in foreclosure proceedings thereunder which admittedly has not ripened into the legal title, is a suit to recover the contents of such instruments as choses in action, and under Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), cannot be maintained in a federal Circuit Court, unless a suit might have been prosecuted thereon in such court if no assignment had been made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.\*]

2. COURTS (§ 312\*)—JURISDICTION OF FEDERAL COURTS—SUITS BY ASSIGNEE.

Under Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), which provides that a federal court shall not "have cognizance of any suit \* \* \* to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder \* \* \* unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made," the limitation does not extend to intermediate assignees, and it is sufficient to sustain jurisdiction where it is shown that the original holder of the chose in action, as well as plaintiff and his immediate assignor, might have prosecuted the suit in that court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865-875; Dec. Dig. § 312.\*]

3. COURTS (§ 263\*)—FEDERAL COURTS—EQUITY JURISDICTION—REMEDIES GIVEN BY STATE STATUTES.

A state statute authorizing the maintenance of a suit to quiet title, although the plaintiff is out of possession, is an enlargement of equitable rights which may be administered by a federal court, and, having jurisdiction to entertain such an action, the federal court may determine any question arising therein which could be determined by any state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. § 263.\*]

Jurisdiction of federal courts as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



4. JUDGMENT (§ 683\*)—PERSONS CONCLUDED—TAX FORECLOSURE SUIT—WISCONSIN STATUTE.

Under St. Wis. 1898, §§ 1197-1210, providing for suits to foreclose tax deeds, and which provides (section 1206) that the judgment shall forever bar the defendants and all others claiming under them after the filing of the *lis pendens* notice from all right, title, and interest in the lands, and the general *lis pendens* statute (St. Wis. 1898, § 3187), which under the decisions of the state Supreme Court is also applicable to such tax foreclosure suits, and provides that the filing of a *lis pendens* shall be constructive notice to a purchaser or incumbrancer affected by the suit, and that "every purchaser or incumbrancer whose conveyance or incumbrance is not recorded or filed shall be deemed a subsequent purchaser or incumbrancer and shall be bound by the proceedings to the same extent and in the same manner as if he were a party thereto," the judgment in a tax foreclosure suit to which a mortgagee was made a party concludes an assignee of the mortgage, although his assignment antedated the suit, where it was not recorded, at least where the plaintiff had no notice of the assignment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1206; Dec. Dig. § 683.\*]

5. JUDGMENT (§ 957\*)—PERSONS CONCLUDED—TAX FORECLOSURE SUIT.

Evidence considered, and *held* insufficient to charge the plaintiff in a suit to foreclose tax deeds under St. Wis. 1898, §§ 1197-1210, with notice of an unrecorded assignment of a mortgage on the lands so as to render the judgment impeachable by a subsequent assignee where the mortgagee was made a party.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 957.\*]

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

Suit in equity by the Hobe-Peters Land Company against J. R. Farr, Victoria Farr, Daniel Bjorklund, Emma Bjorklund, E. A. Westlin, H. A. Lunt, Fred Bolander, Fred Anderson, Nels Dahl, Herman Dahl, and Mrs. Fred Bolander. Decree for complainant (170 Fed. 644), and defendants appeal. Reversed.

The decree of the Circuit Court from which this appeal is brought, grants relief in equity in favor of Hobe-Peters Land Company, complainant, and against the appellants, defendants therein, pursuant to a bill filed, to establish title in the complainant to numerous tracts of land in Wisconsin, and "cancel and annul of record" various tax deeds, together with a judgment thereunder rendered in a state court, held by the appellants, as claimants of title to the lands in controversy. The appellee-complainant is a Minnesota corporation, and its alleged interest in the lands is that of mortgagee, derived through various assignments of such interest in succession (including an unperfected statutory foreclosure), without possession of any portion of such lands; and the appellants are citizens of Wisconsin, in possession (respectively) of certain of the lands and having made improvements thereon, while the remaining lands in suit are "vacant and unoccupied." Other facts which are deemed reviewable are stated in the opinion.

James Wickham and Frank R. Farr, for appellants.

Edward M. Smart and R. N. Van Doren, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). This case proceeded to final hearing and decree, upon the issues raised by the pleadings as to the merits of the respective claims of title, involv-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing various complications both of law and fact, and voluminous evidence; and the main controversy thereunder, as discussed both in the opinions filed by the trial court and in the arguments on the appeal, relates to the sufficiency and effect of a judgment obtained by the appellant Farr, in the circuit court of Price county, Wis., January 21, 1901, which purports to bar, not only the mortgagor, under whom the appellee claims title, but the Minnesota Lumber Company, mortgagee and original assignor thereof, "from any and all right, title and interest in and to the lands" in suit. The proceedings resulting in such judgment were instituted under the Wisconsin statute (Wis. Stat. 1898, §§ 1197-1210), when no assignment of the mortgage in question appeared of record; and in such event it is conceded in the opinion filed below (as revised before entry of the decree) to be the established rule under the statute—and undoubtedly so settled in *Warner v. Trow*, 36 Wis. 195, 200—that any assignee or holders thereof were bound by such proceedings. Thus the decree upon the merits rests on the two-fold assumption, that the prima facie force of the judgment in the state court was not only impeachable in another suit and forum, but was so impeached in reference to the appellee's claim, through oral testimony which was received as tending to prove that the judgment-plaintiff was then chargeable with notice of the unrecorded assignment.

Error is assigned as well for want of equitable jurisdiction to quiet title, as sought in the bill and granted by the decree—whether the above-mentioned conclusion as to notice in fact were either supported or unsupported by the testimony—contending in substance: (a) That such relief, in favor of the appellee having no possession of the lands in suit, is beyond the chancery powers of a federal court, and that the provisions of the state statute (section 3186, Wis. Stat.) vesting in state courts equity powers to that end are inoperative for extension of the federal powers; and if so applicable in any sense, (b) that the trial court was bound by the established law of Wisconsin, in reference to the above-mentioned tax title judgment of the state court, which limits applications by third parties for relief from its prima facie force, to the court wherein the judgment was obtained.

Jurisdiction of the case, however, is challenged upon another ground—plainly presented, both by bill and evidence and by the assignments of error and arguments upon the appeal—raising the fundamental inquiry, whether the complainant, as assignee of the claim in controversy, can sue for its enforcement in the federal court. The solution is not free from difficulty under the seeming conflict in various opinions to be mentioned, but we must be prepared to overrule this objection before either of the other questions is open to review.

1. The bill is for equitable relief, founded alone upon complainant's alleged equities in the lands, as assignee of a mortgage interest, derived through a succession of assignments from the original mortgagee, including (as averred) unperfected foreclosure proceedings by one of its assignors; and the relief sought and granted was to have, title adjudicated in its favor, as against the defendants, and to clear the title of adverse claims recorded in favor of the defendants. Fed-

eral cognizance of the suit is invoked solely on the ground of diversity of citizenship under the averments (a) that both the complainant and the original mortgagee were and are citizens of Minnesota; (b) complainant's immediate assignor is a citizen of Illinois; and (c) the defendants are all citizens of Wisconsin. But the bill further avers that one of the assignees of the mortgage, through whom the complainant derives title (alleged to be an assignment in trust), is and was a citizen of Wisconsin; and the evidence proves another intermediate holder of the mortgage to be a Wisconsin corporation. Thus the question directly arises: Can the suit be entertained under the limitation imposed by the present statute—section 629 and amendments—as carried forward from the eleventh section of the judiciary act of 1789? Omitting exceptions not involved here, this provision reads that the federal court shall not “have cognizance of any suit \* \* \* to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder \* \* \* unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”

The facts in reference to the source of the complainant's interest in the mortgage are as follows: In 1892, one Holmes (whose citizenship does not appear) executed a mortgage covering about 7,000 acres of land in Wisconsin, owned by him, in favor of Minnesota Lumber Company, a Minnesota corporation, as mortgagee, securing notes made by Holmes. In 1899, one Murphy completed a purchase of the notes and mortgage for himself and one Craig, and the mortgagee indorsed on the mortgage an assignment in blank, leaving the name of the assignees to be inserted at their option; and it was agreed between Murphy and Craig—citizens, respectively, of Colorado and Illinois, as alleged in the bill—that Craig, who advanced the purchase money, should have one half of the mortgage interest and hold the other half as security for payment of Murphy's half interest, and that Murphy was to act for both in selling the lands. Murphy held the instruments, contracted to sell to Ogema Lumber Company, a Wisconsin corporation, a portion of the lands, and subsequently, without notice to Craig, delivered the notes and mortgage to that corporation, to secure both his personal indebtedness to it and the contract of sale above mentioned. In 1901 Craig and Ogema Lumber Company joined in an agreement (which fixed their interests respectively) to have the mortgage assigned to one Barry, a citizen of Wisconsin, in trust for foreclosure and sale and to make division of such interests. Murphy then stipulated that Craig's name be inserted in the blank assignment as the assignee, and upon such insertion the assignment was recorded; and Craig executed an assignment to Barry, which was also recorded. Barry commenced foreclosure by advertisement, as assignee, made purported sale of the lands to Craig as purchaser, and delivered his certificate of such sale December 23, 1901. On February 20, 1902, Craig quitclaimed to Hobe-Peters Land Company, the complainant, and the present bill was filed May 15, 1902, while the statutory period for redemption from the alleged foreclosure extended one year from the sale.

[1] Thus no legal title to the lands had vested thereunder—whether the foreclosure was of prima facie validity, or was void for want of the statutory notice, as contended respectively—but the complainant had acquired, as assignee thereunder, all equities which then existed under the mortgage, without other rights in the premises; and it is unquestionable that the suit is for the enforcement of alleged rights conferred by the instruments referred to, as choses in action, and is subject to the foregoing jurisdictional provision, as uniformly construed by the authorities. *Corbin v. County of Black Hawk*, 105 U. S. 659, 665, 26 L. Ed. 1136; *Shoecraft v. Bloxham*, 124 U. S. 730, 735, 8 Sup. Ct. 686, 31 L. Ed. 574; *Plant Inv. Co. v. Key West Ry.*, 152 U. S. 71, 76, 14 Sup. Ct. 483, 38 L. Ed. 358; *New Orleans v. Benjamin*, 153 U. S. 411, 432, 14 Sup. Ct. 905, 38 L. Ed. 764; *Kolze v. Hoadley*, 200 U. S. 76, 83, 26 Sup. Ct. 220, 50 L. Ed. 377.

[2] The test of limitation, therefore, rests on the interpretation of the clause against suit by the assignee, unless it "might have been prosecuted in such court \* \* \* if no assignment or transfer had been made." Both the mortgagee and the ultimate assignee, Craig, who transferred the interest to complainant, were citizens of another state and entitled to sue in the federal court, so the test is narrowed to the inquiry whether the restriction includes, as well, the intervening assignees, through whom title is traced. If such assignees are included, no doubt is entertainable that both of the above-mentioned Wisconsin holders of the mortgage must be so designated. The fact that the assignment to Barry was in trust cannot prevent its application (as contended), for the reason that the citizenship of a trustee is alike controlling of the right to sue (*Dodge v. Tulleys*, 144 U. S. 451, 455, 12 Sup. Ct. 728, 36 L. Ed. 501; 1 *Foster*, Fed. Prac. § 19); and the transfer to the Ogema Lumber Company of the instruments (inclusive of the blank assignment) was not only operative as the assignment of an interest in the mortgage, but was expressly so recognized by all other parties in interest, under the arrangement with Barry.

Decisions of the Supreme Court are numerous in the interpretation of various phases of this provision, and some of the cases have involved construction of the terms above quoted, but we believe no decision of that tribunal, cited by counsel or examined in our research, settles the answer to the present inquiry; nor does aid thereto appear in any ruling of a Circuit Court of Appeals brought to our attention. The cases, however, may well be classified under two different lines of definition—one applying the limitation alone to the original payee or assignor and the other to subsequent assignments of the bill or chose in action—and we are of opinion that neither line of cases in the Supreme Court can be considered decisive of the present inquiry, so that its solution thereunder remains at large.

The cases relied upon to defeat jurisdiction are: *Mollan v. Torrance*, 9 Wheat. 537, 538, 6 L. Ed. 154; *Morgan's Executor v. Gay*, 19 Wall. 81, 82, 22 L. Ed. 100; *Metcalf v. Watertown*, 128 U. S. 586, 588, 9 Sup. Ct. 173, 32 L. Ed. 543. In *Mollan v. Torrance* jurisdiction was denied of suit by New York plaintiffs, holders of a promis-

sory note, against a Mississippi defendant, as "remote indorser" thereof, for recovery upon the indorsement; and the opinion by Chief Justice Marshall states the ground of such ruling to be that plaintiffs "trace their title through an intermediate indorser, without showing that this intermediate indorser could have sustained his action against the defendant in the courts of the United States." It distinguishes the case from *Young v. Bryan*, 6 Wheat. 146, 5 L. Ed. 228, upholding like suit against an immediate indorser, as "a new contract entered into between indorser and indorsee" and "not a claim through an assignment," and refers only to the fact that the declaration is "silent respecting the citizenship or residence of Lowrie, the immediate indorser" of plaintiffs. Moreover, the opinion states that *Turner v. Bank of North America*, 4 Dall. 8, 1 L. Ed. 718, had decided against jurisdiction, while that case does not appear to be directly applicable. Its ruling, however, is plainly limited, both by facts and language, to the failure to show right of suit in plaintiffs' "immediate indorser," while the instant case meets that requirement in the averment and proof that its assignor, Craig, was an Illinois citizen.

In *Morgan's Executor v. Gay* the suit was by the holder of three bills of exchange for recovery against the executor of the maker. "Two of the bills were indorsed by the payees, and the third by its payee and by other indorsers." The plaintiff alleged that he was a citizen of Kentucky, and that the defendant was a citizen of Louisiana, where suit was brought in the federal court, "but said nothing about the citizenship of the payees of the bills, nor, in the case of that one indorsed by subsequent indorsers, of the citizenship of these." On review of the judgment in favor of plaintiff, the opinion, by Mr. Justice Strong, states: "There is no averment of the citizenship of the payees of the bills, or of the citizenship of the subsequent indorsers," and "for aught that appears in the record, they may all be citizens of Louisiana"; that *Turner v. Bank of North America*, 4 Dall. 8, 1 L. Ed. 718, and other cases, require not only averments of citizenship of "the parties to the suit, but also the citizenship of the payee and the indorser" to confer jurisdiction. Reversal was ordered, accordingly, with permission to amend the pleadings if jurisdictional facts could be shown. The requirement to aver the citizenship of the payee conforms to all the authorities, and the opinion mentions only "the indorser" as a further requirement, so that the ruling does not extend beyond that of *Mollan v. Torrance*, supra.

The case of *Metcalf v. Watertown* was the suit of an Ohio plaintiff, as assignee, to recover the amount of a judgment obtained by one Wright against the city of Watertown, in the same (Wisconsin) federal court. The opinion by Mr. Justice Harlan states that the plaintiff is "assignee of certain named persons who became, under assignments from Wright in 1873, the owners, in different portions, of that judgment"; that the trial court dismissed the action as barred by the Wisconsin statute of limitation; and that a question of jurisdiction arose from the record, although not pressed by counsel, and must be determined. Thereupon jurisdiction was denied, under the above provision, as stated in the opinion, "because it nowhere appears in

the record of what state the plaintiff's assignors were citizens when this action was commenced; indeed, it is consistent with the record that they were, at that time, citizens of the same state with the defendant." The question whether it could be maintained as a suit arising under the federal Constitution or laws was also discussed and overruled; and judgment was reversed with further showing of jurisdictional facts left open through amendments. From the statement above quoted, no assignments appear between that of the judgment-plaintiff to his respective assignees and their assignment to the plaintiff in suit, and the language imports that none intervened. The fact that the judgment was assigned in parcels to the several assignors of the plaintiff accounts for the requirement to show citizenship of "plaintiff's assignors." Alike with both of the foregoing citations, the case is authority for such requirement, but not for including mesne assignees.

Another case may be referred to, as in line with the above (and one of the most recent expressions of the Supreme Court) *Kolze v. Hoadley*, 200 U. S. 76, 82, 26 Sup. Ct. 220, 50 L. Ed. 377. The opinion states the general rules of interpretation settled by the authorities, with citations for each, and in reference to one of the contentions in support of jurisdiction remarks that it is immaterial whether the plaintiff derived title directly from the mortgagee, or from the alleged assignor of plaintiff, as both were citizens of the state where suit was brought, "and the inhibition of the statute would apply in either case."

The other lone line of interpretations—commencing with the initial cases under the Act of 1789 (*Turner v. Bank of North America*, 4 Dall. 8, 1 L. Ed. 718; *Montalet v. Murray*, 4 Cranch, 46, 2 L. Ed. 545; *Gibson v. Chew*, 16 Pet. 315, 10 L. Ed. 977) and including extended reviews in *Coffee v. Planters' Bank*, 13 How. 183, 187, 14 L. Ed. 105, *Parker v. Ormsby*, 141 U. S. 81, 83, 11 Sup. Ct. 912, 35 L. Ed. 654, and *Emsheimer v. New Orleans*, 186 U. S. 33, 42, 45, 22 Sup. Ct. 770, 46 L. Ed. 1042—marks the limitation only as applicable, respectively, either to the original parties to the instrument, the original payee, or the original assignor; and it is not deemed needful to give further citations in that line, nor review of the cases. The last-mentioned case, however (*Emsheimer v. New Orleans*), is noteworthy, for the reason that it was there contended that jurisdiction failed for want of averment in the bill showing the citizenship of "intermediate assignees" of the chose in action; and while decision was placed upon the ground that title was not so traced, but came directly from the original payees, the opinion cites and reviews, in reference to the above contention, the following pertinent cases at circuit as holding that intermediate assignees were not included in the statutory requirement, namely: *Milledollar v. Bell*, 2 Wall., Jr., 334, Fed. Cas. No. 9,549, opinion by Mr Justice Grier; *Wilson v. Fisher*, Bald. 133, Fed. Cas. No. 17,803; *Portage City Water Co. v. Portage (C. C.)* 102 Fed. 769.

We are of opinion, therefore, that these authorities do not extend the limitation to intermediate assignees, and that their utmost requirements are satisfied by the averments and proof that both mort-

gagee and the immediate assignor of complainant were entitled to sue in the federal court; that neither the language of the provision nor its apparent purpose requires like qualification on the part of the intermediate assignees, in the absence of evidence (under another provision) that subsequent assignments were merely colorable for evasion of the limitation; and that jurisdiction of the suit was rightly upheld.

[3] 2. The objection that the bill was not entertainable to administer the equitable relief authorized by the state statute is plainly untenable under the authorities. *Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 330, 15 Sup. Ct. 650, 39 L. Ed. 719; *Gormley v. Clark*, 134 U. S. 338, 348, 10 Sup. Ct. 554, 33 L. Ed. 909; 11 Notes U. S. Rep. 940. While it is well settled that the state cannot exercise control over the chancery powers of the federal court, nevertheless "an enlargement of equitable rights by state statute may be administered" by such court "as well as by the courts of the state." *Gormley v. Clark*, *supra*. Thus having complete equitable jurisdiction over the controversy, we believe it to be equally clear that administration thereof embraces the inherent right to determine the effect, as between the parties to the bill, of the state court judgment described in the pleadings, subject only to its interpretation in conformity with the settled law of the state as to the force of such proceedings and judgment, and irrespective of any rule of state practice as to the special forum for that inquiry.

[4] 3. We come, accordingly, to the question on which the decree against the appellants hinges, namely: Whether the judgment of the state court, barring the claims and interest of the mortgagee and of all persons claiming thereunder, is without force against the complainant, under the evidence received, as tending to prove that the judgment-plaintiff (appellant) proceeded in such suit with notice of the unrecorded assignments of the mortgagee.

The mortgagee, Minnesota Lumber Company, was properly made a party with due service of process, as we believe, under the authorities applicable to the proceeding; and the statutory notice of *lis pendens* was filed, so that the judgment on the face of the record became binding against the assignees. No assignment of the mortgage was recorded until long after the entry of judgment; nor was the purported assignment by the mortgagee then completed, by naming the assignee, to entitle the instrument to be entered of record. The statute (section 1206, Wis. Stat.) expressly provides that the "judgment shall forever bar such defendants and all others claiming under them," after the filing of the *lis pendens* notice, "from all right, title or interest in said lands"; and the general statute (section 3187) in reference to *lis pendens* notice, likewise provides, that a purchaser or incumbrancer whose instrument is not recorded "shall be deemed a subsequent purchaser" and "shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto." In *Warner v. Trow*, 36 Wis. 195, 200, these provisions were upheld as concurrent and applicable to tax foreclosure proceedings and judgment; and the effect of the latter provision is well and pertinently stated and applied in *Cutler v. James*, 64 Wis.

173, 175, 24 N. W. 874, 54 Am. Rep. 603; *Prahl v. Rogers*, 127 Wis. 353, 359, 106 N. W. 287; *Siedschlag v. Griffin*, 132 Wis. 106, 112, 112 N. W. 18.

[5] The facts relied upon as notice to the appellant Farr of the unrecorded assignment are, in substance, as follows: Prior to the assignment of the mortgage by Minnesota Lumber Company—but, as elsewhere appears, after its purchase was agreed upon—Murphy had a brief conversation with Farr about purchase of tax certificates held by the latter on the lands, mentioned as “Holmes lands,” and after the date of the assignment correspondence between them is in evidence upon the same subject, without either statement or suggestion by Murphy that he had purchased the mortgage; nor was the mortgage mentioned between them. Farr sent Murphy a list of the “Holmes lands” on which he held certificates and tax deeds, with an offer to sell at the “cost of redemption with a small excess,” and inferred (as he admits) that Murphy was interested in some way in the lands; but only a few certificates were taken by him on what were mentioned as “Ogema lands.” Farr was then informed that Murphy intended to operate the “Ogema mill,” and subsequently knew that Ogema Lumber Company, Murphy’s corporation, was operating the mill, which was on lands embraced in the mortgage, but not embraced in the present controversy. In December, 1900, however, Mr. Barry was serving as attorney for Farr, intending to commence proceedings for foreclosure of the tax deeds, and had correspondence (in evidence) with Engstand & Lofquist, who were operating the “Ogema mill,” as successor to Murphy, in reference to “the whereabouts of the Minnesota Lumber Co.” (mortgagee), and with the Ogema Lumber Company, in reference to their claims. It appears therefrom: That the address of the mortgagee was stated to be “at Polo, Ill.” That Barry wrote to Ogema Lumber Company that he had “set an action going” to foreclose Farr’s tax deeds on “the Holmes lands.” That their name did not appear of record, “otherwise you would have been made a party to the action,” and then inquired:

“What mortgage have you? If you have the mortgage held by Minnesota Lumber Company, you had better put your assignment upon record, and you can come into this action if you desire. We have not yet served this last named company, but expect to very soon. Let us hear from you as to this.”

That such letter was written in reference to one from the Ogema Lumber Company to another party, stating:

“We hold the mortgage on all Holmes land, but have not done anything yet to clear title.”

That Ogema Lumber Company replied to the foregoing Barry letter:

“Yes, we hold the mortgage of the Minnesota Lumber Co., as stated in last letter, but have not come to a conclusion what to do yet”

—and then requested Farr’s address. To this letter Barry replied, giving Farr’s address, and stating:

“You had better put your assignment on record and come into this action. See your attorney at once, as if you come in we need not serve on Minnesota Lumber Co. If you do not, we shall proceed in the absence of any record of transfer.”



The Ogema Company neither tendered the instruments—which appear from the evidence, as before stated, to have been in its custody, with the blank assignment only—nor communicated with Farr, nor answered these requests in any form; and Barry, after reasonable delay, proceeded to obtain service on the mortgagee of record, making an amendment and additional expense needful.

We believe the ruling of the trial court, in effect setting aside the judgment in such proceedings as inoperative against this complainant, to be unsupported by the above facts, irrespective of other questions raised as to its impeachability in the case at bar. Whatever may have been the equities of Murphy, as between himself and Craig or Ogema Lumber Company, no disclosure thereof was either made or intimated in his transactions with Farr, to charge Farr with notice of such equities. Moreover, it further appears from the evidence that Farr wrote to Murphy, prior to the suit, stating that no interest in his favor appeared of record, and requesting that he record or show any claim he held, but no answer was received; that Farr had no information, in any form, either of the nature or fact of Murphy's interest; and that Murphy had then, as he states in his testimony, abandoned all interest or claim in the premises. So the transactions with Murphy are without force as notice to defeat the effect of the judgment, in either aspect of the case. In reference to the notification on the part of Ogema Lumber Company, that "we hold the mortgage of the Minnesota Lumber Co.," it may well be conceded that good practice would have justified, if not required, making such claimant a party defendant with the mortgagee of record, to assure foreclosure of any claim it might have. But the bill neither sets up any interest or title derived from or through the Ogema Lumber Company, nor that Farr had notice of any such claim, resting the complainant's title on the assignment by the Minnesota Lumber Company, as above described, which was subsequently completed and recorded in favor of Craig, and averring that Farr had notice thereof. Thus the question is not presented, whether an application on behalf of the Ogema Lumber Company, or under its claim, would be entertainable in equity, either under the circumstances above stated of express notice of the suit, or without legal assignment of the mortgage, or subsisting interest (legal or equitable) in the lands described in the judgment.

In the course of the oral argument, it was further contended that sufficient occupancy appears of the lands in suit to constitute notice of claim under the mortgage, but we believe this contention to be unsupported by the testimony. Whatever of actual possession is in evidence, directly or indirectly, at the date of Farr's suit, was in the Ogema Lumber Company, extending only over the so-called "Ogema lands," not included in the tax deed or judgment in favor of Farr; and it is neither proven nor claimed that any portion of the lands in suit were continuously occupied by any claimant for logging purposes or otherwise. Craig (assignee of the mortgage) testifies that he viewed the lands in 1898 and "there was no land but what the best timber was cut off"; that they were "all cut-over land." It is

stated in general terms, by one or more witnesses, that timber was taken in their operations from the "Holmes lands," and that there were "logging roads over different portions" which were "used in the winter," but no testimony appears which fixes such use of any tract in controversy, either at the date of Farr's suit, or during the season immediately prior thereto. So the question is not presented whether actual use of roadways across the lands for logging or other purposes would serve as notice that the user was assignee of the mortgage.

The proof is undisputed that neither Farr nor his attorney had information or suspicion that Craig or Murphy, or either of them, had purchased the mortgage held by Minnesota Lumber Company, or claimed interest therein in any form; and we believe it clearly appears throughout the testimony that reasonable effort was made to ascertain whether the mortgage had been assigned in fact without record thereof for the purpose of making any owner thereof party to the suit, and that the proceedings were conducted to that end in good faith, with neither notice nor grounds for belief that Craig or Murphy held or claimed the mortgage or interest thereunder.

The case, therefore, is in no sense within the rule of *Coe v. Manseau*, 62 Wis. 81, 90, 91, 22 N. W. 155, cited in the opinion of the trial court and in the argument of counsel as governing the inquiry, and we believe no authority appears for the decree under any rule cited in the argument.

Other propositions urged in favor of the decree have received consideration, including the contention that the above-stated provisions as to the effect of *lis pendens* notice, if construed to "bind unrecorded claimants," violate "the principle of due process of law" and are unconstitutional, but we believe neither to be tenable, and that further extension of this opinion for their discussion is unnecessary.

The decree of the Circuit Court is reversed accordingly, with direction to dismiss the bill for want of equity.

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CAPEWELL HORSE NAIL CO. v. GREEN et al.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 268.

1. TRADE-MARKS AND TRADE-NAMES (§ 58\*) — INFRINGEMENT — HORSESHOE NAILS.

Complainant, a maker of horseshoe nails, many years ago adopted a trade-mark, consisting of a check figure formed by intersecting lines, which was impressed on the bevel face of the heads of the nails, conforming to the shape of and practically covering such face. Defendant commenced the use of a similar check figure on one grade of its nails; the only material difference being that a triangular space in the center, having its base at the bottom of the face, was left plain. *Held*, that defendant's mark sufficiently resembled complainant's to deceive purchasers and to indicate an intention to do so, and constituted an infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 66, 67; Dec. Dig. § 58.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. TRADE-MARKS AND TRADE-NAMES (§ 93\*)—SUIT FOR INFRINGEMENT—ESTOPPEL—LACHES.**

In a suit to restrain infringement of a trade-mark, evidence *held* insufficient to sustain defendant's burden of proving an acquiescence by complainant, creating an estoppel, or to show laches which would defeat the suit.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.\*]

**3. TRADE-MARKS AND TRADE-NAMES (§ 97\*)—INFRINGEMENT—FORM OF INJUNCTION.**

A writ of injunction against infringement of a trade-mark, in addition to enjoining the precise design found to infringe, may properly include any mark "so similar to complainant's \* \* \* as to be likely to deceive purchasers."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 97.\*]

**4. TRADE-MARKS AND TRADE-NAMES (§ 98\*)—SUIT FOR INFRINGEMENT—DECREE.**

Where the manufacturer and sellers of an article were joined as defendants in a suit for infringement of a trade-mark, and defendants all answered and went to trial, on a finding of infringement, the court properly granted complete relief in the one suit, by awarding to complainant all the profits which defendants jointly and severally made from their infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 98.\*]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Suit in equity by the Capewell Horse Nail Company against Edward M. Green and another. Decree for complainant (182 Fed. 404), and defendants appeal. Affirmed.

This cause comes here upon appeal from an interlocutory decree for injunction and accounting, entered against the defendants in the Northern District of New York. The suit was for infringement of trade-mark.

Robert W. Hardie, for appellants.

Edmund Wetmore and Oscar W. Jeffery, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The complainant has been engaged in the manufacture of horseshoe nails since 1881. Up to 1892 its nails were made with a smooth head. During that year it changed one of the heading dies in its machines, so as to produce a nail with small checks on the front face of the head. It has since then continuously used that mark. It makes three grades of nail, called, respectively, the "Capewell," the "Alligator," and the "Black Prince." The last named, a dark blue-black nail, is the lowest grade. The Capewell, a polished nail, is the highest grade, and has borne this mark on the front face of the head for very many years.

In 1905 it brought suit in Massachusetts against the Putnam Nail Company, alleging ownership of a common-law trade-mark, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charging defendant with infringement. The cause was tried before Judge Colt, who dismissed the bill because of failure to prove that the mark had become associated in the public mind and among purchasers and users of nails with complainant's nail. *Capewell Horse Nail Co. v. Putnam Nail Co.* (C. C.) 140 Fed. 670.

In July, 1907, complainant brought another suit against one Mooney in the Northern district of New York, who was making and selling nails with a check mark which was a Chinese copy of complainant's. Much testimony was taken, and complainant prevailed. 167 Fed. (C. C.) 575. Upon appeal to this court the decree below was affirmed August 20, 1909. 172 Fed. 826, 97 C. C. A. 248. We found that the testimony which was lacking in the *Putnam Nail Case* had been abundantly supplied; that before 1892 various marks had been placed on the front face of nail heads, by others—initials, etc., including a globe with intersecting meridian lines (readily distinguishable from complainant's mark), but that complainant was the first to use the mark it claimed. We further found that such check mark had come to be generally known to the public as complainant's trade-mark, and that goods bearing such mark had come to be publicly known and distinguished as those of complainant's make. We held, therefore, affirming Judge Ray, that complainant had a common-law trade-mark, and that Mooney had infringed it.

In the case at bar the decree recites that complainant—

"is and since 1892 has been the owner of the trade-mark consisting of a pattern of small checks stamped upon the front face of the head of its horse-shoe nails, commonly called a 'check mark,' and as heretofore used covering substantially such front of the head of the nail and generally conforming to the shape of such face, and because of the shape of the head (and face) having four sides, the upper and lower sides being parallel, but unequal in length, the upper being the longer; the right and left sides being of equal length, substantially but not parallel, and having within such boundaries thus conforming to the shape of such face of the head of the nail a pattern of small, but uniform, checks made by lines crossing each other at right angles or diagonally."

The evidence abundantly sustains this finding. To discuss that branch of the case would be merely to repeat what was said in the two opinions in the *Mooney Case*.

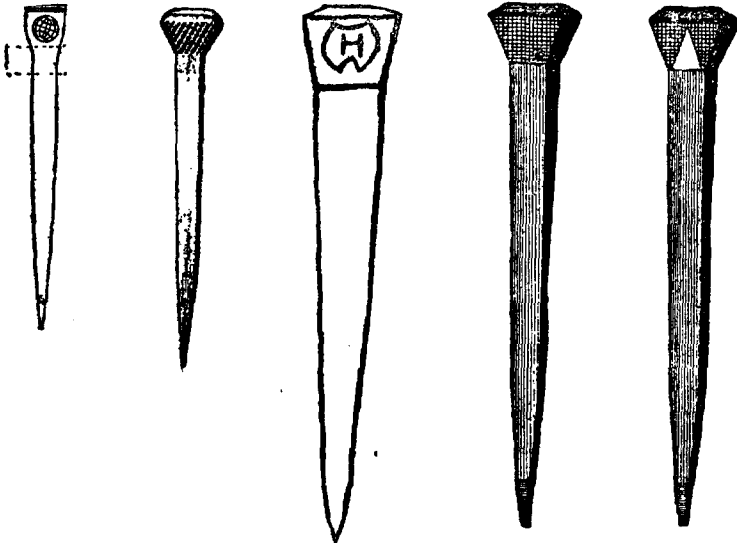
In the early part of 1907, more than 10 years after complainant's *Capewell* nail, with the check mark on its face, became known to the trade, the defendant *Hoopeston Company* placed upon the market a horse nail which it called the "*Peerless*." It already had a high-grade nail known as the "*Hoopeston*," with a distinctive mark of its own on the front face of the head. The "*Peerless*" was a lower grade of nail, and it was marked with a check mark on the front face, substantially the same as those of complainant and of *Mooney*; the only difference being that the tiny checks were squares, instead of diamonds. Suit being threatened, it altered the mark on its "*Peerless*" nails by cutting out a triangular piece from the bottom. At the same time it sent to its customers a card, giving illustrations of both forms of marking and containing this statement:

"It having been repeatedly brought to our attention that inferior nails were being substituted for our *Peerless* because of similar marking under

the head, we have changed our mark to make it more distinctive, that our numerous customers may be protected in getting the best."

Inspection of the two illustrations shows that defendant company still retained the check mark with which it had sought to associate its "Peerless," merely cutting out a portion of it. It was to restrain the use of this second design that this suit was brought.

[1] As we have seen, Judge Ray held, quite properly, that complainant was not entitled to all check marks of every shape, form, and description; there being some which would be so unlike its own as not to mislead any one. For that reason the decree describes the mark with such particularity, but it does not follow that identity must be shown in order to establish infringement. Before taking up this branch of the case, reference may be had to the following illustrations. Being taken from different sources, all are not drawn to the same scale; but it should be understood that the nails thus marked are of the standard sizes. No. 3 is a rough sketch from a nail marked as an exhibit, no drawing of it being found in the record.



No. 1 is the old "globe" mark which antedated complainant's. No. 2 is complainant's. Mooney's was the same. No. 3 is defendant's high-grade "Hoopston" nail, which it used before it marked its "Peerless" nails in the manner indicated, and which it still uses. No. 4 is the mark defendant put on its "Peerless" nails for a few months in 1907, and No. 5 is the modified mark in use when this suit was brought.

Passing upon the question of infringement Judge Ray says:

"Knowing the Capewell trade-mark and looking at the defendant's nail, a purchaser or user would assume it to be a Capewell nail, unless specifically informed that nails with a check mark on the beveled side of the head, such check mark being formed of three triangular spaces, two check marked and the third one interposed plain, were not Capewell nails, but those of the

**Hoopeston Company.** Such a close copy and imitation is an infringement. It tends to confusion and deception. The resemblance is such as to deceive an ordinary purchaser giving such attention to the nails and the marks thereon as such a purchaser ordinarily gives, and cause him to purchase one supposing it to be the other. But it is said that defendant's nails are put up in packages, boxes, or cartons, with the name of the dealer thereon, and that one purchasing a package, box or carton is informed by the name on the package that the nails are not Capewell's. \* \* \* So soon as the package is open and the nails displayed in store and shop, they at once pass for or are easily passed off as Capewell nails. Mistake, deception, and fraud are easy. \* \* \* Purchasers and users understand that the names on packages do not necessarily indicate the maker, but also understand that the trade-mark or name on the articles themselves do."

In our former opinion it was stated that the evidence showed:

"That [five-pound] packages are frequently broken up, and the contents sold to users by the pound, and that users are accustomed to look to markings on the nail itself as identifying the maker."

There is similar testimony in this case.

We concur in the conclusion that both of defendant's "Peerless" marks infringe. As frequently happens in these cases, the visual comparison of the various marks is persuasive. The actual nails, with the marks on them, look more alike than the drawings do. Moreover, as often happens, the defendant unconsciously contributes evidence to the same effect. He is presumably well informed as to the conditions of trade in the articles he makes, and what measure of attention ultimate consumers of those articles are likely to give to their identifying marks. If it is apparant that he is undertaking closely to approach to a well-known mark, it is generally a pretty safe assumption that he thinks the differences are not sufficiently great to prevent confusion. *Fairbank v. Bell*, 77 Fed. 870, 23 C. C. A. 554. Undoubtedly, as appellant contends, the question of *intent* does not enter into a suit on a trade-mark, as it does in one for unfair competition; but it is often illuminative on the question of infringement.

When infringement began in 1907, defendant had a mark of its own (No. 3, *supra*), highly distinctive, and which could by no possibility be confused with complainant's. That mark was impressed on their best model nails, which, as the record seems to indicate, are of excellent standard and favorably known. That mark is still retained. If it were thought well to indicate that the "Peerless" nails were also the product of the Hoopeston Company, it would surely have been easy to impress them with some modification of its own distinctive mark. The addition of a single curve would have changed the H in a shield which denoted the Hoopeston high grade nail to an HP in a shield to denote the Hoopeston "Peerless." We cannot escape the conviction that design No. 4 was adopted because defendant's officer supposed it would lead some persons to think the "Peerless" nails were "Capewells," and that No. 5 was adopted because he supposed that, although there were differences to argue about, the resemblance between No. 5 and No. 2 was still strong enough to induce some confusion.

[2] Defendants also contend that this suit cannot be maintained, because complainant at one time acquiesced in the use by defendant

of design No. 5, and is therefore estopped from now insisting that it be abandoned. This is a question of fact, on which defendant has the burden of proof. The acquiescence is alleged to have taken place during a conversation between two persons, no one else being present. Their testimony as to what was said is diametrically opposed—oath against oath. We concur with the Circuit Court in the conclusion that defendants have not established their proposition by a fair preponderance of proof, and do not think it necessary to add anything to the discussion of the testimony, which is found in the opinion.

It is also contended that, because of laches on complainant's part, the bill should have been dismissed. It appears that, very shortly after defendant began putting Peerless nails on the market with design No. 4, complainant threatened suit, whereupon the use of this design was stopped. The next design, No. 5, was not put on the market till September, 1907, and there is no proof in the record (outside of the disputed testimony touching the interview which took place between Taylor and Williams) that complainant was informed of this design until January, 1908. But that is not material. Two months before this design was issued, complainant had begun the suit against Mooney, in which, with the handicap of the adverse decision in the Putnam Nail Case, it had to establish its ownership of a valid trade-mark. The Mooney Case did not terminate until our decision was filed August 20, 1909, and about a month later written notice was sent to the Hoopeston Company demanding that it cease infringement. Under these circumstances laches is certainly not made out. *Timolat v. Franklin Boiler Works Co.*, 122 Fed. 69, 58 C. C. A. 405.

Some minor matters which have been referred to in argument may be briefly disposed of.

[3] It is insisted that the writ of injunction is erroneous, because it enjoins, not only the precise design found to infringe (No. 5), but also nails—

“bearing any mark so similar to complainant's said trade-mark as to be likely to deceive purchasers and the public and from infringing in any way complainant's exclusive right in said trade-mark.”

This is in the usual form. Without some such general prohibition, defendants might put complainant to the trouble and expense of a new suit, merely by changing the position of the triangular nick they have cut out of the original check mark, or by changing its shape from a triangle to a square or circle of the same area—manifestly colorable changes, which would equally infringe the original mark. We find no force in the suggestion that the writ does not describe the trade-mark as fully as the decree of injunction does. That is immaterial. It is the decree, and not the writ, which must be looked to in order to ascertain what the trade-mark is to which complainant has established title.

It is next assigned as error that the decree enjoins the defendant company from making infringing nails, as well as from selling them when made. The theory advanced is that it is necessary to have

knurling of some sort on one of the head dies; otherwise, the nail would slip while being rolled. The check mark, impressed by this die could be afterwards removed before selling, if it infringed a trademark; but it is vehemently contended that the injunction as it stands would necessarily be violated as a mere incident of manufacture. It is a suspicious circumstance that defendant company is so insistent upon being allowed to make nails with an infringing mark on them, which it will afterwards have to obliterate by some further process of manufacture. This very insistence indicates the propriety of the comprehensive language used in the decree. The argument in support of defendant's contention may be briefly answered. We had this same question as to the necessity of using a die which would grip the nail when passing through the rollers in the *Mooney Case*, and held that such necessity had not been established by a fair preponderance of proof. But as we said in our former opinion:

"If it was necessary to have a gripping surface on the roller, it was not necessary to use the only one of many which would produce on the face of the nail head the counterpart of complainant's distinguishing mark."

That statement is proved in this case. Defendant has had no difficulty in making a first-class grade of nail which did not slip in the process of rolling, being gripped by a pattern cut on die or roller, but which left on the nail face a mark in no way resembling complainant's. A glance at the "Hoopeston" nail No. 3 with the capital H in a shield shows how fallacious is the argument here advanced.

[4] It is also contended that the decree is erroneous, because not limited to the joint infringement of the three defendants. This, of course, refers only to the provisions as to profits and damages. The Hoopeston Company is a resident of Illinois. Green and Sanford are residents of the Northern district of New York. They sold nails which the company had manufactured. All three were sued, and the defendant company appeared generally, answered, and conducted the defense. The bill is framed to recover jointly and severally against all three defendants for separate infringements. It was not demurred to, and the case went to final hearing under that issue. Continuing infringements were proved, and the court properly granted complete relief in the one suit, by awarding all the profits which the defendants jointly and severally have made from their infringement.

The decree is affirmed, with costs.

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#### WEST KENTUCKY COAL CO. v. J. T. MORGAN LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1911.)

No. 2,087.

#### TOWAGE (§ 12\*)—INJURY TO TOW—FAULT OF OWNER OF TOW.

The master of a towing tug is under no such absolute duty to follow his own judgment as to the management of the tow that he may not yield his judgment on the express demand of the owner of the tow, where neither life nor the property of others is imperiled; and where he does

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



so, and injury to the tow results, the owner is estopped to charge the tug with fault.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 24–26, 29; Dec. Dig. § 12.\*]

Appeal from the District Court of the United States for the Western District of Kentucky.

Suit in admiralty by the J. T. Morgan Lumber Company against the West Kentucky Coal Company. Decree for libelant for half damages, and respondent appeals. Reversed.

For opinion below, see 181 Fed. 271.

Wheeler & Hughes, for appellant.

Bagby & Martin and Campbell & Campbell, for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and SATER, District Judge.

SEVERENS, Circuit Judge. This is a suit in admiralty brought by the filing of a libel by the lumber company against the respondent, the coal company in personam. It was a suit to recover damages arising from the alleged negligence of the coal company in performing a contract for towage of a raft of logs from Paducah, Ky., across the Ohio river to Brookport, on the opposite side of the Ohio in Illinois, where the libelant had mills for the sawing of logs into lumber. The raft of logs was moored at the bank a little way up the Tennessee river, which falls into the Ohio at Paducah. From heavy rains the Tennessee river was flooded, and the water rose to such a height as to endanger the logs where they were moored. The libelant thereupon hired the respondent to take its steamer Harth, which it was using for navigating the rivers in that locality, to tow the raft across the Ohio to its mills on the Illinois side, where, the water being not so high, it was supposed by the libelant the logs could be safely secured. The respondent undertook to make the towage with the Harth at the price of \$2.50 per hour for the time employed. The steamer had its own crew and started out with the tow to go across. In the Ohio river between Paducah and Brookport there is a long island running up and down the stream, and the question first to be disposed of was how the raft should be handled by the steamer. The respondent was of the opinion that the best way was to put the raft in front and the steamer behind it, and go up the river and around the eastern end of the island, instead of going down the Kentucky side of the Ohio, where the water was in a more turbulent condition, and presented more danger, and going thence around the western end of the island to Brookport. There was a heavy wind blowing from the Illinois shore, and the Harth encountered difficulty in these conditions in pushing the raft before her up the stream, and thereupon the respondent brought another vessel and the two together, pushing the raft, managed to take it safely around the eastern end of the island. On going around, and when approaching the Illinois shore, it appeared, or seemed to the captains of the steamers, to be a difficult and dangerous undertaking to attempt to take the raft down to Brookport and secure it there. Accordingly the two captains united in informing the president of the libelant,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who was on the Harth and accompanied the tow, that, as the wind was blowing hard from the Illinois shore, and it was late in the day, it would not be safe on that day to attempt to make a landing at Brookport, and that it would be better and safer to put the raft into the "Pocket," as it was called, on the Illinois shore, a place above and sheltered by a row of piles which had been driven out from the Illinois shore into the river for the purposes of a railroad which had a ferry across the Ohio river at that point, and the captains urged that the raft would be safe up there in the "Pocket," and insisted that this course should be pursued. The president of the libelant refused to agree to this, and, stating that he would take the responsibility, directed the landing to be made at Brookport on that day, saying that he would get aboard the libelant's gasoline launch, which was then approaching from Brookport, and would go ahead and make all necessary arrangements for cables and ropes, of which he declared there was an abundant supply at libelant's mills at Brookport. The president of the libelant then left with the launch and went to Brookport to get cables and ropes. The captains of the steamers yielded to these directions of the president and attempted to land the tow at Brookport, but they were unable to do so on account of the heavy wind. They got near enough to extend the long ropes to the raft which the libelant brought out for that purpose, but, on being attached, it was found that the ropes were made of wire and were not elastic, as ropes ordinarily used for such purposes are, and the ropes would not "give," but pulled the raft apart, and a large proportion of the logs were carried down the river and lost. The libelant, at considerable expense and by the use of other boats and men, secured many of the logs which had escaped. The suit was brought to recover the value of the logs lost and the expense of recovering those saved.

It does not appear that there was any negligence on the part of the respondent, unless it be that it did not exercise reasonable judgment in going up the river and around the eastern end of the island, or else—and this is the gravamen of the plaintiff's case as it now stands—that it was negligent in taking the logs down to Brookport, instead of putting them in the "Pocket," as good judgment would indicate would be much the safer course, and where it is likely the raft could have been preserved. The contract being one for towage merely, the respondent was not an insurer, but was responsible for the exercise of reasonable care in the execution of the duty it undertook. The judge made a finding of facts upon the evidence adduced, which is in substance embodied in the finding, and the statement of his conclusions of law. With regard to the negligence imputed to the respondent in not taking the raft downstream and around the western end of the island, the court canvassed the evidence and the arguments of counsel, but could not or did not, find that the negligence of defendant, alleged on that score, was made out. The court seems to have thought it unimportant, in view of its conclusion upon the other point. We find no sufficient ground for charging the respondent with fault in making the choice to take the raft around the eastern end of the island. The master of the Harth was a man of long experience in his calling, and he says, in giving testimony, that

he took what he thought was the safest course. The reasons adduced for a contrary conclusion do not impress us with conviction that he failed to exercise a reasonable degree of skill and judgment.

But upon the question whether the respondent was at fault in taking the tow down to Brookport and attempting to land it there the court took the view that both parties were at fault—the libelant, in requiring the raft to be taken to Brookport that day, instead of taking it into the “Pocket” until the storm abated, and supplying ropes at Brookport which were not suitable for the use intended; and the respondent, in not disregarding the requirement of the president of the libelant and in not taking the raft to the place indicated by it for shelter overnight. Upon these findings it was held that the damages should be divided, and a decree to that effect was entered. In this we think the court erred. The taking the raft to Brookport after rounding the east end of the island was against the judgment and choice of the respondent, and was done only upon the express requirement of the president of the libelant, and the assumption of all liability for the consequences; and his authority is not disputed. The respondent ought not to be charged with the consequences of the mistakes made upon the demand of the libelant, or the fault of not providing proper cables for landing the raft at Brookport, as the respondent had reason to expect from the assurance of the libelant’s president. The conditions upon which a court of admiralty divides the damages between two parties, both of whom are at fault, did not exist. The libelant was estopped by its own act from claiming that it be a fault of the respondent which was done upon its demand. We know of no rule of admiralty law which precludes the application of this general and fundamental rule governing the conduct of contracting parties. If there was a departure from the mode of execution of the contract as originally made (a thing which is not at all obvious), it was but a substitution of another mode of executing it. It cannot be doubted that such a substitution may be made upon the agreement or consent of the parties.

The court seems to have assumed that the master of the steamer, from the control which he possesses over the management of the tow, is bound to exercise it according to his own judgment, and is not to be swerved from that duty even by the demand of the owner. There may be cases where this right of the master should be admitted and enforced, as when the lives or safety of other parties or their property, to whom the master owes a duty, are concerned, and which could not otherwise be protected. But this was not such a case. The court in its opinion refers to the case of *Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477, as if it supported the application to this case of the rule respecting the absolute duty of the master. But we are unable to see how such an inference can be drawn from that case. In our view, the faults complained of by the libelant are subject to the maxim, “*Volenti non fit injuria*,” and that the libel ought to have been dismissed.

The decree of the District Court must be reversed, and the libel dismissed. The appellant is entitled to recover costs in this court, as well as in the court below.

**LUDVIGH v. AMERICAN WOOLEN CO. OF NEW YORK et al.**

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 194.

**BANKRUPTCY (§ 140\*)—PROPERTY PASSING TO TRUSTEE—GOODS DELIVERED TO BANKRUPT—SALE OR BAILMENT.**

By the contract between a woolen company and a corporation organized for the purpose, which virtually represented bankrupts, who were dealers in woolens, it was agreed that the company should deliver goods to the corporation, title to remain in the company until they were sold. The corporation agreed to sell the same, collect the proceeds, and pay the same over to the company at once, less the difference between the invoice and selling price. By a following clause it further agreed to pay the invoice price for any goods not "accounted for" under the preceding clause. *Held*, that such agreement did not bind it to pay for goods unsold, but only such as were sold and the proceeds not paid over or accounted for; that the contract was not one of sale, by which the title passed to the bankrupts, and later to their trustee, but of consignment or factorage, or at most of conditional sale, which was valid as against the creditors of the bankrupts.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

Lacombe, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by Clifford J. Ludvigh, trustee, against the American Woolen Company of New York and the Niagara Woolen Company. Decree (176 Fed. 145) for complainant and defendants appeal. Reversed.

Hays, Hershfield & Wolf (Daniel P. Hays, of counsel), for appellants.

James, Schell & Elkus (A. I. Elkus, Garrard Glenn, and James N. Rosenberg, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. November 15, 1901, P. Horowitz & Co. entered into a written contract with the American Woolen Company, to run to December 1, 1902, whereby the Woolen Company agreed to consign goods to Horowitz & Co., the title to the goods or their proceeds to remain in the Woolen Company until fully accounted for, all bills for the consigned goods to be made payable to the Woolen Company, and Horowitz & Co. to receive as their compensation the difference between the invoice and selling prices (which were not to be less than the invoice) and to be allowed a drawing account of \$1,200 a month to be deducted from their profits. They were also to give security by way of a lien upon real estate to protect the Woolen Company against loss by reason of any failure on their part to observe the agreement. It was also provided that Horowitz & Co. were not to *buy* woolens of any one but the Woolen Company. This word, read in connection with the whole agreement, must be understood as meaning to deal with no one else. If it be given the literal construc-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of purchasing, then the sale to them was not an absolute, but a conditional, sale.

The Woolen Company, apparently because it entertained suspicions of Horowitz & Co., and perhaps, also, because its counsel misunderstood the decision of this court in *Re Garcewich*, 115 Fed. 87, 53 C. C. A. 510, declined to continue the contract and required that the business should be done thereafter through a corporation. Such a corporation was formed under the name of the Niagara Woolen Company "to contract and deal with the American Woolen Company of New York and to deal in fabrics received therefrom." November 25, 1902, an agreement was executed between the American Woolen Company and the Niagara Woolen Company whereby the former agreed to consign goods to the latter for one year on substantially the same terms as contained in the agreement of November 15, 1901, with Horowitz & Co. The capital of the company was \$20,000, in 200 shares, of \$100 each, 195 of which were issued to Philip Horowitz in consideration of a mortgage of \$19,500 on certain real estate, being the same security mentioned in the former agreement.

On the same day an agreement was executed by the American Woolen Company, of the first part, Horowitz & Co., of the second part, and J. P. Murphy, of the third part, whereby Horowitz & Co. guaranteed the faithful performance of the contract by the Niagara Company, and Philip Horowitz as security transferred 195 shares of that company's stock to Murphy, in trust to vote the same for such person as president of the Niagara Company as Horowitz & Co. should designate, and in case of failure of the Niagara Company or of Horowitz & Co. to perform their covenants, respectively, to transfer the stock to the American Woolen Company. The American Woolen Company elected Joseph Horowitz president and one of its own employés treasurer of the Niagara Company and a by-law was adopted requiring all checks on the funds of the company to be signed by the president and treasurer jointly. The Niagara Company had an office on the premises of Horowitz & Co. and a sign on the outside door. Subsequently the American Woolen Company also employed a book-keeper, who kept an account of all its goods billed to the Niagara Company and of all sales and payments reported by the Horowitzes. The goods were sold in the name of the Niagara Woolen Company and the proceeds of sale deposited in its bank account.

The business was carried on strictly in accordance with the agreement of November 25, 1902, until May, 1904, when Joseph Horowitz withdrew from all participation in the business of Horowitz & Co., which was continued by Philip Horowitz, who also became president of the Niagara Company. He soon began to embezzle the funds of the Niagara Company by indorsing checks received by him to its order in its name and depositing them in the bank account of Horowitz & Co. October 26th a very suspicious fire occurred on the premises, Philip Horowitz fled the country, and has not been heard of since. On or about October 26th the American Woolen Company removed from the premises of Horowitz & Co. 760 pieces of goods consigned to the Niagara Company. October 31st a petition in bankruptcy was

filed against Horowitz & Co., followed January 26, 1905, by an adjudication.

July 17, 1907, the trustee in bankruptcy filed this bill in the District Court against the American Woolen Company and the Niagara Woolen Company, praying that the agreements of November 25, 1902, above mentioned, and the removal of the said goods, might be declared void under the bankruptcy act as in fraud of the creditors of Horowitz & Co., and that the defendants might be decreed to deliver the woollens removed by the American Woolen Company, or their value, \$39,685.27, to him, and also to pay over to him the proceeds of woollens sold, to the amount of \$25,000, paid to the American Woolen Company within four months of the filing of the petition in bankruptcy, with interest from October 26, 1904.

A demurrer to the bill having been overruled, the defendants answered, denying all the charges of fraud, and praying that the bill be dismissed, with costs. The learned judge below found that there was no actual fraud on the part of any one connected with the agreements; that they were made under the advice of counsel to protect the American Woolen Company against danger in doing business with Philip Horowitz, and were good inter partes. But he held that the American Woolen Company was at the same time trying to get the privileges of a bailor and the rights of a vendee, and that the contract must be treated as against the creditors of Horowitz & Co. as an absolute sale. He disregarded the Niagara Woolen Company entirely. His conclusion that the transaction was a sale is in large part founded on the following clauses in the agreement between the American Woolen Company, of the first part, and the Niagara Woolen Company, of the second part:

"IV. Said party of the second part agrees to sell such merchandise to such person or persons as they shall judge to be of good credit and business standing, and to collect for and in behalf of the party of the first part all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid immediately upon its collection, minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part and the price at which said merchandise has been sold as aforesaid by the party of the second part.

"V. Said party of the second part hereby guarantee the payment of all bills and accounts for merchandise, possession of which is delivered to it under this agreement; and it hereby agrees, in case any merchandise delivered under the provisions of this agreement by the party of the first part to the party of the second part is not accounted for to the party of the first part, under the provisions of clause IV of this agreement, to pay to the party of the first part the invoice price of said merchandise, and thereupon title to said merchandise, or the proceeds thereof, so paid for shall pass to the party of the second part, and shall then be exempted from the provisions of this agreement."

Upon this subject he says:

"It is to be observed that this document requires the Niagara Company to pay the invoice price of the merchandise delivered to it unless it accounts for the same 'under the provisions of clause 4'; but clause 4 contains, as above set forth, a specific agreement on the part of the Niagara Company to sell the merchandise and pay over to the Woolen Company the sale price thereof, less the difference between such price and the invoice value. It fol-

lows that, if the Niagara Company could not account to the Woolen Company for money by selling the goods, it was nevertheless bound to pay the invoice price, and (continues the written agreement) 'thereupon title to said merchandise \* \* \* so paid for shall pass to the Niagara Company.'

But clause IV plainly refers to accounting for goods sold by the Niagara Company, and we think the merchandise "not accounted for to the party of the first part under the provisions of clause IV" means merchandise sold. Merchandise on hand would be accounted for by the fact that it was on hand. This appears clearly from the provisions of clause VIII:

"VIII. This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part."

The purpose of this clumsy interposition of the Niagara Company was, as counsel for the American Woolen Company points out, that it should be a sort of cash box for the Woolen Company and check on the transactions of Horowitz & Co. Though there are some inconsistencies in the language of the agreements and in the correspondence between the parties, we are clearly of the opinion that it was their purpose honestly to make a consignment or factorage agreement. The goods were to be sold by Horowitz & Co. at not less than the invoice price, and the proceeds were to be turned over at once to the American Woolen Company. The transaction, regarded either as a consignment or as a conditional sale of Horowitz & Co., was entirely legal as against their creditors. Such agreements are valid notwithstanding that credit may sometimes be given to a factor or to a conditional vendee because of his apparent ownership of property in his possession, though in this case there is no evidence whatever of any such thing. Contracts of sale under which title is to remain in the vendor, although the vendee may consume the goods or sell them and apply the proceeds to his own use, are fraudulent as to creditors, because the stipulation that title is to remain in the vendor is entirely inconsistent with the purpose of the contract. In *re Garcewich*, *supra*; In *re Penny & Anderson* (D. C.) 176 Fed. 141.

The agreements which we have had under consideration are contracts of an entirely different character and contain elaborate provisions to prevent the consignee from consuming the goods or selling them and applying the proceeds to their own use.

The decree is reversed, with costs out of the estate, but not against the trustee personally.

LACOMBE, Circuit Judge (dissenting). The construction of clauses IV and V adopted by the District Judge seems to me to be the correct one, and, concurring in his reasoning and conclusion, I dissent from the opinion of the majority of this court.

## AMERICAN MFG. CO. v. BIGELOW.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 228.

## 1. MASTER AND SERVANT (§ 284\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

An action by an employé against the master to recover for a personal injury was properly submitted to the jury where the testimony as to the material facts was in direct conflict; the question of preponderance being for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1132; Dec. Dig. § 284.\*]

## 2. MASTER AND SERVANT (§ 267\*)—ACTION FOR INJURY TO SERVANT.

In an action for an injury to plaintiff caused by the starting up of a loom which she had stopped while cleaning it, a motion to strike out her testimony that defendant's superintendent started up the machine was properly overruled, although she admitted that she did not see him move the lever which started the machine, where she stated that she did see him standing by it, and that no one else was near.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 911; Dec. Dig. § 267.\*]

## 3. MASTER AND SERVANT (§ 180½\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—"ACT OF SUPERINTENDENCE."

The action of the superintendent of a factory in starting up a loom which the operator had stopped for the purpose of cleaning it was an act of superintendence for which his principal was responsible to the operator, who was injured thereby under New York Employer's Liability Act (Consol. Laws N. Y. 1909, c. 31) § 200.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180½.\*]

## 4. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the only prejudice which could have resulted from the admission of immaterial testimony was possibly to increase the amount of damages awarded to plaintiff, the reduction of the verdict by the court to a sum clearly reasonable sufficiently corrected the error to remove any ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.\*]

## 5. EVIDENCE (§ 123\*)—COMPETENCY—RES GESTÆ.

Where plaintiff was injured by the starting up of a loom which she was operating in defendant's factory, and which she had stopped and was cleaning, a statement made by defendant's superintendent while carrying plaintiff from the room immediately after the injury in answer to her charge that he had caused it was admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.\*]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Action at law by Clara Bigelow against the American Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



This cause comes here upon writ of error to review a judgment of the Circuit Court, Eastern District of New York, entered upon a verdict in favor of defendant in error, who was plaintiff below.

J. F. Carew and Thomas F. Magner, for plaintiff in error.

F. W. Sparks, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The action was brought under the employers' liability act (section 200 of chapter 31 of the Consolidated Laws of New York) to recover for injuries sustained from having plaintiff's fingers caught in the gear wheels of a spinning frame. The plaintiff's story was to the effect that she was a "back-tender" at the frame in question, and was on her knees at the back of the machine cleaning it from fluff and dirt, an operation which was performed every Wednesday; that the machine had been stopped or "doffed" to enable her to do so, a rule of the company forbidding all employes from cleaning or repairing machinery when in motion. When stopped, it could be started only by moving a bar at the front of the machine. While thus employed, the superintendent, Devine, came along, let out an oath, and wanted to know what it was laying off for. She replied that she was cleaning it, whereupon he mumbled something about getting back to work and walked around to the front of the machine, which thereupon immediately started up; Devine at the time being the only person in front of the machine and near enough to it to move the starting bar. Defendant's story was that Devine did not pass or speak to plaintiff while she was cleaning, but was himself busy, also on his knees, making some repairs to another machine which was located immediately in front of plaintiff's; that he did not start her machine, but stopped it as soon as he heard her scream; that when she began cleaning her machine was running and continued to run until the accident happened. Since there was evidence in support of each of the stories, there was manifestly no error in denying defendant's motion at the close of the case to direct a verdict in its favor on the ground that "the overwhelming preponderance of evidence (was) in favor of defendant." It was for the jury, not the court, to decide all disputed questions of fact.

[2] The next error assigned is the denial of defendant's motion to strike out all the testimony given by plaintiff "as to the way the machine started up, by Devine starting it up" as "purely speculative on her part." She had stated when first giving her narrative of what took place that Devine "turned it on," but later she stated that she did not see him actually start it, did not see his hand on the bar, but that, after the brief conversation with him, he mumbled something about getting back to work and passed around to the front of the machine; that looking under the machine towards the front she could see him there. There was some obstruction to the view due to the presence of bobbins at the front end, but nevertheless she could see that he was there, and that no one else was there and the machine then started. From this she inferred that he must have started it and the jury evidently drew the same inference, a reasonable one if the facts

were as she stated them. There was no error in sending to the jury the entire evidence of plaintiff without striking out any of it on the ground stated.

[3] It is next contended that, even if Devine did start the machine, his doing so was not an act of superintendence, but was mere manual labor. Reliance is placed on *Guilmartin v. Solway Process Co.*, 189 N. Y. 490, 82 N. E. 725. The cases are not parallel. Devine was not engaged in a manual detail of work as an incident or result of which the machine started. He, if he did what plaintiff contends he did, determined as a matter of superintendence that at that precise time that particular machine should be set going, and, having thus determined, it is immaterial whether it was actually started by the hand of a subordinate obeying his spoken order or by his own hand obeying the exercise of his own will.

[4] Error is also assigned to the refusal to strike out some testimony given by plaintiff. She had testified that immediately following her scream Devine, who, concededly, was only a few feet away, came to her and carried her to the dressing room. She then added: "When he was carrying me out, he was letting out oaths and saying I should keep quiet, and I says, if it wasn't for him I would have my fingers now. 'Well,' he says, 'it is too late.'" The court having ruled that he would let the evidence stand, defendant's counsel said, "I except, and I ask to have it stricken out." To which the court replied: "I will reserve the ruling until I see if it has any bearing." We do not find it stated anywhere in the record that the matter was again brought to the attention of the trial judge. But, waiving any question as to whether the defendant's counsel should have brought up the subject again, we find no reversible error in the refusal to strike out. The first part of the statement, that Devine was "letting out oaths and saying she should keep quiet," was irrelevant and immaterial. *Butler v. Manhattan Railway Co.*, 143 N. Y. 422, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. Rep. 738, a closely parallel case. It could not be sustained as part of the *res gestæ* because it had no reference at all to the accident. Quite likely it may have operated to induce the jury to enlarge their verdict, but since the trial judge, on motion for a new trial, reduced the verdict from \$5,000 to \$3,000, which is certainly not an excessive sum for the injuries sustained, we are satisfied that such reduction sufficiently corrects the error.

[5] The remaining portion of the statement, that to plaintiff's statement that his act had caused her injuries, his sole response was, "Well, it is too late now," is within the principle of *res gestæ*. It took place immediately after the accident, while the excitement produced by plaintiff's screams and the sight of her mangled fingers might well be supposed to be still operative. The statement manifestly referred to the accident itself. The authorities on this branch of the law of evidence are legion. In *Wigmore on Evidence*, § 1747, the exposition of the rule set forth in *U. S. v. King* (C. C.) 34 Fed. 314 (E. Dist. of New York), is cited as satisfactory. It reads:

"The declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they

are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have."

It must appear that the statement "was made at a time when it was forced out as the utterance of a truth, forced out against his will, or without his will, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might, or might not, be wise for him to say."

Wigmore himself (section 1749) thus states it:

"In the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impression and belief."

Whether Devine did make the statement attributed to him was disputed on the proof, but, if he did, the jury might well have found that his mind was still dominated by the excitement of the catastrophe.

The authorities cited on defendant's brief do not apply to the facts of this case. In *Waldele's Case*, 95 N. Y. 274, 47 Am. Rep. 41, the statement was that of the injured party, a deaf mute, made in the sign language to his brother half an hour after the accident. In *Luby v. Hudson River Railroad*, 17 N. Y. 131, the statement was made by the driver of the horse-drawn railroad car which caused the injuries, after he had got off the car, been arrested by a policeman and taken out of the surrounding crowd. To the policeman's inquiry he said that the reason he did not stop the car was because the brakes were out of order. Apparently his mental processes were not controlled by the nervous excitement of the event; as the Court of Appeals said "he was manifestly excusing himself and throwing the blame on his principals." In *Furst v. Second Ave. R. R.*, 72 N. Y. 542, the statement was by the conductor of the car, after the accident, that "if the driver had been looking he would not have run over the child." But the conductor was on the rear platform where he could not see the boy nor the driver, and knew nothing at all about the circumstances under which the accident happened. His guesses as to its avoidance were admissible on no conceivable theory.

There is nothing in the other assignments of error which have been argued here that calls for discussion.

The judgment is affirmed.

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## ROBINSON v. FIDELITY TRUST CO.

(Circuit Court of Appeals, Eighth Circuit. May 15, 1911.)

No. 3,445.

### 1. GUARANTY (§ 6\*)—REQUISITES AND VALIDITY—NOTICE OF ACCEPTANCE.

Where, after negotiations, a bank prepared an agreement of guaranty of the present and future indebtedness of a corporation, and sent it to the president of the corporation, with a request that he sign and return

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it, which was done, no further act of acceptance on the part of the bank was requisite to render it effective with respect to future loans.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 8; Dec. Dig. § 6.\*]

2. GUARANTY (§ 16\*)—CONSIDERATION—SUFFICIENCY.

An agreement by a bank to extend the term of credit of a corporation which is indebted to it, by renewal of its notes as they mature, is a sufficient consideration for a guaranty of the indebtedness, both present and future, by the president of the corporation.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 14-17; Dec. Dig. § 16.\*]

3. GUARANTY (§ 17\*)—FAILURE OF CONSIDERATION.

Where a bank agreed to carry the indebtedness of a corporation to it for a further time on condition of a guaranty of the same by the president, with a proviso that, if financial conditions should change, so that it could not continue to carry the amount, it would notify him, so he could pay it down, there was no failure of consideration for the guaranty because of any change in financial conditions, where the bank continued to fulfill its agreement by renewing or extending the notes of the corporation without objection.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 19; Dec. Dig. § 17.\*]

Appeal from the District Court of the United States for the District of Minnesota.

In the matter of Josiah L. Robinson, bankrupt. From an order allowing a claim in favor of the Fidelity Trust Company, the bankrupt appeals. Affirmed.

See, also, 179 Fed. 724.

W. L. Converse (W. A. McDowell and D. L. Grannis, on the brief), for appellant.

Justin D. Bowersock (Lister M. Hall, on the brief), for appellee.

Before HOOK, Circuit Judge, and RINER and W. H. MUNGER, District Judges.

HOOK, Circuit Judge. The Fidelity Trust Company, a banking institution of Kansas City, Mo., secured an allowance of a demand against the estate of Josiah L. Robinson, a bankrupt, and the latter prosecuted this appeal. The demand arose in this way: Early in October, 1907, a corporation of which Robinson was president owed the trust company on promissory notes about \$50,000, and he desired the line of credit for that amount extended for another year. After negotiations, oral and written, the trust company prepared and mailed to Robinson, October 23, 1907, a form of agreement containing, after preliminary recitals of the situation, a guaranty by him of the present and future indebtedness of the corporation, not exceeding in all the specified maximum and interest. He signed and returned it. Robinson was adjudged bankrupt April 10, 1908. The demand allowed against his estate was upon the guaranty of the notes.

[1] It is contended by Robinson that, as the guaranty was in part prospective, to that extent it required acceptance by the trust company before it became effective, and there was none. But acceptance ap-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

peared from the very course of the transaction. The trust company sought the guaranty, and prepared the agreement and mailed it to Robinson with request that he sign and return it. Moreover, with respect to future loans, it was provided in the agreement that each transaction with the principal debtor should, without notice to Robinson, constitute an acceptance of his guaranty thereof. Again, but one of the notes was discounted after Robinson had agreed to guarantee them, and that was accepted by the trust company on the faith of his statement that he would sign the written agreement when it was prepared and sent to him.

[2] It is also contended there was no consideration for the guaranty. In contracts of guaranty, as in other contracts, a promise for a promise is enough, and the promise of the creditor may be for the benefit, not of the guarantor, but of the third party who owes the principal debt. In the case here Robinson's corporation owed the trust company. An extension of the line of credit for another year was desired. To secure it Robinson promised to guarantee the existing indebtedness and future renewals and replacements. In turn the trust company promised so to extend the credit. That was the round transaction in its completeness, and there was sufficient consideration for the guaranty of both existing and future indebtedness. The promise of the trust company appears by necessary implication from its conduct, the course of the transaction, and the provisions of the agreement which it required, prepared, caused the guarantor to sign, and retained in its possession. It could not have been heard to say it did not agree to carry the debtor corporation for the amount and period specified. The agreement recites the existing conditions, the desire for a continuance of the credit to enable the corporation to carry on its business, the request of Robinson that it be granted, and then his agreement of guaranty to accomplish the purpose set forth in the preambles. Before the year expired, Robinson's company went into the hands of a receiver, and Robinson himself, while insolvent, committed an act of bankruptcy. The trust company was then at liberty to proceed upon its claim.

[3] In the course of the negotiations referred to the trust company wrote Robinson October 8, 1907, that if he would guarantee the loans it would extend the credit for the year provided the financial conditions did not materially change from what they were then, and that if they did change, so that it could not continue to carry so large a sum, it would advise him in time so he could pay it down. It is claimed by Robinson in this connection that conditions did change materially, and that the financial panic of that year came to a crisis the latter part of October, its full influence being felt in Kansas City when the agreement of guaranty was signed, and therefore the event guarded against by the trust company came to pass, it was released from its obligation, and the consideration for his guaranty failed. The final written agreement contained no such condition as in the letter of October 8th, but a different conclusion would not result from bringing the letter and the other negotiations forward as part of it. On October 23d a note for \$5,000, a part of the old indebtedness, was renewed at the instance

of an officer of the debtor corporation, and Robinson was advised of it on the 23d in the letter which transmitted the agreement of guaranty for execution. The trust company at no time claimed the financial conditions were such as to modify or lessen the full extent of its obligation. It gave no notice to that effect to Robinson or to his corporation, and at no time declined to renew or extend the old notes or take others in their place. Nor did the evidence show that the condition specified in the letter arose. The financial change which occurred affected the circulation of money rather than the renewal of loans previously made. Robinson's corporation had drawn out its credit balance, and a renewal of its notes would more naturally have required payments to the trust company than disbursements by it. About the middle of November, 1907, the debtor corporation was put in the hands of a receiver in a stockholders' suit, and there is no contention that before this occurred the trust company did not stand ready to fulfill its agreement.

The order is affirmed.

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### INTERNATIONAL BANKING CORPORATION v. PAYNE

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 163.

#### 1. TRIAL (§ 260\*)—REVIEW—INSTRUCTIONS.

The refusal of a requested instruction is not reversible error, where it was substantially covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 2. FRAUD (§ 64\*)—QUESTIONS FOR JURY.

Where plaintiff charged that defendant procured the delivery to him of foreign drafts, to be paid for later, by means of misrepresentation and without the ability or intention of paying for the same, it was competent for the jury to determine whether the grounds given by defendant for his asserted belief at the time that he could pay for the drafts were reasonable or not.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 64.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by the International Banking Corporation against Henry C. Payne. Judgment for defendant, and plaintiff brings error. Affirmed.

W. C. Prime, for plaintiff in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff was engaged in the business of buying and selling foreign exchange. Defendant, who was a buyer of foreign exchange and had theretofore bought drafts from plaintiff, applied to it on October 22, 1907, for two drafts on London, amounting to upwards of \$15,000. They were drawn and sold to

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

him upon an agreement that he would on the same day give his check for them. The answer avers that it was further agreed that the check should not be presented for payment until the following day, but we find no testimony in the record to support such averment. It appears that there was a custom of the business whereby, for convenience, drafts would be actually delivered to a purchaser the day before that on which the steamer which was to carry them sailed; the purchaser to pay the day after delivery, but the transaction to be considered by both parties as a cash transaction. Some prior purchases of defendant had been made on this basis, but a few weeks before the one in suit plaintiff had insisted that thereafter he must pay on the same day the draft was delivered to him, and he did so pay in each case thereafter, except that for the two drafts sold on October 22, 1907, he has never paid anything.

The theory of the complaint is that, when defendant applied for the drafts, he did not have sufficient funds to pay for them and had no grounds to expect that he would come into possession of sufficient funds, and that he obtained the drafts from plaintiff with intent to negotiate them without payment for them and to defraud the plaintiff of the amount of the drafts. It is further averred that he made representations to plaintiff as to his business, on which it relied in selling and delivering the drafts, which representations were untrue, were known to defendant to be untrue, and were made by him with intent to deceive and defraud the plaintiff and to induce the sale of the drafts.

Considerable testimony was taken on the issues raised by the pleadings, the case took over a day to try, no request to direct a verdict was made by either side, it was sent to the jury, and a verdict was rendered in favor of defendant. With the weight of the testimony, or the propriety of the verdict, this court is in no way concerned. By not requesting a direction in its favor plaintiff conceded that there were disputed questions for the jury to pass upon. No error in the admission or exclusion of testimony is assigned. The court, in charging the jury, first read, and charged, certain requests which each side had submitted, and then further instructed the jury colloquially. No objection was taken and no exception reserved to any part of the charge. Thereafter, and before the jury retired, plaintiff's counsel asked the court to charge:

"Defendant is presumed to intend the natural consequences of his acts. The jury were not to decide whether defendant's grounds were reasonable or not."

[1] To a refusal to entertain and charge this request, plaintiff excepted. The first half of it is correct as a proposition of law; but it would not be error to refuse to charge it in the language of the request, if the subject-matter had been sufficiently covered in the charge. The jury had already been instructed that if, when defendant ordered and received the drafts, he had no present means of paying for them, no reasonable expectation of securing means to pay for them, and that he knew that he would not be able to pay for them, it is not enough for him to testify, generally, that he intended to pay for them. It is for the jury to find his intent. Also that if the jury should find as

facts that defendant made the representations charged, which he knew were untrue, in order to deceive plaintiff and induce it to sell him drafts, being utterly without means for paying plaintiff and intending to use the drafts without paying for them, the jury may from these facts, if found, infer fraud on defendant's part. They were also instructed that:

"The plaintiff cannot show, nor can any other person or persons show, to you the processes of defendant's mind nor the processes of anybody's mind in the same way that there can be shown the existence and the terms of these drafts or pieces of paper that have been submitted to you. *It is only by inference from what a man does that what he thinks can be determined.* \* \* \* *From this testimony as to what was done, it is for you to decide on your oaths what was the intent of defendant in doing what he did.*"

This certainly seems a sufficiently full statement of the proposition that the jury were not to be concluded by defendant's statement of what he intended, but might presume what his intention was from a consideration of what he did. It is contended that the jury should have been instructed as requested, because the court elsewhere in the charge said:

"It is, I think, a fair question, on the testimony of the defendant himself, whether this was a loan."

This instruction was not excepted to and refers to another part of the case. Defendant did testify that he "considered it a loan." He may have had as little reason for this as he would have for considering the transaction to be the taking out of a policy of insurance; but the jury could not have been in any doubt that it was for them to determine what the real intention was from the proved facts, irrespective of defendant's protestations as to what he thought.

[2] The last half of the request, viz., that "the jury were not to decide whether defendant's grounds were reasonable or not" was not a correct statement of the law of the case; on the contrary, if the jury were satisfied that the grounds for defendant's asserted belief that he could pay for the bills when delivered were wholly unreasonable and without any rational foundation, they were warranted in finding a verdict for the plaintiff.

We find no error. The judgment is affirmed.

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#### UNITED STATES v. ATLANTIC TRANSPORT CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 253.

1. ALIENS (§ 54½,\* New, vol. 12, Key No. Series)—IMMIGRATION ACTS—CONSTRUCTION—"SEAMEN."

Horsemen, signed for service on a vessel in caring for horses during a voyage, are "seamen," for the purpose of determining the application to them of the immigration acts.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6374, 6375.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



2. ALIENS (§ 54½,\* New, vol. 12, Key No. Series)—CONSTRUCTION OF IMMIGRATION ACT—HEAD TAX—SEAMEN.

Immigration Act Feb. 20, 1907, c. 1134, § 1, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), which requires the levy and collection of a head tax of \$4 "for every alien entering the United States," such tax to be paid by the master, agent, owner, or consignee of the vessel or transportation line, applies to seamen who are signed by a vessel for a voyage to a port of the United States, but not for the return voyage, and who, in accordance with the contract and intention of the parties, are discharged on the arrival of the vessel and enter the United States.

Ward, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Action at law by the United States against the Atlantic Transport Company. Judgment for defendant, and the United States brings error. Reversed.

This cause comes here upon appeal from a judgment sustaining demurrer to the complaint in an action brought by the United States to collect from defendant head tax levied by the collector of the port of New York, under the provisions of section 1 of the immigration act of February 20, 1907, on three persons whom defendant brought here on its steamship Minneapolis. The persons in question are aliens. They were employed on the ship in the capacity of "horsemen"; that is, "to care for horses carried upon said ship on said voyage." They were paid regular wages and signed on the ship's articles for the voyage to the United States, but not for the return voyage. Upon arrival they were duly discharged by the captain, and entered the United States with his knowledge and consent, and have not since returned to the ship. The collector levied upon defendant a tax of \$4 for each of them. Payment thereof has been demanded and refused.

Henry A. Wise, U. S. Atty., and A. S. Pratt, Asst. U. S. Atty.

Burlingham, Montgomery & Beecher (W. S. Montgomery, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. [1] These "horsemen," like all others who sign a ship's articles for a voyage or succession of voyages, being part of the ship's company, may be considered as seamen, so far as the immigration acts are concerned.

Section 1 of the act of February 20, 1907, provides:

"That there shall be levied, collected and paid a tax of four dollars for every alien entering the United States. The said tax shall be paid to the collector of customs of the port or customs district to which said alien shall come, \* \* \* by the master, agent, owner or consignee of the vessel, transportation line or other conveyance or vehicle bringing such alien to the United States. \* \* \* The tax imposed by this section shall be a lien upon the vessel \* \* \* and shall be a debt in favor of the United States against the owner or owners of such vessel," etc.

Earlier statutes had imposed a head tax "for each and *every passenger* not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States." Act Aug. 3, 1882, c. 376, 22 Stat. 214 (U. S. Comp. St. 1901, p. 1288); Act Aug. 18, 1894, c. 301, 28 Stat. 391 (U. S. Comp. St. 1901, p.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2459); Act March 3, 1903, c. 1012, 32 Stat. 1213. The suggestive changes made by the later statute are the imposition of the tax upon all aliens, whether they come here as "passengers" or not, and the substitution for the phrase "come by vessel from a foreign port to any port within the United States" of the phrase "entering the United States." A person may properly be said to "come to" this port if he arrives here in a vessel, even though he intends to remain on board and depart with the vessel when she sails; but the phrase "entering the United States" would seem to signify a permanent separation from the vessel.

[2] Aliens who arrive here as did the three referred to in the complaint, themselves and the master of the vessel both intending that upon arrival they shall sever their connection with the vessel and enter the United States, are certainly within the enumeration of section 1, *supra*. The sole contention of the defendant is that alien seamen are not within the immigration act for any purpose.

In a former decision (*Taylor v. U. S.*, 152 Fed. 1, 81 C. C. A. 197) we discussed the successive immigration acts at some length and set forth the reasons why a majority of this court were of the opinion that all alien seamen were included in its provisions. That case went to the Supreme Court on certiorari, and it was there contended that the act of 1903 and its several provisions were not intended to apply to bona fide seamen. The alien seaman in that case had signed for the return voyage, and it was the intention of the master that he should remain on the ship and sail with her. The section (18) under consideration was one making it the duty of owners and officers of vessels "bringing any alien to the United States to prevent the landing of such alien at any time or place other than such as the immigration officers might designate." The alien seaman had deserted while the ship lay at her wharf, which was not such a designated place, and the master was prosecuted for violation of section 18. The Supreme Court did not sustain the contention of the plaintiff in error. All that it held was that section 18 did "not apply to the ordinary case of a sailor deserting while on shore leave." The court said:

"The section does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only was there no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact. Whether this result is reached by the interpretation of the words (in section 18) 'bringing an alien to the United States' that has been suggested, or on the ground that the statute cannot have intended to apply to the ordinary and necessary landing of seamen, even if the words of the section embrace it, as in *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, does not matter for this case."

In the subsequent case which was before this court (*U. S. v. International Mercantile Marine Co.*, 171 Fed. 841, 96 C. C. A. 420), the alien was a seaman who had signed articles for the round voyage, here and return, and had deserted while the vessel was in this port.

There being no question here of any desertion, but a conceded intention of all parties that on arrival he should leave the ship perma-

nently and enter the United States, the case is not within the exception declared by the Supreme Court, and the provisions of section 1 of the act of 1907 apply.

The judgment is reversed.

WARD, Circuit Judge (dissenting). If the substitution of the word "alien," in the first section of the act of February 20, 1907, for the word "passenger," used in the former acts, were the only change made in the law, the argument founded on it would be stronger. But the word "alien" was substituted throughout the act for the words "alien immigrants" or "immigrants" used in former laws. The horsemen in question were seamen on the British steamship *Minneapolis*. This would be so by statute as to American vessels (Rev. Stat. U. S. 4612 [U. S. Comp. St. 1901, p. 3120] ; see, also, *The Minna* [D. C.] 11 Fed 759), and is so as to British vessels by chapter 60, 57 & 58 Vict. 742. There is no evidence that they were shipped for the purpose of evading the immigration law. Though it happens that the persons now under consideration are horsemen and the particular provision of the immigration law involved is the head tax, it seems to me to follow from the decision that all alien seamen who are paid off under their articles in this country fall within the definition of aliens throughout the immigration law. The word literally covers seamen, but I cannot believe it was the intention of Congress to include them. *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. They belong to an ambulatory class. There is no presumption that when they are paid off here they will stay here. If there be any presumption, it is to the contrary—that they will continue to follow their calling on the sea. The complaint does not charge that the seamen in question intended to remain in the United States, although they were paid off. Rule 22, subd. "d," of the Bureau of Immigration and Naturalization, enacted after the passage of the present law, provides that no head tax is due on such seamen. It is as follows:

"Head tax shall not be assessed on account of bona fide seamen landing in the pursuit of their calling. On account of such as are discharged with the intent to remain in the United States, and on account of those who are found or shown to have deserted and remained in the United States, the head tax shall be assessed."

It is true that the cases of *Taylor v. United States*, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130, and *United States v. International Mercantile Marine Co.*, 171 F. 841, 96 C. C. A. 420, concerned deserting seamen; but it does not necessarily follow from what was said in them that seamen who are paid off at the termination of their agreements here must be held to be within the immigration law.

For these reasons, I feel compelled to dissent from the opinion of the court.

## THE NASSAU.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 241.

## 1. FERRIES (§ 29\*)—REGULATION—STATUTE PROHIBITING CARRIAGE OF DANGEROUS ARTICLES ON "STEAMER."

A steam ferryboat carrying passengers is a "steamer," and subject to the provisions of Rev. St. § 4472 (U. S. Comp. St. 1901, p. 3050), which prohibits any steamer carrying passengers from carrying certain dangerous articles as freight or stores.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 76; Dec. Dig. § 29.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6655.]

## 2. WORDS AND PHRASES—"FREIGHT."

The word "freight" has two meanings, being used to denote the compensation paid to a carrier of goods and also the property carried.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 2973-2976.]

## 3. FERRIES (§ 29\*)—REGULATION—STATUTE PROHIBITING CARRIAGE OF DANGEROUS ARTICLES.

A ferryboat plying between Manhattan and Brooklyn, carrying both passengers and vehicles, and charging different rates for loaded and empty vehicles, transported a truck loaded with barrels of kerosene of such grade that it would not ignite at a temperature of 110 degrees Fahrenheit. *Held*, that such carriage was a violation of Rev. St. § 4472, as amended by Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 252 (U. S. Comp. St. 1901, p. 3050), and by Act March 3, 1905, c. 1457, § 8, 33 Stat. 1031 (U. S. Comp. St. Supp. 1909, p. 1117), which prohibits steamers carrying passengers from carrying such article as freight, except "upon routes where there is no other practicable mode of transporting it."

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 76; Dec. Dig. § 29.\*]

## 4. FERRIES (§ 27\*)—POWER TO REGULATE ON NAVIGABLE WATERS—FEDERAL STATUTES.

It is within the maritime powers of Congress to impose regulations on steam ferryboats for the protection of their passengers and crews, although they are operated wholly within a state, where they navigate waters of the United States which are common highways of commerce.

[Ed. Note.—For other cases, see Ferries, Cent. Dig. § 74; Dec. Dig. § 27.\*]

Appeal from the District Court of the United States for the Eastern District of New York.

Proceeding in admiralty by the United States against the ferryboat Nassau; the City of New York, claimant. Decree for respondent (182 Fed. 696), and the United States appeals. Reversed.

This cause comes here upon appeal from a decree dismissing a libel filed by the United States for a violation of section 4472, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 3050) which provides, amongst other things, that:

"No loose hay, loose cotton or loose hemp, camphene, nitroglycerine, naphtha, benzene, benzole, coal oil, crude or *refined* petroleum or other explosive burning fluids or like dangerous articles, shall be carried as freight or used as stores on any steamer carrying passengers. \* \* \* *Refined petroleum*

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which will not ignite at a temperature of less than 110 degrees of Fahrenheit thermometer may be carried on board such steamers upon routes where there is no other practicable mode of transporting it, and under such regulations as shall be prescribed by the board of supervising inspectors with the approval of the Secretary of Commerce and Labor."

This section was amended in 1905 (Act March 3, 1905, c. 1457, § 8, 33 Stat. 1031 [U. S. Comp. St. Supp. 1909, p. 1117]) by the addition of the following clause:

"Nothing in the foregoing or following sections of this act shall prohibit the transportation of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power. Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished immediately after entering the said vessel, and that the same be not relighted until immediately before said vehicle shall leave the vessel."

It does not appear that the board of supervising inspectors have made any regulations covering the particular transportation with which this case is concerned.

William J. Youngs, U. S. Atty. (W. A. Moore, Asst. U. S. Atty., of counsel), for appellant.

Archibald R. Watson, Corp. Counsel (Theodore Connoly and G. P. Nicholson, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The claimant appellee operates a ferry from the foot of Whitehall street, Manhattan, to the foot of Thirty-Ninth street, Brooklyn, and owns the steam ferryboat Nassau, which is used in the ferry service. Fare is charged those using the ferryboats, the rate varying with the use made—so much for a foot passenger, so much for vehicles of specified kinds and sizes, different rates being charged for loaded and for empty vehicles, and varying also with the number of horses drawing such vehicles. There are also specified rates for automobiles, for led horses or cattle, etc. On March 6, 1909, while on one of her daily trips with 25 passengers aboard, the Nassau carrier a truck, with driver, which contained 10 barrels of refined petroleum which would not ignite at a temperature of 110 degrees Fahrenheit.

The single question presented is whether this was a violation of the section quoted.

[1] The Nassau, being a vessel propelled in whole by steam, is manifestly a steam vessel, or "steamer." The circumstance that it is, as defendant suggests, what is commonly known as the "double-end type of steamboat," or that it has no hold or underdeck, does not make it any less a steamer or steamboat. It belongs, however, to the particular class of steamers which are known as "ferryboats," and it is contended that, although Congress used the comprehensive word "steamer," it did not intend to include this particular class of steamers. Considering the manifest object of the act, which seeks to secure the safety of passengers on steamers, there is no apparent reason why this particular class should have been excluded. Passengers on a steam

ferryboat, which is carrying such things as camphene, naphtha, nitroglycerine and the others enumerated, are apparently as much exposed to risk and as much entitled to protection as if the steamer were going a few miles up the Hudson river or down the Sound. Nor is it important that, when discussing various rights and duties, courts have frequently referred to ferryboats as "substantially a continuance of the public highway." They are steamers carrying passengers just the same.

[2, 3] It is next contended that the statute does not apply to steam ferryboats, because it is, by its terms restricted to steamers on which the enumerated articles are "carried as freight," it being argued that the truck load of petroleum was not so carried. Many authorities are cited on the brief; but upon examination they are all found to relate to the word "freight," when used to indicate the compensation paid for the service rendered. That word, however, has another meaning. It includes the articles carried, as well as the compensation paid for carrying them. Whether the money paid for the transportation is called "freight," or "toll," or "fare," or what not, articles belonging to one person which are transported by another person for pay, on a vessel owned by him or it, are properly described by the phrase "articles carried as freight." Undoubtedly these barrels of petroleum were carried for pay. The rate of fare charged for an empty truck was increased, because the barrels were on the truck. Moreover, the intent of Congress not to exclude ferryboats from the class "any steamers carrying passengers" is quite clearly indicated by the amendment of 1905. This amendment itself amended an earlier amendment of 1901 (Act Feb. 20, 1901, c. 386, 31 Stat. 799 [U. S. Comp. St. 1901, p. 3050]), also relating to automobiles. The first amendment provided that all fire in such vehicles must be extinguished *before entering* the steam vessel and not relighted until *after leaving* the vessel. In consequence they would have to be hauled on board and hauled off, a matter of much inconvenience, if the steam vessel were a ferryboat, but immaterial if automobiles were being shipped for long distances by other steam vessels. If Congress had not intended by the original statute to keep gasoline and similar dangerous explosives off steam ferryboats carrying passengers, it would not have found it necessary to amend the statute twice in order to except gasoline when carried by motor vehicles.

The evidence does not show that there was, in the language of the statute, "no other practicable mode of transporting" the ten barrels of refined petroleum. Manifestly the truck carrying them could have been driven over one of the bridges to Brooklyn, or they could have been transported by some vessel not carrying passengers. Such modes of transportation would merely have been more inconvenient and expensive.

[4] It is further contended that the maritime powers of Congress do not apply to ferryboats not engaged in interstate commerce, although they are steam vessels navigating waters of the United States which are common highways of commerce, and the legislation is primarily for the purpose of protecting their passengers and crews. On

this branch of the case we concur with the District Judge in the conclusion that the contention is unsound, and do not think it necessary to add anything to his discussion.

Since, however, we do not concur in his conclusion that Congress did not intend to compel ferryboats to adopt the precautions with relation to the carriage of gasoline, petroleum, etc., which they required of other steam vessels carrying passengers, the judgment is reversed, and cause remanded, with instructions to decree in conformity with the views expressed in this opinion.

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THE MERRILL C. HART. THE A. C. CHENEY. THE SEMINOLE.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

Nos. 242-244.

**1. COLLISION (§ 75\*)—LIGHTS—SAILING VESSELS IN TOW ALONGSIDE.**

Rule 11 of the pilot rules, relating to the lights to be carried by barges and canal boats when towed alongside, does not apply to sailing vessels, which are governed by article 5 of the statutory rules for rivers and harbors, in Act June 7, 1897, c. 4, § 1, 30 Stat. 97 (U. S. Comp. St. 1901, p. 2877), which requires them to carry the regulation colored side lights.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 105-121; Dec. Dig. § 75.\*]

**2. COLLISION (§ 95\*)—YACHT AND STATIONARY TUG WITH TOW ALONGSIDE—LIGHTS.**

A collision near the center of the North River, about opposite Thirty-Second street, in the evening, between a yacht going down at a speed of about 12 knots and a tug and a schooner in tow on her starboard side, which were stationary, held due to the fault of all three vessels; the yacht being in fault for navigating without due care and for coming too close to the other vessels, which she supposed she was overtaking, without signaling, and the tug and tow because of the failure of the schooner to carry the side lights required by the rules, which misled the yacht, and the lights of the tug being obscured by the schooner and her deck load.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.\*]

Appeals from the District Court of the United States for the Southern District of New York.

Suits in admiralty for collision by John N. Robins, owner of the yacht Seminole, against the schooner Merrill C. Hart, Richard Dunn and others, claimants, and the steam tug A. C. Cheney, the Cornell Steamboat Company, claimant, and cross-libels by claimants of the Hart and Cheney against the Seminole. Decree against all three vessels, and cross-libelants appeal. Affirmed.

The controversies arose from a collision of the steam yacht Seminole with the schooner Merrill C. Hart and the tug A. C. Cheney, which had the schooner in tow. The collision occurred about 9:30 p. m. on August 5, 1907, near the center of the North River and about off Thirty-Second street, New York. The court below held all three vessels at fault and entered decrees accordingly. Appeals were taken

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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by the claimants of tug and schooner. The opinion of the District Judge will be found in 162 Fed. 371.

Amos Van Etten, for appellant Cornell Steamboat Co.

James Forrester, for appellants Dunn and others.

C. S. Haight, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] The opinion of the District Judge fully sets forth the details of the pleadings and the evidence. They need not be repeated here. The Cheney took the Hart in tow from anchorage at a place within anchorage limits somewhat above a point opposite Fourteenth street, then went down river a little, turning to the eastward below a stakeboat, the North. She had the schooner on her starboard side, and continued on a turning course till they again reached the anchorage grounds at a point not far from another stakeboat, the Eureka, where it was intended to make up the flotilla of which the Hart would form a part. At that time the tugboat Cordts with a long tow was maneuvering near the Eureka preparatory to turning and proceeding up the river. To give the Cordts time to move out of the way, the Cheney stopped in the water and waited several minutes—apparently at least 10 minutes. She and the Hart were then heading towards the Jersey shore, about N. W. Either while they were still lying there, or just as they started to move forward behind the Cordts' tow, then under way, the Seminole came into collision with the starboard bow of the Hart, and thereafter with the Cheney. The Seminole had come down the river from Nyack, had passed to the eastward of some war vessels at anchor off the lower part of Riverside Drive, and had then crossed over to the westward, with the intention of keeping on down the right-hand side of the channel. When about Fiftieth street she saw a vessel with two staff lights (the Cheney), but no other lights exhibited. As she drew nearer she assumed the vessel exhibiting these lights was a tug with a tow bound in her own direction, down the river. When she was very close, apparently this vessel turned across the course of the Seminole, which was expecting to overtake and pass her on the Seminole's port side. In reality the Cheney and Hart made no such turn, having, during the time the Seminole was coming diagonally down from a position off Fiftieth street, been lying with their starboard side turned towards her. No one on the Hart or the Cheney seems to have discovered the presence of the Seminole till she was almost in collision with them.

The Cheney's side lights were set and burning. The Hart had a white light in her rigging while at anchor, which she took down when picked up by the Cheney. Her sidelights were not lit at any time before collision. The District Judge held her in fault for not exhibiting them, and held the Cheney in fault for not seeing to it that she did so. From this decision the claimants of these two vessels appeal.

Article 5 of the rules enacted by Congress provides that:

"Sailing vessels under way or being towed shall carry the same lights as are prescribed by article 2 for a steam vessel under way, with the exception of the white lights mentioned therein, which they shall never carry."



Article 2 provides for the regulation colored lights. Manifestly the Hart failed to comply with this rule. This failure is sought to be excused by reference to the following rule of the board of supervising inspectors, approved by the Secretary of Commerce and Labor:

"Barges or canal boats towed alongside a steam vessel, if on the starboard side of said steam vessel, shall display a white light on her own starboard bow; and if on the port side of said steam vessel, shall display a white light on her own port bow."

[2] Since the Hart was neither a barge nor a canal boat, she was not covered by the provisions of this rule. We cannot find that her failure to comply with article 5 did not in any way contribute to the collision. On the contrary, we think it was one of the direct causes thereof. The schooner had a deck load about eight feet high. Including her freeboard and her furled sails, she formed an obstruction which effectually shut off the tug's starboard light from the view of vessels approaching on her starboard side. We do not doubt that if the schooner had displayed her green light, as the article required, the Seminole would have discovered that she and the Cheney were heading across the Seminole's course, instead of downstream, long before she did, and may assume that her navigation would have been modified accordingly. We concur, therefore, with the District Judge in the conclusion that the Hart was in fault for not displaying her colored lights, and that the Cheney was in fault for not directing her to do so. It was the master of the Cheney who ordered the Hart to take the white anchor light out of the rigging and put it on the starboard bow.

Without considering the other charges of fault against the Seminole, which the District Judge sustained, we fully concur in this excerpt from his opinion:

"The theory of the Seminole was that the Cheney and tow were at first bound down the river, and then suddenly changed to the westward and across the Seminole's bow, thus bringing about the collision. The Seminole's maneuvers, however, were not in conformity with such a theory. If the Seminole was an overtaking vessel and desired to pass, it was her duty to signal the Cheney and obtain an assent to such passing, but no signals were given."

We are satisfied that, misled by the failure of tug or tow to exhibit the proper light, the Seminole did believe she was overtaking a vessel bound in her own direction. Manifestly, however, she approached so close to the vessel she supposed she was overtaking that a sudden change of course by the latter would bring about a collision. But she should not have come so close to an overtaken vessel without signal. The overtaken vessel is not required to look behind before she changes her course, however abruptly. The rule which requires a signal from the overtaking vessel and assent from the other is intended to avoid just what, on the Seminole's theory, happened on this occasion. Moreover, we agree with the District Judge in the conclusion that her "navigation was not marked by the degree of caution that a fast vessel under the circumstances should have observed."

The decrees are affirmed, with interest and costs.

**WILSON et al. v. PENINSULA BARK & LUMBER CO.**

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,105.

**SHIPPING (§ 51\*)—CHARTER—ACTION FOR BREACH.**

Libelant chartered respondent's vessel to carry a number of cargoes of timber, to be loaded from the water alongside. On reporting for the first load the quantity on hand was insufficient to make a full cargo, owing to the closeness of inspection by a purchaser from libelant. The master finished loading what there was on Sunday morning. Monday was a holiday, and libelant had a large quantity of the timber near by which could have been delivered at the vessel by Tuesday morning, which was the next loading day under the charter, but the master refused to wait and sailed with the amount then on board, and respondent refused to return or further carry out the charter. *Held*, that such action was not justified, and was a breach of the charter, for which libelant was entitled to recover damages.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 203-210; Dec. Dig. § 51.\*]

Appeal from the District Court of the United States for the Western District of Michigan.

Suit in admiralty by the Peninsula Bark & Lumber Company against the steamer Mathew Wilson, Mathew Wilson, and others, claimants. Decree for libelant, and claimants appeal. Affirmed.

William Carpenter, for appellants.

E. S. B. Sutton, for appellee.

Before KNAPPEN, Circuit Judge, and McCALL and SATER, District Judges.

McCALL, District Judge. This case is here on an appeal from the United States District Court for the Western District of Michigan. It is a proceeding in admiralty. The libelant, the Peninsula Bark & Lumber Company, a corporation, with its main office at Sault Ste. Marie, on October 2, 1908, filed its libel against the steamer Mathew Wilson and its owners, alleging a breach of contract and praying for the issuance of an attachment and for the recovery of \$1,500 as damages. Process was issued as prayed for. The libelees answered and filed a cross-libel.

At the hearing much evidence was introduced. The court below decreed in favor of the libelant for \$1,008, and dismissed the cross-libel, except \$75 was allowed cross-libelant as demurrage for one day's delay while loading the vessel. Judgment in favor of libelant for the net amount of \$997.53 and eight-tenths of its costs was rendered. From which decree and judgment the libelees appealed.

The controlling facts disclosed by the testimony are substantially as follows: The libelant had contracted to furnish certain hemlock timbers at the government's locks in Sault Ste. Marie. It had purchased these timbers from the Worcester Company under a contract which

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

required the latter company to deliver the timbers to the libelant, "f. o. b. water, delivered alongside boat at Chassell." It was necessary for the libelant to transport or cause to be transported the timber from Chassell to Sault Ste. Marie for delivery. For this purpose, on July 25, 1908, the libelees entered into the following contract with the libelant:

"On the part of the owners of the steamer 'Mathew Wilson,' we hereby agree to carry approximately one million feet of 12-12 hemlock timbers from Chassell, Mich., to Sault Ste. Marie, Mich.; said timbers to be delivered on or before November 15, 1908. The commencement of said delivery to be at your call in about ten days.

"The price for delivering said timber to be \$1.50 per M.

"Said timber to be received in sufficient water alongside of boat, either in rafts or cribs, and to be delivered at Sault Ste. Marie on dock as far away from the boat as the boom will reach; you to care for the timber as soon as it is cast from the boom."

The first notice that timber was ready for transportation, and the first call for the vessel was given and made by the charterer August 18, 1908, as appears from the following telegram, addressed to William Wilson:

"We chartered steamer Mathew Wilson some time ago, Chassell to Soo, Michigan, haul timber. No word since. Want to know at once when we can expect it. Three loads ready. Wire answer."

In response to this call, the vessel arrived at Chassell on Thursday, September 3d. After the hold was filled with certain lumber destined to Muskegon, which the vessel was at the time also engaged in transporting, they proceeded on Friday, September 4th, in the afternoon to load the hemlock timbers on the deck of the vessel. The notice of August 18th stated that the charterer had "three loads ready" yet because of the close inspection made by the representative of the government as the timbers were being put aboard the vessel, and perhaps from some other causes not important, it resulted that there were only about 153,000 feet of timber then actually at Chassell ready for transportation. The timbers were put aboard Friday afternoon, Saturday, and Sunday morning up to 9 o'clock. A short time thereafter, and without demanding any additional timber to complete the cargo, the vessel sailed for the Sault.

In point of fact, there were no other available timbers in the water at Chassell; but at Lake Linden and Baraga, some miles away, there were large quantities of hemlock timber ready to be delivered by the Worcester Company to libelant at Chassell, and to be transported thence by the libelees to Sault Ste. Marie under the contract in question. The owners did not on their own motion send the vessel back to Chassell for any more of the hemlock timber, and refused to do so when again called by the charterer.

The cause assigned for this course of conduct is in substance that the vessel, when first called by libelant and notified that three loads were ready, responded and on arrival at Chassell found only a small portion of that amount of timber ready, and, because the libelant failed to furnish sufficient timber, it was compelled to sail with a short cargo,

greatly to its damage, that this was a breach of the contract on the part of the libelant, and that it was therefore relieved from further performance thereunder, and was justified in canceling the charter.

The libelant, upon the other hand, insists that it had more than enough timber at Chassell to make a full cargo when the Wilson arrived, but that by reason of the close inspection made thereof a greater per cent. of it was rejected than it had any reason to anticipate. That it had large quantities of the timber at Baraga and Lake Linden, a few miles away, and had the captain of the Wilson demanded additional cargo, when it was apparent that there was not enough at Chassell for the purpose, it could have put alongside the vessel within a few hours timbers in quantity more than sufficient to have completed the cargo, and that too by the time that it could have been legally required so to do.

This is based upon the facts that the Wilson finished loading on Sunday morning, and the Monday following was a legal holiday, and therefore the captain of the vessel could not of right have demanded more timber to be loaded earlier than Tuesday morning, and that, before that time arrived, libelant could and would have had timbers alongside the vessel more than enough to have completed the cargo, if more cargo had been demanded. This, in brief, presents the contentions of the parties. It would be useless to review here the testimony of the witnesses. We are satisfied with the conclusion reached by the trial judge. Whether or not it was determined not to return to Chassell for the remainder of the timber at the time the vessel sailed, or on or after its arrival at the Soo, sure it is that the shortness of cargo was the excuse for such determination. Under the contract and facts in this case, we are of the opinion that that was not sufficient to relieve libelees from their obligation under the charter party.

The charterer was only obligated to put the timber alongside the vessel for loading. This could not be done until the vessel was at Chassell. That there were no more timbers in sight on the Sunday morning when the Wilson sailed with a short cargo did not warrant the conclusion that the charterer would not have had timber alongside ready for loading on Tuesday morning, the earliest time that the captain of the Wilson could have legally demanded that more timber be placed alongside to complete the cargo.

Had he desired more cargo, he should have waited at Chassell until Tuesday morning. That he sailed with a short cargo rather than wait until the time when he could legally demand timber to complete his cargo (although he might be entitled to relief in a proper proceeding) did not warrant him either in refusing to return to Chassell for the remainder of the timber when called upon to do so, if called within the life of the contract, or to cancel the charter.

We do not interpret the correspondence as containing demand by libelant that the vessel go to Lake Linden for cargo.

There are other questions raised and discussed in this record, but we deem them unimportant.

The decree of the court below will be affirmed, with costs.

## ROYCE v. DELAWARE, L. &amp; W. R. CO.

(Circuit Court of Appeals, Second Circuit. May 25, 1911.)

No. 275.

## 1. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

A rule of defendant railroad company required conductors to report at once to the superintendent any injury to or defects in engine or cars, but such rule was not observed; the report being made instead to the chief train dispatcher, who gave orders in place of the superintendent. A crosshead guide on one side of an engine was lost en route. The conductor reported the fact to the dispatcher, and asked for a pusher, which was sent, and the train proceeded with the disabled engine. That side could have been disconnected, but was not, and the driving rod became disconnected, and struck the cab, in which plaintiff, who was a brakeman, was riding, and he was injured. *Held* that, the defect having been reported in accordance with the recognized practice, the responsibility of proceeding with the disabled engine, without disconnecting it, was that of defendant, those in charge, whether the dispatcher or the conductor and engineer, being its representatives as master, and that whether reasonable care was exercised in so doing was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.\*]

## 2. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

In an action by a brakeman to recover for an injury received while he was riding in the cab of the engine, whether he was there in violation of a rule which required him to be on top of the cars at the time in the course of his duty, and, if so, whether his being there was contributory negligence, were questions for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Joseph M. Royce against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 180 Fed. 879.

Hatch & Clute (Edward S. Hatch and Vincent P. Donihee, of counsel), for plaintiff in error.

Frederick W. Thomson, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. [1] This is a writ of error to a judgment on a verdict directed by the court in favor of the defendant. 180 Fed. 879. On a former writ we reversed the judgment entered on a verdict of a jury in favor of the plaintiff, because we found no negligence on the defendant's part as master. 176 Fed. 331. It had prescribed reasonable rules, which required conductors to report defects in cars or engines to the superintendent. But the conductor, who was the plaintiff's fellow servant, reported to the chief train dispatcher,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

asking merely for a pusher to help the train in, which was sent. The chief train dispatcher's duties under the rules concerned only the movement of trains and distribution of cars. Therefore we held that the master, having no notice whatever of the accident en route to an engine which started out after sufficient inspection, was not guilty of any failure of duty to the plaintiff in respect to it. That was the ground of the decision. On this trial, however, the plaintiff proved that the rule requiring such defects to be reported to the superintendent was never observed. It was the practice, on the contrary, to report to the chief train dispatcher, who, by the regular course of business, whether he consulted him or not, acted in the place of the superintendent. Accordingly the situation now is as if the defendant had allowed the engine to start on a trip in a disabled condition, or as if the superintendent himself had done en route exactly what the conductor and engineer did. It was therefore clearly for the jury to say whether letting the disabled engine proceed with the train was reasonable care on the part of the defendant as master or on the part of those who stood in its place. It is no defense that the chief train dispatcher, when acting for the superintendent as alter ego of the master, may have supposed that the engineer had disconnected the disabled side of the engine, because the failure to do so, if negligence, would be the negligence of the defendant as master, and not the negligence of the engineer as the plaintiff's fellow servant.

[2] It is sought to sustain the judgment on the ground that the plaintiff should not have been in the cab of the engine at the time of the accident, but should have been on the top of the cars, as required by rule 17, which reads:

"17. Trainmen must be on top of train going in and out of yards, nearing railroad crossings at grade, drawbridges, water stations, and on descending grades where, if air brakes fail, the engineer may not be able to control the train. Upon heavy ascending grades trainmen must be careful to prevent detached portions from running back, in case of train parting, by prompt application of hand brakes."

It is a matter of dispute whether the train was going into the yard when the accident occurred, and the plaintiff testifies that he was at the time just leaving the cab to go on the cars. These were questions of fact for the jury, and so, to state it most favorably for the defendant, we think it was for them to say whether, if he did fail to obey rule 17, such failure was contributory negligence. The plaintiff's being in the cab at the time of the accident, though a necessary condition of his injuries, had nothing whatever to do with them causally. Rule 17 was not prescribed with reference to the cab as a dangerous place, or for the plaintiff's safety. On the contrary, he had a right to be there, except when rule 17 required him, for purposes in no way connected with the engine or cab, to be on the top of the cars.

The judgment is reversed, with costs.

## WESTERN BANK NOTE &amp; ENGRAVING CO. v. SLENTZ.

(Circuit Court of Appeals, Third Circuit. June 13, 1911.)

## No. 18.

**1. APPEAL AND ERROR (§ 1178\*)—REVERSAL—FORM OF MANDATE.**

Where a judgment entered non obstante veredicto under the Pennsylvania practice is reversed by the appellate court, that court has power, on an alternative request by the defendant in error, to grant a new trial, whereby resort to a second writ of error may be avoided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.\*]

**2. APPEAL AND ERROR (§ 1053\*)—REVIEW—HARMLESS ERROR.**

The admission of testimony, which was clearly made immaterial by the charge of the court, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

**3. APPEAL AND ERROR (§ 1058\*)—REVIEW—HARMLESS ERROR.**

The overruling of an objection to testimony, if error, was without prejudice, where the witness had twice before testified to the same thing without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195-4206; Dec. Dig. § 1058.\*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action at law by Andrew Slentz against the Western Bank Note & Engraving Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 180 Fed. 389, 103 C. C. A. 535.

Reed, Smith, Shaw & Beal and Edwin W. Smith, for plaintiff in error.

T. M. & R. P. Marshall, Oliver K. Eaton, and Meredith R. Marshall, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and McPHERSON, District Judge.

BUFFINGTON, Circuit Judge. In the court below Andrew Slentz, a citizen of Pennsylvania, brought suit and recovered a verdict against the Western Bank Note & Engraving Company, a corporation of Illinois, for damages sustained by him through its negligence in operating an elevator. Thereupon the defendant, in accordance with the Pennsylvania statute of April 22, 1905 (P. L. 286), moved the court to enter judgment in its favor non obstante veredicto. This motion was subsequently granted, and to the entry of judgment the plaintiff sued out a writ of error to this court. Thereafter this court, in an opinion reported at 180 Fed. 389, reversed the lower court and issued its mandate, directing that—

“Judgment be entered for the plaintiff in accordance with the verdict rendered by the jury, and that the said plaintiff in error, Andrew Slentz, re-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cover against the said defendant in error, the Western Bank Note Company, the sum of \$183.90 for his costs herein expended and have execution therefor."

In accordance with said mandate the lower court entered said judgment. Later the defendant sued out a writ of error, on which it assigns for error the ruling of the court in admitting over its objection certain testimony on behalf of the plaintiff.

[1] When it reversed this case on the former writ of error, this court had power, on an alternative request in this court, as indicated by the Supreme Court of Pennsylvania in *Hughes v. Miller*, 192 Pa. 368, 43 Atl. 976, to direct a new trial. This practice commends itself to our judgment, and should be followed hereafter by counsel in this court, for thereby resort to a second writ of error may be avoided.

[2] The assignments of error concern the admission of certain testimony over the defendant's objection. The facts of the case are fully set forth in our former opinion, and need not be here repeated. In one assignment the testimony complained of bore upon the practice of the elevator man for two days in detaining the elevator at the floor to which he had carried freight until the workmen who removed it had finished placing such freight on the floor and were ready to descend. In view, however, of the charge of the court that, to sustain a verdict, the jury must find there was an express promise by the elevator man to the plaintiff to wait for him on the lower floor, the evidence admitted, which bore on the practice of the elevator man, became inconsequential, and manifestly had no part in determining the issue.

[3] As to the assignment in reference to the testimony of the plaintiff that he believed the elevator was still on the first floor level when he stepped into the shaft, we are of opinion no error is involved which should lead to a reversal. The plaintiff twice before and without objection had testified he thought such was the case. And while the court at a later stage overruled the objection when such belief was testified to for a third time, yet the matter was of such inconsequence that the ruling was not even made a ground for a new trial. Without, therefore, entering upon a discussion of whether the evidence was admissible, we are clearly of opinion that it should not be held reversible error. Common sense teaches us that the man would not have stepped into the open elevator shaft, unless in the belief the elevator was there. The verdict of the jury is predicated on that fact; otherwise, he was guilty of contributory negligence.

It follows, therefore, that the evidence was merely cumulative and inconsequential, and not ground for reversal. As said in *National Association v. Dolph*, 94 Fed. 743, 38 C. C. A. 1:

"The court will not reverse for error which has done no injury to the party complaining"—citing *Chase v. Hubbard*, 99 Pa. 226, and *Galbraith v. Zimmerman*, 100 Pa. 374.



## LEHTOHNER v. NEW YORK, N. H. &amp; H. R. CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 278.

## RAILROADS (§ 350\*)—INJURY TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where plaintiff's intestate was killed on a dark and foggy night, in front of a station on defendant's railroad, by an engine running without a headlight, and which sounded no whistle and rang no bell, the decedent having reached a point opposite the station by a path in constant daily use without objection by the railroad company, and where there was evidence tending to show that he was crossing the track to the station platform, and that he stopped and looked and listened, the question of his contributory negligence was one for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166–1192; Dec. Dig. § 350.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Eva Lehtohner, administratrix, against the New York, New Haven & Hartford Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

The action was brought to recover damages for the death of plaintiff's intestate who was killed by a locomotive operated by defendant. The occurrence took place in front of or near West Farms station. At the close of the plaintiff's case verdict was directed by the court in favor of defendant.

T. J. O'Neill (L. F. Fish, of counsel), for plaintiff in error.

C. M. Sheafe, Jr. (C. M. Corwin, on the brief), for defendant in error.

Before LACOMBE, WARD and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The accident happened about half past 6 in the morning of December 21st. It was foggy and very dark. The locomotive, which was running without a headlight, sounded no whistle and rang no bell. The West Farms station, with its platform, was on the northerly side of the track. Whether or not there was a platform opposite to it on the southerly side is not entirely clear. To the station there was a public highway. There was no such approach from the south, but for years there had been a well-trodden pathway across private property from the subway station at 177th street to a point opposite or near the West Farms station. This pathway was in constant use by persons wishing to take New Haven Railroad trains at that station. Having reached the end of the pathway, they, of course, had to cross the track. It did not appear that any fence or barrier had been put up to keep persons from approaching the station from this direction, nor that any notice or warning not to use such approach had ever been posted.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The trial judge directed a verdict for the defendant, because of contributory negligence on the part of deceased, on the ground that at the time he was struck he was walking along on the railroad track, instead of walking along outside of the track, without any reason, but simply for his own convenience, manifestly a reckless thing to do at night.

The difficulty with sustaining this disposition of the case, however, is the testimony as it stands in the record. The witnesses were foreigners, unfamiliar with the use of English, and the interpreter who translated for some of them seems not to have known much more of it than they did. The photograph (Exhibit I) does not elucidate the testimony, because, although there are pencil marks and letters on it, there is no statement as to what such marks and letters represent. These witnesses were walking with deceased at the time, some before and some behind him, and their narratives leave us in some uncertainty on several points. Enough can be found in them to sustain the summary given in the last paragraph; but the jury might, on the other hand, have found from the proof that deceased, having reached a point opposite the station, possibly a station platform on the southerly side of the tracks, was undertaking to cross from one side to the other when he was struck. If that were so, we are unwilling to hold as matter of law that a person is guilty of such negligence as will bar his recovery for injuries caused by negligence of a railroad company, when the person injured reaches a platform opposite a station by a path in constant daily use without objection by the railroad, and then undertakes to cross from the one platform to the other, even at night, provided he takes the usual precautions of stopping, looking, and listening—of which there seems to have been some evidence in the case. Upon such a showing, the question whether or not he was negligent is one for the determination of the jury, after they have determined from the testimony precisely what the facts were as to the movements of the injured person.

The authority cited in appellee's brief (*Keller v. Erie R. R.*, 183 N. Y. 67, 75 N. E. 965), might seem to require such a construction of the statute forbidding the use of railroad tracks by pedestrians (Laws of 1892, c. 676, § 53) as would prevent a recovery on either theory of what actually took place. But a later decision of the same court, which is not on either brief (*Lamphear v. N. Y. C. & H. R. R. R.*, 194 N. Y. 172, 86 N. E. 1115), indicates that the *Keller* opinion was not intended to apply to usual and well-recognized crossings, where the pedestrian did not intrude upon a railroad track, except for the purpose of crossing it.

The judgment is reversed.

## HOSSFELD v. HOSSFELD.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,096.

**HUSBAND AND WIFE (§ 335\*)—ACTION FOR ALIENATION OF AFFECTIONS—PRESUMPTIONS AND BURDEN OF PROOF—ACTION AGAINST PARENT.**

In an action by a wife against her husband's mother for alienation of his affections, where evidence was introduced by both parties on all substantial issues, an instruction to the jury that defendant had the right to advise her son in good faith and from proper parental regard, and that, if they found that she did interfere to induce him to separate from plaintiff, a clear case of want of justification on her part must be shown to warrant a recovery, was not erroneous, either as a statement of the law or as placing the burden of proof upon the issue on plaintiff; the presumption being in such case that defendant acted in good faith.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1126; Dec. Dig. § 335.\*]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Action at law by Pearl Hossfeld against Ida Hossfeld. Judgment for defendant, and plaintiff brings error. Affirmed.

M. C. Lykins, for plaintiff in error.

Allen Andrews (M. O. Burns and Andrews, Harlan & Andrews, on the brief), for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and DENISON, District Judge.

SEVERENS, Circuit Judge. This was an action brought by the plaintiff to recover damages from the defendant for the alienation by her of the affections of her husband, Albert Hossfeld, who was a son of the defendant. To reverse the judgment entered upon it, the plaintiff sued out this writ of error.

The evidence, which is contained in a bill of exceptions, tended to show that the conditions upon which the conduct of the defendant was to be judged were substantially these: The plaintiff had made her home at Covington, Ky. She had been twice married before she married Albert Hossfeld. By her first husband, who was dead, she had two children, who were living. From her second husband she had been divorced. In September, 1907, Hossfeld, who was resident and engaged in business at Hamilton, Ohio, met her at a house in Lexington, Ky. Relations there commenced were continued for nearly a year, when on August 30, 1908, they were privately married. The fact of the marriage was not for a time revealed to his mother, who was a widow, also living at Hamilton. But in October following the son took the wife to Hamilton, intending to establish a home there, and introduced her to his mother as his wife. The mother was greatly distressed and bewailed the marriage. In a day or two after she had a private interview with her son. What he disclosed to her does not appear. But apparently enough was told to confirm her opinion.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At length the son put the wife away, announcing his intention to separate from her, and to give her \$5,000, which she refused. A sister of the plaintiff intervened to induce the mother to withdraw her objections and to recognize the plaintiff as the wife of her son, but to no purpose. The mother's insistence was that the son's continuance of his relations to the plaintiff would be injurious to him and destructive of his family relations and of the mother's and his sister's happiness. Enough appears to justify the conclusion that the defendant's remonstrances with the son led to the separation from his wife.

The judge instructed with reference to the lawful privilege of a mother in such circumstances in a manner not now complained of, except in the particular presently to be noted. He said:

"The reciprocal relations of parent and child continue through life. There is a right, with proper limitations, of the parent to advise the child, and the right is to be protected the same as the right of husband and wife. So, as I say, if you should find from the evidence that the defendant did anything to bring about a separation of these two parties, the question is, Was that done with malice or from proper parental regard? The defendant had a right to advise her son, if she did so in good faith, within proper limitations and the proper motive and was not a mere intermeddler. A clear case of want of justification on her part should be shown, before you can return a verdict against her, if you should find that she did interfere to produce a separation between these people."

To the first paragraph there was no separate exception. Counsel for plaintiff, however, excepted "to so much of the charge as refers to want of justification." But the counsel excepted to the whole of the second paragraph, and the contention here made is that this second paragraph would lead the jury to understand that the burden of proving a want of justification rested upon the plaintiff, whereas, it is urged, it was a matter of defense and the burden rested upon the defendant. It is more than doubtful whether the exception taken was sufficient to indicate that it was leveled at any such objection as one resting upon the question of the burden of proof. It might fairly be said that the attention of the court was not called to the point which counsel now raise in support of this assignment of error. But, aside from this, we think the exception, even if it were construed to be as specific as is now claimed, could not be sustained. In a case where there is no evidence to support a material factor to the plaintiff's cause of action, or of the defendant's defense, the question of the burden of proof is often important, but when, as here, evidence has been given by both parties upon all the substantial facts in controversy, it is of little consequence by what witnesses, whether of the plaintiff or defendant, the evidence has been given. It is all before the jury for what it is worth, and the question upon whom the burden of proof rested is not of so much account as where there is an entire lack of evidence upon an essential fact. Moreover, there is a presumption of good faith on the part of the parent in such cases which would be sufficient to support the defense in the absence of proof to the contrary, and it would have been erroneous to have told the jury that the defendant must affirmatively have proven that she acted in good faith. The presumption of fact stood in the place of evidence. *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196, *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623.

Huling v. Huling, 32 Ill. App. 522, Rice v. Rice, 104 Mich. 371, 62 N. W. 833, and 21 Cyc. 1619, 1620, where the law on this subject is fully stated. The law differs in this respect from that in the case of an action against a stranger.

In this instance, when the case was finally submitted, the court said to the jury:

"If you should find that the mother in this case did interfere as between the son and his wife, and that the motive of such interference was not the protection and welfare of her son, but was wrongful or founded on hatred and ill will toward the plaintiff, then, if the separation was produced by such interference, the plaintiff is entitled to recover."

This instruction is not complained of, and we think it stated the alternative of the issue on which the plaintiff would be entitled to recover, in a manner which substantially fulfilled all legal requirements.

As this question of the burden of proof is the only one of any substantial consequence now pressed, we have no occasion to consider others.

The judgment must be affirmed, with costs.

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SPIEGEL et al. v. ZUCKERMAN et al.

(Circuit Court of Appeals, Second Circuit. May 25, 1911.)

No. 272.

TRADE-MARKS AND TRADE-NAMES (§ 21\*)—PERSONS ENTITLED—PRIORITY OF USE.

Complainants *held* not to have acquired the right by registration under the statute to the exclusive use of the word "Princess" as a trade-mark for shirt waists, on evidence showing an extensive use of the word in connection with shirt waists by others throughout the country for several years prior to the earliest date of its use by complainants.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 21.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Hyman Spiegel and Conrad Prehs, copartners, against Louis Zuckerman and others. Decree for defendants, and complainants appeal. Affirmed.

This cause comes here upon appeal from a decree dismissing a bill for infringement of trade-mark. The trade-mark is alleged to be the word "Princess," used in connection with the sale of women's shirt waists. The opinion of the Circuit Court will be found in 175 Fed. 978. It sets forth the facts with such fullness that they need not be restated here.

James E. Bennet (C. G. Hensley, of counsel), for appellants.

Samuel I. Frankenstein (S. I. Frankenstein, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge. No question of unfair trading or of infringement of a common-law trade-mark is presented by this appeal. The parties are all residents of the state of New York, and the federal courts have no jurisdiction of any such controversy.

On April 8, 1907, complainants, alleged to be the successors of H. Kottler & Co., filed a statement and declaration under the provisions of the trade-mark act of February 20, 1905 (33 Stat. 724, c. 592 [U. S. Comp. St. Supp. 1909, p. 1275]), and certificate of registration was duly issued under date of October 22, 1907. By the terms of the statute (section 16) such certificate is made prima facie proof of ownership of the trade-mark; but such prima facie proof may be overcome, if it be made to appear that the applicant was not entitled to the particular trade-mark which he sought to appropriate. The testimony shows an extensive use of the word "Princess" in connection with shirt waists, going back for several years—indeed, prior to the date named in the application (January 1, 1901), and prior to the earliest date to which complainants have been able to show their own use of it, by persuasive testimony. Many different persons used it, in many different places. It is not necessary to find that any one of these has used the word as a trade-mark so long and so continuously that he, rather than complainants, is entitled to exclusive ownership. It is quite sufficient to dispose of this appeal to find, as we do and as the Circuit Court found, that in and prior to 1901 the word "Princess" was being used by so many different persons in connection with the sale of shirt waists and similar garments, and had been so used for so long a time, that complainants could not, by adopting it as a mark for their own goods, acquire any exclusive right to its use as such mark.

The decree is affirmed, with costs.

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In re DATERSON PUB. CO.

(Circuit Court of Appeals, Third Circuit. June 5, 1911.)

No. 50.

**BANKRUPTCY (§ 140\*)—CLAIMS AGAINST TRUSTEE—USE OF PROPERTY HELD UNDER CONDITIONAL SALE CONTRACTS.**

Where machines in possession of a bankrupt under contracts of conditional sale, which required monthly payments from the bankrupt, called rental in the contracts, were reclaimed by the vendors after the bankruptcy, they cannot recover such contract rentals for the time the machines remained in possession of the trustee during the determination of their rights; but, if the trustee used the machines without their consent, the extent of their right is, on proof, to recover the reasonable value of such use.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

Petition for Revision of Order of the District Court of the United States for the Western District of Pennsylvania.

In the matter of the DaterSON Publishing Company, bankrupt. On petition to revise order of District Court. Order affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Magnus Pflaum, for petitioners.

Clarence R. Bissel and McKee, Mitchell & Alter, for trustee.

Before GRAY and BUFFINGTON, Circuit Judges, and McPHERSON, District Judge.

BUFFINGTON, Circuit Judge. In the course of the proceedings in bankruptcy in the court below in *Re the Daterston Publishing Company, the Dexter Folder Company and the Whitlock Printing Press Manufacturing Company*, the petitioners in this court for review, presented, the former a claim of \$1,050, being for 7 months' alleged rental at \$150 per month for a folder and feeder and the latter a claim of \$875, being for 7 months' alleged rental at \$125 per month for a printing press. These rentals were respectively based on rates of payment termed rentals in certain contracts of conditional sale under which the bankrupt held the machinery under bailment at the time of bankruptcy. The referee disallowed the claims, and on certificate the court below approved his action. To review the order of disallowance by the court, this proceeding in review is brought.

We have had the benefit of an able and forceful argument by counsel for the petitioners that a trustee in bankruptcy, accepting for the estate and in pursuance of the contract the articles in question, would be bound by the stipulations of the contract; but the difficulty is that the trustee never elected to take these articles as belonging to the estate, nor were the vendors willing he should. On the contrary, the vendors claimed, retained, and were decreed to have the title to the property in themselves. They contend, however, that while the question of their title was being determined by the court the machines remained in the possession of the trustee, and that for such period the estate should pay at the rental rate fixed by the contract. But this is a non sequitur. If during such period the trustee used the machines, he could have been prevented from doing so on complaint to the court; for its general order permitting him to continue the business for a limited period did not authorize him in doing so to use other people's property without their consent. Or, if he used it without formal permission of the owner, the court would no doubt, on a proper showing, have directed him to pay a proper sum for such use and occupation. But, whatever might have been the rights of the petitioners, no such relief was sought, nor have we before us proof of facts which would enable us to take any such action.

Reaching the conclusion, therefore, as we do, that the parties to these contracts did not, after bankruptcy, elect to continue them as sales, and there being no proof of the extent or value of the trustee's use of the machines during the interim of determining the question of petitioners' title, the petition for review must be denied, and the order of the court below disallowing their claims affirmed. Lest by silence we should appear to sanction these two petitioners joining in a single petition to review, we may say we have not raised or decided that question.

## THE J. M. GUFFEY.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 249.

## SHIPPING (§ 84\*)—LIABILITY OF VESSEL—INJURY TO WORKMAN.

An oil tank steamer *held* liable for an injury to a pipe fitter in the employ of a contractor engaged in making repairs on the vessel in dry dock, caused by an explosion of gas while he and others were at work with open torches in a tank, on the ground that it was the duty of her officers to render the place safe for the work, or, if that were impossible, to warn the men of the danger and furnish them with electric torches, which were kept for the use of the crew.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 349-351; Dec. Dig. § 84.\*]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by James W. Dalton against the steamship J. M. Guffey; the J. M. Guffey Petroleum Company, claimant. Decree for libellant, and claimant appeals. Affirmed.

This cause comes here upon appeal from a decree holding the ship responsible for injuries received by libellant, a steamfitter employed by contractors who were making repairs and altering the position of an oil pump; the vessel being a tank steamer.

J. J. Mahoney (M. J. Wright, of counsel), for appellant.

Hirsh & Rasquin (Hugo Hirsh, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The facts are fully set forth in Judge Chatfield's opinion. 180 Fed. 611. We do not think it necessary to repeat them, since we fully concur with him. The ship had not been turned over to the contractors, but was under the control of her officers. Although efforts had been made to remove all accumulations of gas from her interior, the result shows that the pump and pump connections had not been made safe. Exactly what had been done to that end was known to the ship's officers, who had conducted the operations, but not to the contractors or their employes. If it is the fact, as claimant's principal witness on this branch of the case testified, that in spite of all precautions there will sometimes remain little "pockets" of gas, which are liable to explode in the presence of heated rivets or any open flame, then warning should have been given to the men, who specifically asked, as to the ship's condition, "whether it was safe or not," before going to work in a dark place under the pump, that they ought not to use an open flame light, but should use only electric lights, such as the electric flame torches which were always kept on board the ship for use by her officers or crew whenever they were "going around and working any dangerous place." The two permanent signs, "No Smoking," which the chief officer testified were displayed, one on the break of the forecandle head, were not suffi-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



cient; nor would they have been if they had been lettered, as libellant had seen them on other vessels, "No Naked Lights to be Used," because it might be supposed that they were intended as warning only when the ship was in commission, and did not refer to a time when she had been cleansed and put in dry dock.

The decree is affirmed, with interest and costs.

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BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT v. WEBB.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1911.)

No. 3,451.

EMINENT DOMAIN (§ 69\*)—CONDEMNATION PROCEEDINGS—DAMAGES.

On an appeal from an award of damages made in proceedings to condemn land for levee purposes, the landowner was entitled to an award of damages in money, and the court properly refused to withdraw from the jury the question of damage from obstruction of drainage, on an offer by the district to cut drains through an old levee to obviate such damage.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.\*]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Proceedings by the Board of Directors of St. Francis Levee District against George T. Webb. From a judgment awarding damages to defendant, plaintiff brings error. Affirmed.

H. F. Roleson, for plaintiff in error.

Percy & Hughes, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and RINER, District Judge.

HOOK, Circuit Judge. The board of directors of St. Francis levee district instituted in a state court of Arkansas proceedings to condemn a right of way for a levee over the lands of George T. Webb on the west bank of the Mississippi river. Appraisers were appointed as provided by local statute, and they subsequently filed their report and award of the value of land taken and the damages. The landowner filed exceptions to the report, and then removed the cause to the Circuit Court of the United States for the Eastern District of Arkansas, where it was tried to a jury. The trial court submitted to the jury special questions covering the various items of damage, and also the market values of the entire tract of land before and after the appropriation. The value of the land taken and the damages shown by the special verdict aggregated \$5,000, and judgment was rendered in favor of the landowner for that sum. It appeared that \$2,000 of the award was for obstruction to the natural drainage of that part of the land which was between the line of the new levee and an old levee nearer the river built some years before. The controversy here is over that item.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At the close of the evidence the levee district filed in open court a written offer and agreement to cut the old levee next to the river, so as to make the drainage claimed to have been obstructed as effective as it was before the new levee was built, that the court might make appropriate orders directing and requiring the work to be done, and that if it was inadequate when completed the judgment in the present case should not bar a future action by the landowner for damages. It then asked the court to instruct the jury that no damage should be found for obstructed drainage, except the cost of artificial drainage; also that the offer and agreement referred to eliminated from consideration all question of damage by such obstruction. The instructions were refused. The court also withdrew from the questions to be answered by the jury one as to whether the land between the levees could be drained artificially and made as good as before, and, if so, at what cost.

We think the trial court was right, regardless of an Arkansas statute relating to damages which the landowner claims is contrary to the state Constitution. This being so, the validity of the statute need not be determined. The controversy at the trial was whether the natural flow of the surface waters was obstructed and the land thereby damaged, not whether artificial means of drainage were practicable; and there was no evidence whatever as to the cost of such means even if they were practicable. Again, there was evidence that formerly the surface waters naturally ran off the land westward towards the new levee, and it was not claimed at the trial that that levee could safely be opened to permit their escape. The offer of the levee district was properly disregarded. It does not appear that the plan according to which the condemnation proceeded and the levee was built specified as part thereof permanent means of draining the land. The condemnation was not qualified or limited in that way. When the case was tried the landowner was entitled to an assessment of his damages in money, not in obligations or promises possibly productive of future litigation. Of course, when the matter is under the control of the owner of the property, the cost of adjusting it to changed conditions, or of alleviating or preventing the damage, is proper evidence; but that was not the case here, as the levee was a public structure, and, besides, as already noted, there was no evidence of such cost.

The judgment is affirmed.

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HANDY THINGS CO. et al. v. TUCKER & DORSEY MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1911. Rehearing Denied April 11, 1911.)

No. 1,667.

PATENTS (§ 328\*)—PRIOR PUBLIC USE—VEGETABLE AND FRUIT SLICE AND SLICER.

The Regnier patents, No. 678,514, for a vegetable or fruit slice and method of making the same, the slice being corrugated on both sides in such manner that numerous perforations are made without waste of ma-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terial, and No. 744,107, for a slicer to produce such slices, are both void for prior public use for more than two years prior to the applications.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit in equity by the Handy Things Company, Eugene S. Regnier, and Louisa M. Richards against the Tucker & Dorsey Manufacturing Company. Decree for defendant, and complainants appeal. Affirmed.

The decree from which this appeal is brought dismisses (for want of equity) the appellants' bill, charging infringement of two patents, Nos. 678,514 and 744,107, issued for alleged inventions of the appellant E. S. Regnier.

No. 678,514 was granted July 16, 1901, on an application filed October 11, 1900, for "Improvements in vegetable, fruit, or other slice and method of making the same." The specification and drawings show the "apparatus for producing the slices," together with views of the products, as slices corrugated on both sides with perforations at various places; and the invention is thus described:

"I produce an entirely new product, which is novel, ornamental, and useful, which will not pack nor mat with other slices, which may be used for making salads from vegetables or fruits, or making Saratoga chips from potatoes, giving to the slice a very large area for the action of the hot grease, which makes a very crisp chip. This result is also brought about without wasting any of the material, because the material cut out of the holes in each slice simply forms a part of the next slice cut and is not cut out and wasted."

The claims are:

• "1. The method of making perforated vegetable or other slices, which consists in cutting in the opposite sides of the slice intersecting corrugations, the corrugations in one side being disposed at an angle to the corrugations in the other, substantially as described.

"2. The method of making perforated vegetable or other slices, which consists in successively subjecting the vegetable to the action of a corrugated cutter and partially rotating the vegetable about an axis perpendicular to the general plane of said cutter after each cutting operation, whereby successive slices are produced, said slices having in their opposite sides intersecting corrugations disposed at an angle to each other, substantially as described.

"3. The method of making corrugated vegetable or other slices, which consists in first subjecting the vegetable to the action of a corrugated cutter, whereby the face of the vegetable is corrugated, then partially rotating the vegetable about an axis perpendicular to the general plane of its corrugated face, and then again subjecting the vegetable to the action of the cutter, and thereby producing a slice having in its opposite sides intersection corrugations resulting in perforations, substantially as described.

"4. As a new product, a vegetable or fruit slice having corrugations or flutes in the opposite faces thereof extending at an angle to each other, said corrugations intersecting each other, so as to form perforations in the slices, substantially as described."

No. 744,107 was granted November 17, 1903, on application filed February 10, 1900, for "Improvements in slicers," with the apparatus described as in the foregoing patent. It consists of a corrugated knife and a guide-board mounted between the side-bars of a frame—the guide-board corrugated on one side and plain on the other face, and pivoted, so that it may be inverted as desired and clamped in place. The specification states:

"This invention relates to improvements in that class of devices especially designed for slicing vegetables, fruits, etc., such as potatoes, cucumbers, apples, and the like; but it is especially adapted for slicing potatoes into novel forms for frying or for making 'Saratoga chips,' whereby a new product of both domestic and commercial value is produced.

"The primary object of this invention is to enable the production of a slice, whether of vegetable or fruit, that will be novel and ornamental in appearance, that will expose the maximum superficial area, whether it be intended for cooking or drying, and that will not pack or mat while cooking or drying, whereby it insures the thorough cooking or drying of each slice of a batch

and the production of a product novel both in shape and appearance, as well as in characteristics.

"Another object of my invention is to enable the production of either perforated or imperforate, fluted, or corrugated slices, as may be desired, at the same cost both of time and material, with no loss of the vegetable or fruit being sliced and with no more labor or skill than is involved in the production of plain slices by the slicers now commonly employed.

"Another object is the ready production of corrugated or fluted imperforate slices having their opposite faces parallel or perforated slices having their opposite faces corrugated or fluted at an angle to each other, manipulating the vegetable upon the slicer in one or another of two ways, as hereinafter described."

And the claims are:

"1. In a slicer, the combination of a cutter, having longitudinal corrugations and a guide-board, said cutter and guide-board being so disposed with relation to each other that the plane of the working surface of the guide-board and a second plane touching the lowest points of the corrugations at the cutting edge of the cutter, are separated by a distance which is less than the depth of said corrugations, substantially as described.

"2. In a slicer, the combination of a cutter, having longitudinal corrugations and a guide-board, having a flat working surface, said cutter and guide-board being so disposed with relation to each other that the plane of the working surface of the guide-board and a second parallel plane touching the lowest points of the corrugations at the cutting edge of the cutter, are separated by a distance which is less than the depth of said corrugations, substantially as described.

"3. In a slicer, the combination of a cutter, having longitudinal corrugations and having also parallel upper and lower surfaces, and a guide-board, having a flat working surface, said cutter and guide-board being so disposed that the plane of the working surface of the guide-board and a second plane parallel therewith and with the cutter and touching the lowest points of the corrugations, are separated by a distance which is less than the depth of said corrugations, substantially as described.

"4. In a slicer, the combination of a cutter, having longitudinal corrugations, a cutter-board on which said cutter is mounted, said cutter-board having corrugations corresponding with and fitting in the corrugations of the cutter, the end of the cutter being extended some distance beyond the cutter-board and the cutter and guide-board being so disposed with relation to each other that the plane of the working surface of the guide-board and a second parallel plane touching the lowest points of the corrugations at the cutting edge of the cutter are separated by a distance which is less than the depth of said corrugations, substantially as described.

"5. In a slicer, the combination of a cutter having longitudinal corrugations, an invertible guide-board disposed in operative relation thereto, said guide-board having one of its faces plain and its opposite face corrugated, and means for fixing the guide-board with either of its faces uppermost, substantially as described."

Other facts bearing upon the issues are stated in the opinion.

L. M. Hopkins and Frank T. Brown, for appellants.

Arthur M. Hood and Chester Bradford, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The two patents in suit rest on an alleged invention of Regnier for slicing potatoes (and other vegetables or fruit), to produce a slice corrugated on both sides, in such manner that numerous perforations are made as well, without waste of material; and the utility of means and product is undoubted. Patent No. 678,514 is aptly referred to as "the method and product patent"—having three so-called "method" claims and one for "a new product"—and No. 744,107 is for the apparatus

or "slicer." The slicer consists of a corrugated knife and guide-board, mounted in a frame for use as a hand slicer; with the guide-board having one face plain and the other corrugated, so pivoted that one or the other face can be turned up, adjusted, and clamped for different uses. For its main use, in producing the above-mentioned slices, the plain face of the guide-board is employed and properly adjusted in front of the knife; the operator holding the potato for slicing on the board. When the first cut is made, the operator turns the potato (say a quarter turn) to make the second cut at another angle, so that the corrugations left by the first cut are perforated in their valleys, and each slice in such method becomes both corrugated and perforated, with its integrity preserved.

The defenses raised by answer and evidence were: (1) Want of patentable invention, either for anticipations or prior public use; and (2) noninfringement by the appellee of the patent device. It does not appear in the transcript which defense was upheld for dismissal of the bill; but it may well be assumed that the trial court was convinced, under the established facts, that neither patent was valid. These twofold issues are plainly presented, with no complications of fact in the way of their solution: (a) Whether either specification discloses an improvement of patentable novelty in the vegetable slicing art—in product, or means, or both—and, if so, (b) whether either patent is valid, under the undisputed evidence of prior public use; and the appellee's contention that its device is not substantially identical with that of the patent, does not appear to be tenable. For the tests of patentability, we believe extended discussion to be unnecessary of the two grants and sets of claims separately, in reference to the evidence, for the reason that both branches thereof are applicable to the "method and product" patent, No. 678,514, under any admissible interpretation of the claims, if it be assumed that such claims are otherwise valid, for the operation or function of the apparatus of No. 744,107.

Slicers for vegetables and fruit, either for rough or fancy slicing, are old, well-known means, and, among the patent appliances in evidence, pertinent references are: No. 118,944, James & Currier (1871), for vegetable slicers; No. 184,471, Iske (1876), for vegetable cutter and slicer; No. 446,379, Dana (1891), for fruit and vegetable cutter; No. 527,253, Struble & Turner (1894), for potato slicer; No. 597,009, Mabbett (1898), for cutting and slicing vegetables, etc.; design No. 30,366, Hill (1899), for corrugated blade of vegetable cutter; German patents: No. 236,644, of Podlipsky (1883), and No. 90,072, of Rassmus (1895), for beet cutters. Use of the corrugated cutter, when corrugated slices were required, was not only well known, but appears in several of these patents, framed with a guide-board, whereof the face is plain in instances and corrugated in others. Mabbett (No. 597,009) shows a corrugated cutter, with two interchangeable guide-boards, one plain and the other corrugated. So the apparatus device of the appellants' patent, with its corrugated knife and adjustable guide-board mounted in a frame, is not differentiated (in the sense of the patent law) from Mabbett and other references, unless inven-

tion may rest, as appellants contend, on these features: (a) Its single guide-board, having one face plain and the other corrugated, pivoted to make it reversible for alternative use, instead of two adjustable guide-boards shown by Mabbett for like use; and (b) adjustment disclosed of the guide-board to the knife (as described in appellants' brief) making the space between them "less than the depth of the corrugations," so that perforations result from successive cuts when the potato is turned by hand.

We are not impressed with either of these elements thus introduced as involving patentable invention in the apparatus, but that each was an obvious expedient, without substantial departure from the prior conceptions. Whenever perforation of the first corrugations was desired, the adjustment and change in angle of the cut was within the ready adaptability of such means; and this, irrespective of the actual adaptation by Hill, to be considered in another phase. Thus the claims of invention therein, were, as we believe, rightly rejected by the primary examiner, in the Patent Office (as exhibited in the file wrapper) on the references mentioned.

The independent device and use of the witness Hill, however, as clearly defined by the convincing and uncontroverted testimony, we believe must defeat both of appellants' patents, under the facts in evidence of procrastination and public use on the part of the patentee, although it be assumed for such consideration that Regnier's conception was both meritorious and prior.

The original application of Regnier was filed February 10, 1900, while Hill completed his means, substantially identical, in the "fall of 1898," and filed his application for a design patent on his form of corrugated knife therein February 6, 1899. From the completion in 1898, it is not open to question that Hill's combined means of knife, guide-board, and frame were in public use, producing the corrugated and perforated potato slice described in Regnier's subsequent patents. The appellants' testimony tends to prove completion by Regnier of an earlier slicer in 1897, with which he successfully and repeatedly made the form of slice described in patent No. 678,514. This slicer, however (as explained by the witness and shown by an exhibit device), did not have the improvements on which the present claim of patentability rests; otherwise, the conceded facts would leave slight ground for the contention that use of the device was experimental only. It was submitted to a solicitor, with application for a patent in view, but no action appears to have been taken by such solicitor (now deceased) beyond approval of the device and attempts to procure its adoption by manufacturers. Regnier testifies that he proceeded to work out improvement, and perfected the patent apparatus about June, 1898, thus anticipating Hill, and that he frequently operated it, with complete success throughout, although no application for patent was made until long after, in 1900.

The evidence throughout impresses us to furnish no reasonable excuse for this delay and intermediate (conceded) use of the perfected device, to preserve the right to a patent for any supposed invention therein. Simplicity of means and complete operation, as

alleged, in June, 1898, leave no excuse open for experimentation during such intervals, either in means or use; and the admitted frequent use—on the part of Regnier, members of his family, and others—in producing potato slices of undoubted value for domestic utility, plainly infers public use. Thus, if the above-mentioned device and use of Hill were anticipated in date by Regnier, they became public property through Hill's independent disclosure and dedication, pending such conduct of Regnier indicative of abandonment, and we believe any (assumed) invention therein on the part of Regnier must be treated as abandoned and unpatentable, under the settled policy of the patent law. *Kendell v. Winsor*, 21 How. 322, 329, 16 L. Ed. 165; 5 Notes U. S. Rep. 850.

In reference to the method and product patent (No. 678,514), the production by the patentee in 1897, as stated, is deemed sufficient to establish public use for more than two years prior to the application, and excludes patentability, if otherwise allowable.

The decree of the Circuit Court, therefore, is affirmed.

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RAJAH AUTO SUPPLY CO. v. EMIL GROSSMAN CO.  
(Circuit Court of Appeals, Second Circuit. May 26, 1911.)

No. 285.

PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—SPARK-PLUG.

The Mills patent, No. 825,856, for an improved spark-plug, the essential feature of which is a bushing having a lower edge of soft metal so thin and pliable that, when it is screwed down upon the shoulder, it will upset and hug the insulating material without breaking it, was not anticipated, and discloses patentable invention; also *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Rajah Auto Supply Company against the Emil Grossman Company. Decree for complainant, holding valid and infringed claims 3 and 6 of letters patent No. 825,856, granted to David B. Mills for an improvement in spark-plugs, and defendant appeals. Affirmed.

Joseph L. Levy, for appellant.

Emerson R. Newell, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The patent in question relates to a combination in a spark-plug composed of the following elements:

1. A socket having a screw-thread and a shoulder.
2. A shank of insulating material having thereon an enlargement adapted to rest on said shoulder and tapering upward from said enlargement.
3. A threaded bushing surrounding said tapered portion, screwing upon said socket and adapted to press against said tapered portion, the lower edge of said bushing being sharpened and formed of soft metal and adapted to be upset when screwed down upon said tapered portion.

The invention resides in the third element—the bushing. Mills was the first to produce a spark-plug bushing having a lower edge of soft

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

metal so thin and pliable that when it is screwed down upon the shoulder it will be upset and hug the insulating material without breaking it.

When an unyielding bushing is screwed down upon a shank made of porcelain or similar material, the expansion of the shank when heated or the pressure of the bushing when screwed down too tight, will cause the shank to crack. The lower edge of the Mills bushing being of beveled soft metal prevents this danger of breaking and also obviates the necessity of a gasket between the collar of the shank and the bushing. It is not pretended that the invention as thus stated is anticipated by any prior patent and we agree with the judge of the Circuit Court in thinking that invention is not negated by the disclosures of the prior art. The defendant's best reference is the patent to Mosler, but it is clear that this patent does not show the beveled edge of soft metal adapted to be upset when screwed down, which, as before stated, is the new feature of the Mills patent.

The other prior devices and patents principally relied on by the defendant are discussed in the opinion below and we agree with what is there said regarding them.

The invention is, of course, a narrow one, but it belongs to that large class where the courts have sustained improvements over the prior art, which produce a new and beneficial result that materially advances the art to which they belong. When a defendant persists in using such an improvement in preference to prior devices which he insists are equally efficacious, he tacitly concedes its superiority. It is difficult to reconcile his persistent use, even though it involves him in an infringement suit, with the contention that other devices which he is free to use are equally good.

Infringement is clear. The defendant's bushing is an exact counterpart of the patented structure except that the bevel of the lower or sharpened edge is not so pronounced, more force being required to produce the outward pressure, or upsetting, when the bushing is screwed down. That the lower edge is upset and performs the identical function of the bushing of the patent is too plain for argument. The hugging contact is there, only in a less degree.

The decree is affirmed.

**NOTE.**—The following is the opinion of Hazel, District Judge, in the court below.

**HAZEL**, District Judge. The David B. Mills patent, No. 825,856, dated July 10, 1906, relates to improvements in a spark-plug, which is used to ignite the gaseous discharges in the cylinder of internal combustion engines, and the defendant company is charged in the bill with infringement of claims 3 and 6 of said patent. The specification explaining the object of the invention says:

"It has been found that where an earthenware shank—such, for example, as porcelain—is used with an unyielding bushing screwing down upon a collar on the same, there has been great danger of cracking the shank, because the pressure when the bushing was screwed down too tight or the expansion of the shank when heated would cause the porcelain to crack, even when a packing material is used. The embodiment of my invention illustrated avoids both these objections, and also avoids the necessity of providing a gasket between the bushing and the collar of the shanks."

The proofs show that in prior spark-plugs there was difficulty in keeping the porcelain shank from cracking when the bushing was screwed down or clamped tight against the gasket on the shoulder to prevent the escape of



gas. Indeed, that the use of asbestos gaskets was objectionable, in that they would not hold tightly against the explosive forces without first tightening the parts, appears clearly from the patent to Mosler, No. 738,831, dated September 15, 1903, which evidently was designed to remedy said defect, but without success. In the Mills patent, in suit, a ring gasket is placed in the shoulder between the lower edge of the bushing and the enlarged portion of the tapered shank to obtain a yielding pressure, while Mosler inserted the packing gasket between the porcelain shank and the socket. The bushing used by the patentee is preferably made of soft brass, and may be screwed down tightly upon the porcelain shank to make an absolute joint, and owing to its sharpened or beveled edge yields to any slight irregularities of form in such porcelain shank. The claims are for a combination, and the third and sixth only are in controversy. They read:

"3. In a spark-plug in combination, a socket having a screw-thread and a shoulder, a shank of insulating material having thereon an enlargement adapted to rest on said shoulder and tapering upward from said enlargement, and a threaded bushing surrounding said tapered portion and screwing upon said socket and adapted to press against said tapered portion; the lower edge of said bushing being sharpened and formed of soft metal and adapted to be upset when screwed down upon said tapered portion."

"6. In a spark-plug in combination, a socket having a screw-thread and a shoulder, a shank of insulating material having thereon an enlargement adapted to rest on said shoulder and tapering upward from said enlargement, and a threaded bushing surrounding said tapered portion and screwing upon said socket and adapted to press against said tapered portion; the lower portion of said bushing below the threads thereon being smaller in diameter than said threads and formed of soft metal and adapted to be upset when screwed down upon said tapered portion."

The elements of claim 3 are: (a) A socket with a screw-thread and shoulder; (b) a shank which is provided with an enlargement adapted to rest on the shoulder and departing outward from said shoulder; (c) a threaded bushing surrounding the tapered portion and screwed in a socket and adapted to press upon the tapered portion; the lower edge of said bushing being sharpened and formed of soft metal, so that it will be upset when screwed down upon the tapered portion. Claim 6 is not unlike claim 3, except that it emphasizes that the bushing below the thread shall be of smaller diameter than the threads and formed of soft metal. The principal defenses are want of patentability and noninfringement.

The defendant contends that the claims do not clearly express the nature of the improvement, in that they are open to the impression that the lower edge of the bushing is of different metal than the body of the bushing. The specification and proofs, however, sufficiently disclose the intention of the patentee to provide a bushing of soft material, preferably soft brass, which, at its lower edge, shall be sharpened for upsetting when screwed down tight on a porcelain shank. It was of the utmost importance to secure a uniformly distributed pressure on the porcelain shank, which was easily ruined or cracked from pressure, and that such object was achieved by the means adapted to upset or expand the bushing is thought clearly established. It is a general rule of patent law that, when the claims are ambiguous or uncertain, a construction should be placed upon them which sustains the contract with the government rather than one which destroys it. *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 45 C. C. A. 544.

I think the Mills invention may be fairly regarded as an improvement which progressed the art. None of the prior patents for spark-plugs—the Mosler patents, Nos. 698,042 and 738,831; patents to Jacobson, No. 774,432; to Herz, No. 790,571; to Ross, No. 829,545—disclose the combination of claims 3 or 6. The Mosler and Jacobson bushings were of the unyielding type, and could not be upset or expanded to make a tight fit on the tapered shank. In the Ross patent (which, however, according to the evidence was applied for subsequent to the completion of the Mills invention, in March, 1904), the lower edge of the bushing is threaded, and the edge cannot be upset or expanded. Manifestly none of the patents specified solved the problem of overcoming the defects which the simple, though important, **modification**

made by the patentee solved. It is true it was not new to make a bushing of brass, nor was it new to make a metal bushing which had an outside thread. Indeed, the patentee was not the first to design a bushing below the screw-thread of a less diameter than above it, or at the point where it was threaded, or tapering or beveling it at or near the edge. His altered construction, however, had never before been combined with the elements of the claims in suit, and he was the first to adapt a bushing made of soft brass or metal with the lower edge sharpened to fit a tapered porcelain shank of a spark-plug. In my opinion, it required more than mere mechanical skill to make such improvement. While it is true the separate elements of the claims are not new—they are found in prior inventions for spark-plugs and in another art—yet when assembled as they are by the patentee and made of soft metal a new and useful result was attained. It is invention without doubt to combine old elements by which a new and useful result is produced, and, moreover, a combination of elements may be patentable, if an old result is secured "in a more facile, economical, and efficient way." *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, supra.

Considerable stress is placed by the defendant upon the steel and iron bushings described in the patents to Abbott and to Cooke—bushings which, owing to cutting or sharpening the edge, are of less diameter at the edge than at the threaded portion and are used to form a joint. But such patents are found in an art far removed from the Mills invention, and, in my opinion, are not entitled to be considered to anticipate or limit the claims under consideration. The bushing in the Abbott patent was designed for joining or coupling iron pipe and upsetting the end of it so as to make a tight connection, while in the patent to Cooke the bushing was designed to fasten together hose so that it could not be separated. The patentee could scarcely have assumed that the bushing of Abbott or Cooke, when made of soft metal or brass, might with success have been used as a substitute for the Mosler bushing. The fragile nature of the porcelain shank, its tapered shape, and the peculiar use to which it was put presented a problem which required skill and a fair amount of inventive ingenuity to solve. It was not mere substitution of an old bushing in a new environment. Its use in connection with a porcelain shank was not so analogous to the bushing known to the art as to become in its new use an obvious expedient or a case of double use.

In *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, upon which case the defendant relies to substantiate the claim of double use, the patentee provided a particular kind of spur wheel to his windmill to reduce the strain caused by alternative motion. Many other mechanisms disclosed contrivances to convert a rotary into a reciprocating motion. In fact the combination of the Martin patent, which was there in controversy, had been previously used in windmills, although not to convert rotary into reciprocating motion, and the question before the Supreme Court was whether it involved invention to substitute the same combination to so change the motion. It was held that no new function had been discovered, and that it was a mere application of an old element to a new purpose. The facts of the case were wide apart from those in this case, and the enunciated principle is therefore inapplicable. So, also, is *Bradley v. Eccles*, 143 Fed. 521, 74 C. C. A. 478, readily distinguishable from the present case, as will be noticed on reading the headnote of the opinion of the Circuit Court of Appeals.

Does the defendant corporation infringe the claims? The evidence discloses that the defendant, in its construction of a spark-plug, embodies the subject-matter of claim 3 in suit, and the various parts are assembled in the same way, and the precise result of the patent in suit is attained. Its porcelain shank is substantially formed and tapered as in complainant's device, and its bushing of soft metal is threaded and adapted to be screwed upon the socket and upset against the tapered portion of the porcelain shank. The defendant sharpens the bushing at its lower end, and thus reduces its diameter below the threads, and hence also infringes claim 6.

My conclusion is that the claims are valid and patentable as an improvement in spark-plugs, and complainant is entitled to its exclusive use, and hence may have a decree for an injunction as prayed for in the bill, with costs.

## GENERAL ELECTRIC CO. v. WINONA INTERURBAN RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1911.)

No. 1,741.

## PATENTS (§ 328\*)—INVENTION—REGULATION OF ELECTRIC CURRENTS.

The Steinmetz patent, No. 594,144, for an improvement in regulation of alternating current systems, is void for lack of patentable invention in view of the prior art.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit in equity by the General Electric Company against the Winona Interurban Railway Company. Decree for defendant, and complainant appeals. Affirmed.

The appeal is from a decree dismissing the bill for want of equity. The bill was to restrain infringement of letters patent No. 594,144, issued November 23, 1897, to Charles P. Steinmetz, assignor to appellant, for an Improvement in Regulation of Alternating-Current Systems.

The claims of the patent sued upon are as follows:

1. The combination in an alternating-current system, of a source of out-of-phase waves of current or electromotive force between the feeding-mains and a working subcircuit or branch of the system, and a phase-modifier in such subcircuit.

2. The combination in an alternating-current system, of a regulable phase-modifier in a subcircuit or branch of the system, and a localizer restricting the influence of the phase-modifier from other portions of the system, as set forth.

3. The combination in an alternating-current system, of a phase-modifier in a working subcircuit or branch of the system, and an inductance localizing the action of such phase-modifier, as set forth.

5. The combination in an alternating-current system, of a source of out-of-phase waves of current or electromotive force between the mains and a subcircuit of the system, with an electrodynamic phase-modifier comprising a conductor movable relatively to a magnetic field, and means for regulating the phase-modifier, as set forth.

6. The combination in an alternating-current system, of an inductance for localizing a subcircuit or portion of such system, and an electrodynamic phase-modifier comprising a conductor movable relatively to a magnetic field for modifying the relation of current and electromotive force in such regulated portion of the system and means for regulating the phase-modifier so as to cause the current to lead or lag, as set forth.

7. The combination is an alternating-current system, of an electrodynamic phase-modifier of the synchronous type regulable for modifying the phase relation as desired in a subcircuit or portion of the system, and an inductance serving as a localizer for restricting the influence of the phase-modifier, as set forth.

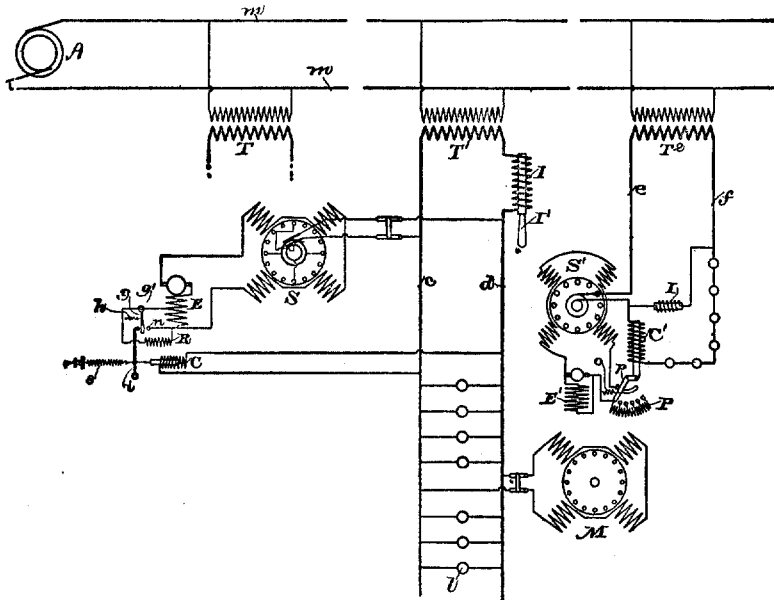
12. The combination in an alternating-current system, of an artificial inductance, a phase-modifier and means for regulating the phase-modifier so as to cause the current to lag or lead as desired.

18. The method of regulating an alternating-current-distribution system which consists in modifying the phase relation between current and electromotive force in a subcircuit or portion of such system requiring regulation, and localizing the influence of such phase modification from other portions of the system, as set forth.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

22. The method of localizing a subcircuit supplied from alternating mains, which consists in adjusting the relative value of the self-induction and of displacement of phase of electromotive force and current in such portions to give the desired relation between the subcircuit and the mains.

The drawing in the patent is as follows:



In the application for the patent, the prior art is referred to as follows:

In other applications for Letters Patent I have shown that the phase relation between current and electromotive force in an alternating-current circuit may be modified by electro-dynamic phase-modifiers resembling in general construction the synchronous machines now used for motors and other purposes by properly regulating the field strength of the phase-modifier or otherwise. I have also shown that in this manner the evil effects of self-induction in an alternating circuit may be overcome or compensated and that constant potential or constant current may be maintained in the regulated circuit, together with other desired ends.

The present invention relates to the same subject of phase modification, and the phase-modifiers previously described are made a part of the invention in certain new combinations.

Other patents cited are the following:

- No. 372,330, E. W. Rice, Jr., Nov. 1, 1887.
- No. 383,662, O. B. Shallenberger, May 29, 1888.
- No. 392,370, Sellon & Mordey, Nov. 6, 1888.
- No. 508,638, E. W. Rice, Jr., Nov. 14, 1893.
- No. 508,887, J. F. Kelly, Nov. 14, 1893.
- No. 543,907, C. P. Steinmetz, Aug. 6, 1895.
- No. 548,511, P. Boucherot, Oct. 22, 1895.
- No. 582,131, B. G. Lamme, May 4, 1897.
- No. 832,852, W. MacN. Fairfax, Oct. 9, 1906.

Further facts are stated in the opinion.

Parker W. Page and Thomas B. Kerr, for appellant.

C. V. Edwards, Thomas F. Sheridan, and Lawrence K. Sager, for appellee.

Before GROSSCUP and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion:

The general nature and purpose of the Steinmetz invention, from the point of view of the appellant, is stated in the brief of the appellant as follows:

"The invention of the patent in suit is an improvement in systems for the distribution of alternating currents of electricity from a central power station over a main line or circuit running therefrom to a number of independent sub-circuits, the object being to so organize the system that each of the sub-circuits, whatever its individual requirements, will at all times in the operation of the system, experience the proper electric pressure or potential and receive the proper current for the operation of the translating devices connected with it, without reference to or disturbance of the conditions on either the main line or any of the other sub-circuits.

"In order to make this matter perfectly clear, assume that in the City of Indianapolis there is installed a large central generating station or power house at which is developed alternating current for the operation of electric lights, motors or other translating devices in a number of out-lying and isolated towns. A main line transmission circuit runs from the central station to such towns, and current is delivered to it at high tension or pressure. At each town a portion of this current is tapped or drawn off from the transmission line, lowered in pressure by means of static transformers, and fed into the local or sub-circuit mains extending through the town. It is evident that one of such sub-circuits may habitually carry a heavier load, that is to say, may supply more lamps or motors than the others, or that at given times one of such sub-circuits may be called upon to run more or less lamps or motors than another, and that, in general, the character and the amount of the load on each sub-circuit will be constantly varied.

"The greater the load on any given circuit, the greater the amount of current that must be delivered to that circuit to perform the work, but the conditions and amount of load on a circuit result in a variation of the pressure or potential that causes the current to flow therein, just as the pressure in the branch water pipes of a building is varied in each, according to the number of faucets opened or closed at different points in the building at the same time. Therefore, if with a given normal main line pressure or potential, the number of translating devices on a sub-circuit be increased or reduced, the potential on that sub-circuit varies accordingly, tending to produce a greater flow of current than required when the load is light, and a lesser proportionate flow when it is heavy.

"Manifestly, from the above considerations, if a heavy load be suddenly thrown on one of the sub-circuits of a system of distribution, such as that under present consideration, it would not be practicable to adjust the generator or generators at the central power station to raise the potential on the transmission line to meet the demands for higher pressure in that particular sub-circuit which such increased load imposes, for the adjoining or some other sub-circuit of the system may at that moment be carrying an abnormally light load and call for a lower potential. Thus, any variation of the main line potential might throw the whole system out of balance, and it would do so unless it should so possibly happen that the requirements of all the sub-circuits as to potential and current were at all times precisely the same. Again, it may happen that conditions arise in one or more of the sub-circuits that tend to vary the pressure or potential on that circuit, while the best conditions of operation require a constant pressure, or finally, the main line pressure may vary, while it is desirable to maintain a constant

pressure in the several sub-circuits or pressures varying in a manner different from that which the main line pressure undergoes.

"It is, therefore, essential to the proper operation of such a system that the regulation of each of the several sub-circuits should not only be *independent of that of the main line, but also of every other sub-circuit*, from which it follows that the introduction into one or more of the sub-circuits of such a distribution system, of a device, the *sole* function of which is that of regulation of potential, would not only fall far short of solving the problem with which the patent in suit deals, but might defeat the very purpose of the patent, for whatever effect such a device produced in a sub-circuit would be felt throughout the whole system. If, in other words, a device introduced into any one of the sub-circuits, should operate to raise or lower the potential in that portion of the system, it would raise or lower it all the way back to the generator, and thus affect all the other sub-circuits, for all being dependent parts of one system, they become in effect a unit, and what affects a part affects the whole.

"This explanation will suffice to illustrate the well established proposition in electrical engineering that in any system of distribution including a main supply circuit and two or more independent sub-circuits, the regulation of current and potential in each sub-circuit may be effected independently and in such manner as not appreciably to influence the conditions in respect to these factors in either the main circuit or in any of the other sub-circuits, or to put it otherwise, so that the main circuit potential may be maintained uniform or may be varied, but each sub-circuit will take care of itself and its potential varied, maintained uniform, or in general, regulated in any desired manner.

"It would be possible to accomplish this result by means well known in the art and which, at the date of the patent in suit, would have at once suggested themselves to an electrical engineer. For example, instead of simply drawing off current from the main line and delivering it directly or through static transformers to the sub-circuits, the current taken from the line at any given point, might be used to operate a motor, and this in turn used to drive an independent generator, feeding current into the sub-circuit, and this latter generator, by ordinary and well known means, might be regulated to give in the local or sub-circuit any current or potential that might be required. This plan, however, involves the use of *two* separate machines in addition to the static transformer for each sub-circuit, namely, a motor, and a generator, which obviously adds enormously to the complication and expense of the system.

"What Dr. Steinmetz undertook to do and accomplish by the invention of the patent in suit, was to produce a practical means of distributing current from a transmission line *directly* over any number of sub-circuits, and, while securing in each of the sub-circuits any desired regulation of the potential or current therein according to need, to restrict or limit the effects of such regulation *to the sub-circuit where it occurs*, and thus to make the working conditions in each of the sub-circuits independent of those in the main or transmission line.

"He accomplished this by using in each sub-circuit two instrumentalities in combination or co-operative relation, one of which he designates in the patent in suit as a 'dynamic phase modifier' and the other as a 'localizer.' Neither of these devices was in itself new, but though known in the art prior to the date of the patent in suit, the two had never been associated as Steinmetz discovered they could be, nor used for any such purpose as he applied them. As a full appreciation of the invention as a whole requires a clear understanding of the nature of these devices, we devote space at this point to a somewhat detailed explanation thereof, and to definitions of terms used in the patent considering them."

Appellant's dynamic "phase modifier," just as it appears in the patent, is found in the prior art, performing the same function as in the patent. The "localizer" appears also in the prior art as a self induction coil, being used, as here, to produce synchronism between

the current and the electromotive force. And the relation of these two agencies to each other, reciprocally acting upon each other to produce synchronism, was known in the prior art.

With these facts in mind, counsel for appellant, at the oral argument, in reply to an inquiry from the Court, stated that were these two agencies to be used in a single circuit—that is to say, were the relation of sub-circuits to the main line to be eliminated—such use would not be covered by this patent. Indeed, there would be no occasion for such use in a single circuit, for the function of the dynamic phase modifier could be performed by the generator.

Counsel for appellant also stated, in answer to an inquiry from the Court, that were the self induction coil "L," in the Steinmetz patent (the "localizer"), to be omitted, the dynamic phase modifier would remain operative, with the effect, however, that its automatic action, in bringing about synchronism within the sub-circuits, might be reflected back into the main circuit, and thereby disturb conditions that ought not to be disturbed. The alleged new thing, therefore, that makes the Steinmetz combination patentable invention, if it be patentable invention at all, is the interposition of this self induction coil, for this purpose, into the sub-circuit. Is that, in view of the prior art, patentable invention?

We are of the opinion that it is not. The concept, as a mere concept, of bringing about synchronism in the sub-circuits, does not seem to us, in view of what electrical inventors and engineers were then thinking and doing, to have been invention. Not every advance is invention. Coming, as successive advances do, in the evolution of electrical uses, many such advances disclose nothing beyond good electrical engineering. To bring synchronism in the sub-circuits, when the sub-circuits had come, must have been within the thought of every electrical engineer; and to bring it about, independently of the main circuit, could not have escaped the thought of mere engineers. The concept present, Steinmetz had at hand, in the prior art, everything necessary to the concept except a means of cutting off the reflection back. And the self induction coil, as such means, appears to us, in view of the prior art, so obvious a means that its selection is not invention. That the use of the dynamic phase modifier might, unless something was interposed, reflect back upon the main line, must have been in the thought of electrical engineers; and to cut it off by the interposition of the well-known self induction coil, was almost as obvious as the interposition of resistance coils, where resistance coils are needed. To pronounce each adaptation of this kind patentable invention, would be to so encumber the electrical field with monopoly, that mere engineers would have no room to give to the art the benefit of their knowledge.

The decree appealed from is affirmed.

## UNDERWOOD TYPEWRITER CO. v. VICTOR TYPEWRITER CO.

(Circuit Court of Appeals, Second Circuit. May 16, 1911.)

No. 264.

## PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—TYPEWRITING MACHINE.

The Wagner patent, No. 559,345, for an improvement in typewriting machines, claim 2, the essential feature of which is a lifting spring to assist the shift-key in lifting the platen to receive impressions from upper case type, is void for lack of invention, in view of the prior art. Claim 3, conceding its validity because of an additional element, *held* not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Underwood Typewriter Company against the Victor Typewriter Company. Decree for defendant, and complainant appeals. Affirmed.

Arthur v. Briesen and Eugene Eble, for appellant.

Knight Bros. (Henry C. Workman and Harry E. Knight, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit to restrain the alleged infringement of letters patent No. 559,345 issued to Franz X. Wagner, assignee, on April 28, 1906, for an improvement in typewriting machines. The complainant is the present owner of the patent.

The defenses are:

- (1) Invalidity.
- (2) Noninfringement.

The patent relates to "front-strike" typewriters having movable carriages in which are mounted platens or paper rollers traveling therewith to receive the impact of type-bars at proper intervals under the control of an escapement mechanism. In a typewriter of this kind the type-bars carry two different characters, generally a capital above and a small letter below, so that it is necessary that the platen should occupy two vertical positions in order to receive the impact of all the characters. As the small letters or lower case characters are more frequently used, the lower position of the platen—which receives the impact of those characters—is the normal one, and it is maintained in that position by gravity. To bring the platen so that it will receive the impact of the capital letters, a shift-lever is provided which lifts it to the upper position.

As the upwardly shifting operation of the platen is opposed to the force of gravity and as the parts to be lifted have considerable weight, the strain upon the operator's finger in continually lifting the platen becomes burdensome when a shift-key alone is used, and a feature of the claims of the patent now in issue is the employment of a lifting-spring to co-operate with and supplement the action of the shift-key.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



The principal claim here involved is the second, which is as follows:

"A carriage, combined with a platen or paper roller, swinging arms connected to said roller, a shaft for said arms, a lifting-spring for the roller coiled about said shaft, and a finger-key made to co-operate with the spring for lifting the roller, substantially as described."<sup>1</sup>

While the complainant urges that the reduction of the muscular power required to lift the platen by the employment of the lifting-spring is a most important feature of the claim, it denies that that is the only purpose of the mechanism provided. It insists that, while the spring acts on the platen through the swinging arms to counterbalance the excess weight, yet that the swinging arms themselves fulfill an important function by so supporting the platen that it remains in parallelism to the printing line, whether in upper or lower case position, and so preserve proper alignment.

The defendant, on the other hand, while denying invention and novelty, contends that, if they are to be found at all, they must be looked for in the counterbalancing spring element of the claim; that the other elements, separately or in combination, were old, and were, in effect, conceded to be so by the patentee in the Patent Office.

The file wrapper shows—as the defendant contends—that, when the claim corresponding to the claim aforesaid was rejected by the Patent Office, the arguments advanced by the patentee against such rejection related altogether to the spring. He insisted that the patents cited against the claim did not show counterbalancing springs. Moreover, the first claim of the application as originally presented was for a combination of a carriage and a platen made shiftable independently thereof to bring the paper to the printing points of the various types. This was rejected by the Patent Office on various citations. The patentee then amended the claim by inserting the words, "and swinging arms made to connect the platen and the carriage." Again the claim was rejected, and the patentee filed a new and distinct claim which contained the spring element.

It therefore seems clear that the patentee acquiesced in the ruling that there was nothing novel in the combination of a carriage with a platen, swinging arms connected thereto, a shaft for said arms, and a finger-key for raising the platen. Furthermore, we are satisfied from our examination of the prior art as shown in the record that there was in fact nothing novel in such a combination. The platen travels upon the carriage and must have some connection thereto,

<sup>1</sup> Claim 3 is also in issue and reads as follows:

"A carriage, combined with a paper-roller, swinging arms connected to said roller, a shaft to which said arms are fixed, a spring coiled about the shaft, a tooth collar loosely mounted on the shaft and engaged by the spring, and a second toothed collar fixed to the shaft and engaged by the loose collar substantially as described."

It will be observed that this claim is substantially the same as the second, with the exception of the toothed collars for regulating the spring. So far as the claim may be regarded apart from this element, that which is said in the opinion regarding claim 2 is applicable to it. The effect of the presence of this element will be considered when claim 3 is separately taken up near the conclusion of the opinion.

and we think that connections by swinging arms were old in the prior art. Thus, for example, the Kidder patent, No. 471,794, had a rock-shaft and pinions serving substantially the purpose of the swinging arms of the claims.

It must also be observed that it is by no means clear that the swinging arms of the claims, acting by themselves, do fulfill the function of preserving the alignment as the complainant contends. The complainant urges in its brief and presents drawings to show that the swinging arms of the defendant's machine—which it asserts come within the claim—will not hold the platen in proper alignment, and that guides are needed for such purpose. Besides this, the complainant's experts point out a pin and slot arrangement in the drawings of the patent in suit for keeping the platen plumb.

We are therefore of the opinion that the defendant is correct in its contention that without the spring element there is nothing new in the claim, and that invention and novelty must be found, if at all, in the lifting-spring.

Now it is entirely clear that the structure of the claim is operative without the lifting-spring. The complainant's witnesses who used the alleged infringing machine testify that it would work, but less easily, with the lifting-spring disconnected. The only difference was that there was more of a load to lift. It is also manifest that the connection of the spring to the other elements involves no new method of operation in the elements separately or in the combination. The platen is raised by the shift-lever, whether the spring is present or absent. The spring itself performs the same function it would perform if used elsewhere. The claim is invalid without the spring, and the bringing into the combination of the spring—concededly old in itself—and leaving it and the other elements to perform their old functions in the old way, would seem to produce little more than an aggregation.

It is unnecessary, however, to hold the claim invalid as a mere aggregation. We may take judicial notice that it was old in the art to provide counterbalances for readily lifting heavy parts of machines. Such counterbalances by weights were in general use, and counterbalancing springs were not uncommon. They were employed in typewriters. Thus the Spiro patent, No. 464,398, calls for a flat or leaf form spring for the purpose of lifting the carriage. The specification of this patent says:

"A spring, H<sup>3</sup>, is secured to the upper surface of the bed and impinges against the under surface of the track, so as to merely counterbalance the weight of the carriage and track, in order to reduce the power required to lift said carriage."

As stated, this spring was to be used for lifting the carriage, and not for lifting the platen alone; but it indicated the use of a counterbalancing spring in a typewriter to assist in raising a more or less heavy part. The Kidder patent, No. 471,794, shows a vertical shifting platen moving independently of a carriage and provided with a counterbalancing spring. In this machine the spring which assists in lifting the roller also retards its depression to receive a third type; but, so far as it relates to the lifting operation, it indicates the

use of a lifting spring to assist the key lever in raising the platen to receive the impact of the type-bar. Other old patents show the use of reciprocating springs in connection with different parts of type-writers. While it may be that none of the structures of these patents constitutes an anticipation of the structure of the claim, yet with them in the prior art we think it did not involve invention to employ a lifting-spring in the manner stated. We think that it should have been obvious to any person skilled in the art, who found that the platen lifted with difficulty by the use of the key-lever alone, to apply in some form a lifting-spring to assist the lever. Nor do we think that it involved invention to select the old coiled spring upon a rock-shaft as the particular form.

For these reasons, it is our opinion that the second claim of the patent is invalid for want of invention in view of the prior art.

The third claim of the patent—as we have seen—is substantially the same as the second, except that it embraces means for adjusting the coiled spring on the shaft. Assuming that the claim is valid because it embraces the additional element, it is obvious that it is of the most narrow nature and must be confined substantially to the means indicated. These means are the two toothed collars—one loosely mounted on the shaft, and the other fixed thereto. In the defendant's structure, however, there is no collar loosely mounted on the shaft, and we think that the screws, which pass through the single collar and bite on the shaft, are not within any range of equivalents to which such a narrow claim is entitled.

The decree of the Circuit Court is affirmed, with costs.

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**COMMERCIAL ACETYLENE CO. et al. v. SEARCHLIGHT GAS CO. et al.**

(Circuit Court, N. D. Illinois, E. D. April 25, 1911.)

No. 30,301.

**1. PATENTS (§ 132\*)—TERM—LIMITATION BY FOREIGN PATENT.**

In determining whether the invention of a United States patentee was previously patented in a foreign country within the meaning of Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), so that its term is limited by such foreign patent, the court must look through the mere form of phraseology and determine what was the essence of the invention laid open to the public by the foreign patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 188½–191; Dec. Dig. § 132.\*]

**2. PATENTS (§ 132\*)—TERM—FOREIGN PATENT—ACETYLENE TANKS.**

The Claude and Hess patent, No. 664,383, for an improvement in apparatus for storing and distributing acetylene gas, is limited as to term by the British patent No. 29,750 of 1896, granted to the same inventors for an improved method of storing acetylene for lighting and other purposes, and which expired by limitation June 30, 1910.

In Equity. Suit by the Commercial Acetylene Company and the Prest-O-Lite Company against the Searchlight Gas Company and others. On motion for preliminary injunction. Motion denied.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Matthew Mills, Elmer D. Brothers, John P. Bartlett, Clarence Winter, and Keyes Winter, for complainants.

Robert H. Parkinson (John S. Miller and Merritt Starr, of counsel), for defendants.

George A. Miller and W. K. McIntosh, for certain defendants.

KOHLSAAT, Circuit Judge. Complainants have filed their bill herein to restrain infringement of claims 1, 2, and 5 of patent No. 664,383, granted to Claude and Hess on December 25, 1900, upon application filed March 1, 1897, for improvement in apparatus for storing and distributing acetylene gas. The cause is now before the court on motion for a preliminary injunction. The patent, as well as the infringement thereof here involved, were adjudicated by Judge Quarles on January 13, 1909, in Commercial Acetylene Company v. Avery Portable Lighting Company (C. C.) 166 Fed. 907, in favor of the present complainant. That decision is broad enough to bind the defendant herein upon all the questions now involved save one. British letters patent No. 29,750, issued to said Claude and Hess, upon application filed June 30, 1896, which patent expired under the English law in 14 years, or on June 30, 1910, provided all requirements were observed. As a matter of fact, so defendant asserts, the English patent expired on June 30, 1900, by reason of patentee's failure to comply with the requirements of the laws of Great Britain.

Assuming the fact to be that at the date of the prior adjudication the English patent was still in force, it is apparent that the questions here presented would not have been pertinent. They were neither present nor considered, and are now presented for the first time. This suit was instituted on February 1, 1911, or more than seven months after the expiration of the British patent. By the terms of section 4887 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382), it is provided that where a patentee has caused his invention to be first patented in a foreign country and afterwards takes out an American patent on the same subject-matter, the American patent shall be so limited as to expire at the same time with the foreign patent. The several amendments to the act have no bearing upon the present litigation. Thus, if it appears that the subject-matter of the claims in suit is substantially the same as that involved in the British patent, then the claims in suit constituted no cause of action at the time the suit was instituted, and this suit could not be maintained.

The three claims here involved read as follows:

"(1) A closed vessel containing a supersaturated solution of acetylene produced by forcing acetylene into a solvent under pressure, said vessel having an outlet for the acetylene gas which escapes from the solvent when the pressure is released or reduced, and means for controlling said outlet whereby the gas may escape therethrough at substantially uniform pressure, substantially as described.

"(2) A prepared package consisting of a tight shell or vessel; a solvent of acetylene contained within said vessel; and acetylene dissolved in and held by said solvent under pressure and constituting therewith a supersaturated solution, the package being provided at a point above the solvent with a reducing-valve, substantially as and for the purpose set forth."

"(5) As a new article of manufacture, a gas-package comprising a holder or tight vessel; a contained charge of acetone; a volume or body of gas

dissolved by and compressed and contained within the solvent; and a reducing-valve applied to an opening extending to the interior of the holder above the level of the solvent, substantially as set forth."

The court in *Acetylene Company v. Avery Portable Lighting Co.*, supra, held that the means for maintaining uniform pressure of claim 1, the reducing valves of the claims 2 and 5, together with the outlets in said claims severally described, found their equivalent in the needle valve of defendants in that case. The valve here involved is likewise a needle valve.

Complainant no longer employs the reducing valve shown in the drawings. It is defendants' contention that the subject-matter of the British patent is substantially that of the patent in suit. It will be noticed that the British patent calls for "an improved method of storing acetylene for lighting and other purposes," while that in suit is entitled, "Improvement in apparatus for storing and distributing acetylene gas." The court held in the case above cited that "Claude and Hess were the first to discover a practical and safe method of storing and transporting" acetylene and acetone, although the claims in suit called for an apparatus; i. e., a "closed vessel," "a prepared package consisting of a tight shell or vessel," and "a gas package comprising a holder or tight vessel." The claims are for a combination, one element of which is a supersaturated solution caused by forcing acetylene into acetone or other solvent under pressure. This was suggested by the board of examiners. In summing up the invention, the court, in the case above cited, says:

"By equipping the gas package with acetone as a solvent, they (Claude and Hess) have enormously increased the storing capacity of the tank, rendering it possible to store under moderate pressure 300 times as much acetylene gas as would otherwise be compressed therein; second, they have disclosed the chemical changes that take place in both gas and liquid when so combined, which render both innocuous and capable of safe transportation. These two features of the discovery clearly entitle the inventor to protection. \* \* \*

Both of these accomplishments, it will be seen, go to the use of acetylene and acetone under pressure. It does not appear from the record that the British so-called method patent was ever called to the attention of the court. It discloses very specifically the method of storing acetylene by compression in connection with certain liquids, particularly acetones. It follows that at the time this suit was brought this method of reducing acetylene to a greatly reduced volume for purposes of storage, transportation, and utilization was public property, but it might still, although public, become an element of a valid combination patent, so that, in order to hold that the patent in suit expired with the British patent, it must appear for the purposes of this hearing that the latter disclosed the combination. Claims 6 and 7 of the British patent read as follows, viz.:

"The employment of a receiver containing a liquid charged with acetylene under pressure and from which the acetylene is evolved when required for use as specified.

"The herein described method of storing acetylene gas in a small volume for lighting or other purposes, which consists in dissolving the acetylene gas under pressure in a suitable liquid solvent such as described from which it can be evolved when required for use."

It will be seen that, while ostensibly describing a method, these claims describe the device of the patent in suit as construed by the Wisconsin court.

[1] In determining the meaning of the word "patented" in section 4887, the courts have not confined themselves to its narrow sense as applying to what is specifically covered by the claims. Such a construction would manifestly lead to absurdity; for, if nothing less than a literal copy of the foreign patent could be held the same invention, it would not be difficult for the skillful patent solicitor to defeat the intent of the statute by mere colorable changes in the specification and claims. It is very clear that the court must look through mere form and phraseology and determine what was the essence of the invention laid open to the public by the foreign patent, and base its decision upon matters of substance rather than those of form. *Commercial Mfg. Co. v. Fairbank Co.*, 135 U. S. 176, 10 Sup. Ct. 718, 34 L. Ed. 88; *Siemen v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153; *Western Electric Co. v. Citizens' Telephone Co.* (C. C.) 106 Fed. 215; *Electric Accumulator Co. v. Julien Electric Co.* (C. C.) 38 Fed. 117, 143; *Sawyer Spindle Co. v. Carpenter* (C. C.) 133 Fed. 238, 240, 241, and 143 Fed. 976, 75 C. C. A. 162; *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121.

[2] The patentees conceded before the officials of the Patent Office that the closed vessel with its two valves and containing acetylene gas involved no patentability, and it was only by the use of the acetylene gas in connection with the acetone, both under pressure, that a patent was granted. Therefore there is no patentable novelty in the form of receiver or closed vessel alone. When, therefore, the British patent calls for the employment of a receiver containing a liquid charged with acetylene under pressure and from which the acetylene is evolved when required for use as specified, it must be held to have contemplated the common forms of receiver, among which is that of the patent in suit, or the one used by the parties hereto, thus disclosing every step in the claims in suit. With this construction the specification is in full accord. It reads in part as follows:

"With a pressure of about equal to that used in a soda-water syphon, we are able to store a considerable volume of acetylene in a receiver of relatively small dimensions. With a liquid dissolving  $m$  times its volume of acetylene, we can thus store at equal pressure about  $m$  times more gas than if it were simply compressed without being dissolved in a liquid which is the principle of our invention.

"When gas is withdrawn from a receiver containing a solution of acetylene under pressure, the pressure necessarily falls constantly, and to obtain a regular supply of gas we provide the vessel with a pressure regulator. The process may be carried out as follows, for instance, although subject to modifications.

"The acetylene is dissolved in the liquid chosen, for instance by the means ordinarily employed in making soda-water, the solution of the gas being facilitated by agitation under pressure in contact with the liquid. The solution under pressure, however obtained, is filled into a receiver of metal or of glass (such as used for soda-water) capable of resisting the pressure employed. The receiver has a cock and the necessary adjuncts for connection directly or through an expansion chamber, with the appliances in which the

gas is used by the consumer, the substitution of charged for empty receivers being readily effected.

"The storage receivers may vary in dimensions from a small portable, to a large fixed, gas-holder."

As the record now stands, the receiver or package is nothing more than a mere receptacle with a needle valve outlet regulation, one of the commonest trade means of storing an article for transportation. It is difficult to understand how, given the liquid acetylene as an article free to all, its monopoly can be further prolonged by claiming it in combination with an ordinary tank or other receptacle for transportation as a combination patent. Had the two patents been granted in this country, there would seem to be little doubt but that the patent in suit, under the present record, must be held void, under the rule laid down in cases of double patenting. It is therefore held for the purposes of this hearing that the patent in suit expired on June 30, 1910, with the English patent.

The motion for an injunction in limine is therefore denied.

COMMERCIAL ACETYLENE CO. et al. v. ACME ACETYLENE APPLI-  
ANCE CO. et al.

(Circuit Court, E. D. Michigan, S. D. April 26, 1911. On Motion for  
Rehearing, May 11, 1911.)

No. 4,104.

1. PATENTS (§ 107\*)—VALIDITY—ABANDONMENT—METHOD AND APPARATUS AP-  
PLICATIONS.

A method and the apparatus for practicing such method are distinct things, and may be the subjects of separate inventions and covered by separate patents; and, where separate applications are made for each by the same inventor, his withdrawal or abandonment of one does not affect the validity of a patent granted for the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 150; Dec. Dig. § 107.\*]

2. PATENTS (§ 132\*)—VALIDITY—INVENTION PREVIOUSLY PATENTED IN FOR-  
EIGN COUNTRY.

A foreign patent for a method is not for the same invention as an application for a United States patent for an apparatus for practicing that method so as to bring the case within Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), and invalidate a patent granted on such application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 188½-191; Dec. Dig. § 132.\*]

3. PATENTS (§ 307\*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—  
SECURITY ON GRANTING.

On the granting of a preliminary injunction against infringement of a patent which will necessarily close down a business being established by defendant with good prospects, the actual damages which will result if the injunction is erroneously issued will necessarily be incapable of even approximate ascertainment, and the ordinary bond for payment of such damages will afford inadequate protection, and in such case it should be conditioned for the payment of a fixed sum estimated by the court as the fair value of the business to be destroyed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 502, 503; Dec. Dig. § 307.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Commercial Acetylene Company and the Prest-O-Lite Company against the Acme Acetylene Appliance Company and others. On motion for preliminary injunction on patent No. 664,383. Motion granted.

Bartlett, Brownell & Mitchell and Winter & Winter, for complainants.

Day, Calfee & Fogg, for defendants.

On Motion for Preliminary Injunction on Patent No. 664,383.

DENISON, District Judge. Under the settled rules which govern such motions and giving due force to the previous decisions upon this patent, this motion should be granted, unless the new evidence now presented by defendants is so forceful as to indicate that it would have defeated complainant if it had been presented in the former hearings. This new evidence is (1) the record of the application for the method patent, and (2) the prior British patent to the same patentees.

#### (1) The Method Application.

[1] The two applications on apparatus and on method were filed together. They were complementary to each other. The inventions were correlative. One sought to patent an apparatus which employed the method, and the other sought to patent the method which employed the apparatus. Passing by various distinctions which developed, and assuming for the present that they remained perfectly correlative, it resulted that the apparatus application was granted and ripened into the patent in suit, and that the method application after rejection was abandoned. It is now urged that thereby the main idea, the "soul of the invention," was abandoned to the public.

I do not so understand the rule. The two things, method and apparatus, are distinct inventions. They may be patented by separate patents. The apparatus applicant may apply for the method, or he may not, as he chooses. If he applies for both in separate applications, he may change his mind, and withdraw or abandon either without affecting the other. The doctrine of the cases upon which defendants rely is that acquiescence in the rejection of a claim and acceptance of a grant with other claims estop the grantee from construing the grant as if it contained the claim rejected. This doctrine cannot apply to negotiations which did not mature into the grant of anything. The references and arguments which had more or less effect in inducing the abandonment are now important, not as an estoppel, but only on their merits; and on their merits they have been considered in the former decisions.

#### (2) The British Patent (No. 29,750 of 1896).

[2] The full term of this patent expired at the latest in December, 1910, and I assume (without consideration) that it was not affected by article 4 *bis* of the Brussels Convention. Was it for the same invention as the patent in suit, so as to invoke section 4887, Rev. St. (U. S. Comp. St. 1901, p. 3382)?



The Leeds & Catlin Case, 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805, decides, as I read it, that a foreign patent for a method and a United States patent for an apparatus for practicing that method do not make a case under section 4887. The British patent, now involved, I think was a patent for the method. True, it discloses an apparatus, but so must a method patent usually do. Even claim 6 is not in terms of means. It is in terms of use, "the employment of, etc.," and, taking title, description, and claims together, I call it a patent for the method or process.

[3] It follows that the injunction should be granted. However, the questions now raised are at least partly new to this litigation. The Court of Appeals or this court on final hearing may take a different view; and complainant should give security. In such a case, where an injunction closes down a business which is being established and which has good prospects but no long-settled basis, a bond, conditioned in the common form to pay such damages as defendants may suffer by the issue of the injunction, is not a real protection. The damages in such a case are likely to be serious and genuine, but largely or wholly incapable of proof. In such case the condition should be to pay a fixed sum which can fairly be estimated as the value of the business which is destroyed. An injunction here will continue for several months. It will destroy the defendants' expected business for the current season, and make their investment largely worthless. I think it can fairly be anticipated that their damages by the issue of the injunction, if the injunction turns out to be wrongful, will be \$5,000. Therefore the condition of the bond will be:

"That if it shall, in such cause, be finally determined either that the patent sued upon was invalid or that the defendants were not acting in infringement thereof, the complainants will pay to the defendants the sum of five thousand dollars as and for liquidated damages caused by the issuing of such preliminary injunction; and also such damages, if any, caused thereby in excess of five thousand dollars as may be assessed by the court in this cause in favor of the defendants and against the complainants on account of the issuing of such injunction, such damages both liquidated and assessed excess to be subject to be ordered to be paid in the final decree in this cause, or by proceedings herein at the foot of the decree."

#### On Motion for Rehearing.

Defendants ask a reconsideration, and present a further argument upon the point that the patent in suit expired with the British patent. They call my attention to the decision of Judge Kohlsaat in the Searchlight Company Case, 188 Fed. 85, which decision, upon the former argument, either was not mentioned or escaped my notice.

The argument presented is the same which I considered in the memorandum opinion already filed. With the greatest deference to the opinion of Judge Kohlsaat, I am, upon further consideration, satisfied that my former conclusion is correct. The contrary argument seems to me to overlook the rule of the Leeds & Catlin Case that patents for a process and for the apparatus, although, in a vague sense, really for the same invention, are not within and are not covered by section 4887. Further examination confirms me also in the opinion that the British patent is really and essentially a patent for the method,

and that to consider it as an apparatus patent does violence to its structure.

In the present status of the matter, it is to be assumed that the patent in suit is for an invention very useful to the public. It was granted in 1900 for 17 years. The Patent Office did not require it to be limited on its face, although the British patent was of record in the United States Patent Office. Now to shorten the 17-year term into a 10-year term, is a step that I think should not be taken unless the statute is clearly applicable.

Let an order be entered denying the application for rehearing.

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UNITED STATES v. SWIFT et al. (three cases).

(District Court, N. D. Illinois, E. D. May 12, 1911.)

Nos. 4,509, 4,510, 4,511.

1. COURTS (§ 91\*)—PREVIOUS DECISIONS—SHERMAN ANTI-TRUST ACT—VALIDITY OF CRIMINAL PROVISIONS.

Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is primarily a criminal statute, prohibiting certain acts as unlawful restraints and monopolies of interstate trade and commerce and prescribing the punishment therefor, the jurisdiction conferred on Circuit Courts as courts of equity by section 4 to "prevent and restrain violations of this act" being made dependent on the preceding criminal sections and confined to preventing the carrying out of that which is declared in the prior sections to be criminal. Therefore every decision of the courts sustaining an injunction granted under such section has necessarily determined that the preceding sections are valid, and that the things enjoined were crimes, and in view of the numerous decisions of the Supreme Court upholding such injunctions the validity of the criminal sections is no longer open to question in the inferior courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 325; Dec. Dig. § 91.\*]

2. INDICTMENT AND INFORMATION (§ 125\*)—DUPLICITY—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.

An indictment charging a combination in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is not bad for duplicity because it charges and enumerates different means adopted or different things done to accomplish the object of the combination.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 350-371; Dec. Dig. § 125.\*]

3. MONOPOLIES (§ 31\*)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CRIMINAL PROSECUTIONS—INDICTMENT.

An indictment for a combination in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), between defendants as representatives of three different packing concerns, which charges that each concern was represented by certain individuals, each one of whom was authorized to act for the others of his "group" and that the word "group" as used therein is intended to apply to any or all of the members of the particular group, is sufficiently specific where it charges that acts were done by a particular group without averring that each particular member of such group individually took part therein.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**4. MONOPOLIES (§ 31\*)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.**

An indictment for a combination in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which charges that defendants were officers of certain corporations which they managed and controlled, directing the corporate action, and that the groups of defendants representing the several corporations combined together to do the illegal acts, sufficiently charges defendants as individuals.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**5. MONOPOLIES (§ 31\*)—VIOLATION OF ANTI-TRUST ACT—INDICTMENT.**

An indictment which charges acts constituting a contract, combination, or conspiracy in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is good whether such acts are alleged to constitute a contract, combination or conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**6. INDICTMENT AND INFORMATION (§ 59\*)—REQUISITES AND SUFFICIENCY OF ACCUSATION.**

An indictment is sufficient when it contains a substantial accusation of crime and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution for the same offense, and when from it the court can determine that the facts charged are sufficient in law to support a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 180; Dec. Dig. § 59.\*]

**7. MONOPOLIES (§ 31\*)—ANTI-TRUST ACT—OFFENSES.**

An indictment alleging facts which show that defendants control three extensive packing concerns doing an interstate business and controlling the larger part of the business in the states in which they operate; that they have combined together in a plan to eliminate competition between such concerns by an agreement not to bid against each other for live stock, but to bid exactly the same amounts for like grades, and by fixing a uniform selling price to be charged by each, and apportioning among themselves the total business done according to the financial interest of each—charges a contract combination or conspiracy in restraint of interstate commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.\*]

Proceedings by indictments against Louis F. Swift and others. On demurrers to indictments. Overruled.

See, also, 186 Fed. 1002.

Geo. W. Wickersham, Atty. Gen., Edwin W. Sims, U. S. Atty., Wm. S. Kenyon, James H. Wilkerson, Pierce Butler, James M. Sheean, Oliver E. Pagan, Elwood G. Godman, and Barton Corneau, for the United States.

John S. Miller, Moritz Rosenthal, Levy Mayer, George T. Buckingham, M. W. Borders, Albert Veeder, Henry Veeder, Alfred R. Union, and Ralph Crews, for defendants.

CARPENTER, District Judge. First I will dispose of the contention that the provisions of the Sherman act (Act July 2, 1890, c. 647,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) are "too indefinite and uncertain in defining the elements or constituents of the crime to justify the indictments, and punishment thereunder by imprisonment or fine."

[1] In this connection I may say that great skill and ability have been exhibited by the counsel for the defendants in analyzing the various decisions of the Supreme Court of the United States which have passed upon the Sherman act. In the view which I take of those decisions, it will not be necessary for me to determine whether the Congress of the United States meant exactly what it said in passing that act, or whether its meaning was to depend upon judicial construction. If the matter had come to me as an original proposition, I would be obliged to say, having due regard to the three independent branches of our government, that the sole power to make the law rested with the legislative branch, and that the sole power of the courts, being satisfied that the legislative body had not exceeded its constitutional authority, was to interpret and enforce the law as made; that the power of the courts is to interpret, rather than to create, a law. This statute defines the acts declared to be unlawful in simple English. The purpose of the act, when ascertained from the language used, is as clear as may be. The legislative purpose inspiring its passage is interesting as a matter of history, but in the absence of ambiguity or uncertainty in the words or phrases used, is, legally speaking, at least unimportant. Canons of construction and means used commonly by the courts to determine legislative intent serve only to confuse when that intent is clearly expressed. Rules of construction serve no good purpose when there is nothing to construe. Courts ought not to interpret that which has no need of interpretation, and, when the words of a statute have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose either of limiting or extending their operation. *Beardstown v. Virginia*, 76 Ill. 40. Courts are not concerned with the advisability of legislation, viewed either from a political or economical standpoint; and it would seem unnecessary to observe that, acting within the limits of the Constitution, the Congress of the United States is supreme and independent. Its enactments represent the law until they are repealed.

However that may be, the statute now under consideration has been the subject of decision for 20 years. The Supreme Court of the United States many times has sustained decrees which restrained violations of it. The individual justices of that court have differed, not on the constitutional power of Congress to pass a penal statute relating to interstate commerce, but as to whether or not a given case has come within its condemnation. In four cases at least a decree or judgment based upon that statute was sustained by that court, and without dissent. *Montague v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52

L. Ed. 488; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

The Sherman act is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." It is essentially a penal statute. Sections 1, 2, and 3 declare what is illegal, and provide for punishment in case of violation. Section 4 declares that:

"The several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. \* \* \*

Section 7 provides:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue in any Circuit Court of the United States \* \* \* and shall recover threefold damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Congress aimed effectually to prevent restraint of trade in interstate commerce. It had constitutional power to accomplish this purpose by making restraints of trade criminal acts; or, without making them criminal, by empowering the United States, as complainant, to secure injunctions against acts which constitute restraints of trade, or by doing both. By passing the Sherman act it did both. The result could have been accomplished in several ways. Congress could have enacted two separate statutes, the one providing that acts done in restraint of trade should be criminal and punished as such; the other providing that the condemned acts should, on the application of the government, be enjoined in the civil courts. It could have passed one statute instead of two, and provided in one section that the various acts in restraint of trade should be criminal, and punished, and in the second section have declared that the same acts in restraint of trade could, on the application of the government, be enjoined.

If it had passed two separate statutes, then clearly, and if it had passed one statute, then possibly, the two statutes and the two sections respectively would be construed independently of each other. As to the two statutes, this requires no discussion. As to the single statute, if it combined both remedies it could not be called primarily a criminal statute or primarily a civil statute. The two essential objects obviously would be distinct, and each would be tested by its own language in determining its constitutionality. In that event it could be argued that the criminal section, worded broadly as in the Sherman act, was not specific enough; that it did not declare the exact nature of the offense, and that no one could know in advance what the law condemned, and therefore no indictment, or at any rate no indictment in the language of the statute, would be valid. And this, notwithstanding the fact that the civil statute would not be, for the purpose of an injunction, subject to the same objection. If such a statute had been passed, and if under it the Supreme Court had upheld the constitutionality of the act in equity cases, such decisions

would not absolve this court from the obligation of considering the constitutionality and validity of the criminal section.

Such, however, is not the act which was passed by Congress. The Sherman act is primarily a criminal statute. Its title announces its purpose. Sections 1, 2, and 3 declare certain things to be illegal, and prescribe punishment for their doing. The equitable remedy provided by section 4 does not authorize the Circuit Courts of the United States to enjoin restraints of trade, as such; it does not subject to the processes of a court of chancery, contracts, combinations in the form of trusts or otherwise, or conspiracies or monopolies, in restraint of trade, either definitely or indefinitely. On the contrary, it invests the Circuit Courts of the United States with jurisdiction to prevent and restrain "violations of this act"; and it is a well-known fact that the courts of the United States have no jurisdiction, except such as is conferred upon them by Congress. Here the jurisdiction of the equity courts is made dependent upon the criminal sections. If sections 1, 2, and 3 were repealed by Congress, there would be nothing left of the law to which sections 4 and 7 could apply. It is impossible to give effect to the equity sections without reference being had to the criminal section. It authorizes the processes of the Chancery Court to be used only to prevent the carrying out of that which is declared in the prior sections to be criminal. It follows, therefore, that unless that which is sought to be enjoined is a violation of the act under one of the preceding sections, in other words, that, unless that which is sought to be enjoined is a crime, it cannot be enjoined, because it is only that which is made a crime by the statute which is subject to the equity jurisdiction. Therefore, if injunctions heretofore have been upheld by the Supreme Court, the Supreme Court in upholding them necessarily has determined that the things which were enjoined were crimes, as defined by one at least of the first three sections of the act. If, however, as is contended, the first three sections of the act are void, there could be no "violation of this act" susceptible of being enjoined. Whether or not there is any merit in the argument on behalf of the defendants is not a matter for this court at this time even to consider, in view of the fact that in the judgment of this court the decisions of the Supreme Court upholding injunctions necessarily involve the proposition that certain things are made criminal by the statute, and that therefore the criminal sections of the statute necessarily must be valid.

The same is true as to the jurisdiction under section 7. Recoveries have been sustained by the Supreme Court under that section. *Montague v. Lowry*, supra; *Loewe v. Lawlor*, supra. And yet the only authority there vested in the Circuit Court was to award threefold the damages sustained by any individual "by reason of anything forbidden or declared to be unlawful by this act." Nothing is forbidden in terms. Many things are declared to be unlawful. Unless they were unlawful, as defined in the criminal sections, no relief could have been given under section 7. It might be said, of course, that the Supreme Court, in passing upon these civil cases, acted without consideration of the logical extension of the exercise of the civil jurisdiction, and

without argument as to the possible invalidity of the first three sections as a criminal statute, and that a decision even of the Supreme Court holding the civil section valid, although logically necessarily involving a holding that the first three sections are also valid as penal sections, should not be deemed binding upon this court. This argument, however, is inapplicable, because it was pressed strongly upon the Supreme Court in the Northern Securities Case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, that the criminal sections were invalid for the reasons urged here, and that for that reason the equity sections could not be enforced. Argument of Young, Northern Sec. Case, 193 U. S. 262, 264, 24 Sup. Ct. 436, 48 L. Ed. 679, Argument of Johnson, 193 U. S. 270, 24 Sup. Ct. 438, 48 L. Ed. 679, Argument of Griggs, 193 U. S. 279, 24 Sup. Ct. 439, 48 L. Ed. 679, Argument of Grover, 193 U. S. 285, 24 Sup. Ct. 442, 48 L. Ed. 679, Argument of Stetson, 193 U. S. 292, 24 Sup. Ct. 443, 48 L. Ed. 679, where he said:

"This act is a criminal statute pure and simple, and its meaning and effect as now determined must also be its meaning and effect when made the basis of a criminal proceeding."

The contention, however strongly urged, did not affect the conclusion of the court. I am of the opinion, therefore, that the Supreme Court of the United States has determined that sections 1, 2, and 3 of the Sherman act define with sufficient accuracy the offenses therein enumerated.

[2] It is urged also that the first and second counts of indictment No. 4,509 are bad for duplicity, because they charge a combination in restraint of trade in the purchase of live stock, and also in the sale of fresh meat. The objection is not sound. The crime charged is a combination in restraint of trade. Such a combination may design to accomplish its object in many different ways, and the enumeration of the various means adopted does not render the indictment bad for duplicity. Duplicity in an indictment means the charging of more than one offense, not the charging of a single offense committed in more than one way. Duplicity may be applied only to the result charged, and not to the method of its attainment. *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

[3] Counsel for defendants also contend that counts 1, 2, and 3 of indictment No. 4,509, and indictments Nos. 4,510 and 4,511, are fatally defective by reason of the use of the word "groups" as designating the defendants representing the Armour, Swift, and Morris concerns. The indictments show that the Armour, Swift, and Morris interests were represented each by certain individuals, and the individuals composing each class are designated as "the Swift group, the Armour group, and the Morris group." This is followed by the charge that each member of each group had full authority to act for his group, and that whenever the word "group" is used it is intended to apply to any or all of the members of each group. In other words, the charge against a group is to be taken to mean that whatever was done was done by one of the members of the group in behalf and by

authority of all. In this connection it is argued, "first, that not all of the defendants are charged with the commission of acts; and, second, that those charged and those not charged cannot be separated from each other under the averments." Grand jurors are required to state their charge with as much certainty, and no more, as the circumstances of the case will permit. In this case the jurors knew the men engaged in the matter under their investigation; knew with which of the three great concerns (Armour, Swift, or Morris) each one was associated; believed that they were of one mind as to the plan of operation of their business. It was not known, and probably could not have been discovered, what part in the general programme was assigned to each individual. The practical way, and probably the only possible way, was for the jury to charge as it did that the combination was entered into by the separate groups of men, and that the action of each group was with the consent, knowledge, and design of each constituent member. The indictments charge an unlawful combination, conspiracy and monopoly as a result of joint action, and it is not necessary, to sustain those charges, that each one of the individual participants should have been doing the same thing at the same time. *United States v. MacAndrews (C. C.)* 149 Fed. at page 832. It is quite consistent with a charge of combination or conspiracy or monopoly that the individuals concerned therein should each have been assigned to different tasks, aimed to bring about the result planned by all. The indictments charge the ultimate plan, the specific acts by which it was carried out; and, further, that those specific acts were planned and executed by the three groups of individuals, each member of each group acting for himself and every other member of the group. I do not see how the grand jury could have made the charge more definite, and believe that it is sufficiently specific to satisfy the substantive law.

[4] The point is made against the counts of indictment No. 4,509 that they fail to charge properly the defendants with responsibility for the acts done; that it appears that the defendants were officers of corporations, and that they could not be liable for corporate doings unless it appeared clearly that they knew of, connived at and directed the things done. The answer to this is found in the indictment, which charges, not that the corporations, but that the groups of individual defendants, did what was alleged to be unlawful; and further, that the defendants managed and controlled the various corporations, and directed the corporate action. More was not necessary.

[5] Much stress is laid upon the proposition that indictment No. 4,509 is bad as describing a conspiracy or a contract in restraint of trade, and calling it a combination. The obvious answer to this is that it makes no difference what the grand jury labeled the offense. The question is, Do the facts as stated amount in law to any offense? If the acts charged in this indictment constitute a contract, combination in the form of trust or otherwise, or a conspiracy in restraint of trade or commerce, it is a valid indictment, so far as this objection is concerned.

[6] It is apparent that the foregoing objections to the indictment go to matters of form rather than to matters of substance. An in-



dictment is well enough that states facts which constitute a crime, and in language which leaves no doubt in the minds of the defendants of what they are accused. It is true that a defendant should be informed clearly by the indictment of the exact and full charge made against him, yet the manner in which the information is given is unimportant. An indictment is sufficient when it contains a substantial accusation of crime, and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same offense, and when, from it, the court can determine that the facts charged are sufficient in law to support a conviction. *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407. The present indictments fulfill all of these requirements. Moreover, section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720) provides:

"No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

[7] This brings us to the question whether or not the indictments charge facts sufficient in law to support a conviction under the Sherman act, and for answer we must look to the facts stated, and not to any conclusion drawn from those facts by the grand jury. The indictment in case No. 4,509 charges in substance that there has been carried on from Chicago (and other named cities in different states) an extensive industry involving (1) the purchase of live stock; (2) the slaughter of such stock; and (3) the furnishing of fresh meats to the people in certain named states; that 85 per cent. of all fresh meats consumed in the named states has been slaughtered in those cities in designated proportions; that 70 per cent. of this 85 per cent. "has been carried on, directed and controlled" by the defendants; that the Armour group had branch houses in 317 different towns and cities in different states; the Swift group 280; and the Morris group 82; that the defendants, divided into three groups representing certain corporations or interests, managed, controlled, and directed by them, entered into an agreement: First, that they would not compete in the purchase of live stock, and would make uniform bids for animals of like grade. Second, that the three groups by agreement adopted a uniform system of determining the sale price of dressed beef by adding to the cost of the animal on the hoof certain fixed and excessive charges to cover operating expenses, and by deducting certain inadequate allowances for by-products. Third, that each group would direct its sales agents to sell at the prices figured according to the agreement, or, if not at that price, at a certain other price also agreed upon. That by agreeing on the amounts to be paid for the live stock, and upon the amounts to be added for operating charges, and the amounts to be deducted for by-products, and in reaching a uniform sale price they have eliminated all competition in the fresh meat industry between the three groups of defendants. That they

were large operators in interstate commerce, and by a combination among themselves they have agreed upon a system which restricted the business of each individual group. The medium through which all groups collected information and operated was the National Packing Company, organized, owned, and directed by the groups collectively. Its office furnished a common meeting ground, and there the total business done by all the defendants, by agreement, would be equalized from time to time, each being permitted to share according to its financial interest, and prices were kept up by increasing or decreasing shipments to particular territories according to market conditions. The whole plan, from its inception, appears plainly to be one to eliminate competition as a factor in fixing prices among the three groups of defendants, beginning with the agreement not to bid against each other, and in fact to bid exactly the same amounts for like grades of live stock, determining a uniform selling price, and ending with fixing a uniform sale price and an apportionment among themselves of the total business done.

Indictments Nos. 4,510 and 4,511 charge substantially the same facts (1) resulting from a conspiracy, and (2) creating a monopoly.

The defendants urge that three great concerns operating side by side, and conducted by men of great business skill, might arrive at the same system of doing business (the tendency to introduce efficiency methods into our industries might indicate such a possibility); and that all the indictments charge is that the defendants adopted a uniform system of doing business. It need not be disputed that given the same ability, facilities, and capital invested, these three groups of individuals might arrive at very nearly the same method of determining the sale prices of their articles, and that they would endeavor, so far as possible, to obtain such price. The adoption by the defendants of such a system might be accidental or a mere coincidence, but the difficulty with the argument is that the offense charged is not the accidental adoption of a uniform system of doing business, resulting in the fixing of prices, but a system which is the result of concerted action—the result of a combination, conspiracy, or a positive agreement. The law says there may be no contract, combination, or conspiracy in restraint of trade. It is not aimed against accidental restraints of trade. The defendants could not be held for a moment had each group, acting in its own interest, arrived at the identical system of doing business, under which, it is charged, they were operating. It is the maintaining of that system by agreement or combination which constitutes the offense defined by the Sherman act, provided it results in a restraint of trade, and such a result in this case is direct and inevitable. The aim of the parties is the same, although reached by different means, as that in the Addyston Pipe Case, where the agreement was that the low bid would be made by one concern, and that the other concerns would make a somewhat higher bid, and that ultimately all would share in the profit.

I am of the opinion that the facts stated in the indictments show clearly a plan or scheme organized and put in operation by the defendants, the ultimate purpose of which was to control the production,

sale, and distribution of fresh meat throughout a large section of this country; and, as incidental to that control, to lower prices to the producer of the raw material, and raise prices to the consumer of the finished product. While the facts do not disclose an absolute monopoly, yet the large percentage of the business which they control indicates that they intended to acquire at least a commercial monopoly. As Judge Hough said in *United States v. MacAndrews* (C. C.) 149 Fed. at page 833:

"Commerce among the states is not a technical legal conception, but a practical one drawn from the course of business. The criterion as to whether any given business scheme falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade nor a complete monopoly; it is enough if its necessary operation tends to restrain interstate commerce, and to deprive the public of the advantages flowing from free competition."

The indictments show an agreement, combination, conspiracy and monopoly directly restraining interstate trade. My reading of the indictments is confirmed by the record in the present cases, and has received the sanction of the Supreme Court of the United States.

On May 10, 1902, the district attorney for the Northern District of Illinois filed in the Circuit Court of the United States, in this Circuit, a bill or petition in chancery (case No. 26,291), against these defendants and various corporations and other persons. That action was brought under section 4 of the Sherman act, and charged the defendants with substantially the same matters and things charged in these indictments. A final decree was entered restraining the defendants from—

"entering into, taking part in or performing any contract, combination or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several states and territories and the District of Columbia, a restraint of trade, either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock, or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering the prices, or fixing uniform prices at which said meats will be sold, either directly or through their respective agents, or by curtailing the quantity of such meats shipped to such markets and agents. \* \* \*

On May 26, 1903, a new petition was filed, setting out a continuance by the defendants of the matters stated in the original bill.

On December 6, 1910, the defendants in the present proceedings filed their sworn petition, setting out the pleadings and orders in chancery suit No. 26,291, and moved this court for an indefinite stay of proceedings. On page 64 of that sworn petition, at paragraph numbered "eighth" it is stated:

"The contemplated acts and transactions of these petitioners restrained and enjoined by said original decree, and the supposed acts and transactions of these petitioners alleged, charged and complained of in said new petition, are the same acts and transactions and are identical in substance and effect."

That same petition then charges, on page 65, in paragraph numbered "ninth" that the grand jurors returned indictment No. 4,509 in which the petitioners were charged with certain offenses, and then continues:

"The alleged acts and transactions of these petitioners charged in and by said indictment to have constituted such combination in restraint of trade and such violation of said anti-trust act are the same identical acts and transactions which are alleged and charged in said new petition against these petitioners."

And on page 66:

"The particular supposed acts and transactions alleged in said indictment No. 4,510 as constituting said illegal conspiracy and said violation of said anti-trust act are the same identical acts and transactions, and not others, which are alleged in said new petition."

And further, on the same page:

"The supposed acts and transactions alleged in said indictment No. 4,511 as constituting the said alleged monopoly are the same identical acts and transactions, and not others, as those charged and alleged against these petitioners in and by said new petition."

The same counsel represented the defendants then as represent them on this demurrer, and even if there were doubt (and I believe there is not) as to whether the bill in chancery charged the same facts as are charged in these indictments, we have the judgment of the defendants themselves that the facts are substantially the same. These indictments were specific enough to warrant the defendants in stating this under oath.

The decree of the Circuit Court in the chancery case was reviewed in the Supreme Court of the United States, and in all essential particulars was sustained, Mr. Justice Holmes delivering the opinion, and all the other members of the court concurring. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. The court there said:

"The scheme, as a whole, seems to us to be within reach of the law."

In the light of that decision, and upon principle, it follows that the indictments in this case state facts which amount in law to a violation of the Sherman act.

The demurrers will be overruled.

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#### UNITED STATES v. UNION PAC. R. CO. et al.

(Circuit Court, D. Utah. June 24, 1911.)

No. 993.

#### 1. MONOPOLIES (§ 12\*)—ANTI-TRUST ACT—CONTRACTS OR COMBINATIONS PROHIBITED.

To bring any transaction within the condemnation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), it must be a contract, combination, or conspiracy in restraint of international or interstate commerce, and this restraint must be substantial in character and the direct and immediate effect of the transaction complained of.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 10; Dec. Dig. § 12.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CARRIERS (§ 33\*)—THROUGH JOINT RATES—OPTION OF CARRIERS TO ESTABLISH.

Prior to the passage of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), in 1906, connecting railroads were free to adopt or refuse to adopt joint through tariff rates, and this freedom was not abridged, as between the Union Pacific Railroad Company and the Central Pacific Railroad Company, by either section 12 of Act July 1, 1862, c. 120, 12 Stat. 495, requiring the roads of such companies to be operated as one continuous line, so far as the public or the government are concerned, or section 15 of Act July 2, 1864, c. 216, 13 Stat. 362, which requires them to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 86-90; Dec. Dig. § 33.\*]

3. MONOPOLIES (§ 16\*)—ANTI-TRUST ACT—COMPETING RAILROAD LINES—UNITING CONTROL.

In 1901 the Union Pacific Railroad Company bought stock of the Southern Pacific Company, which gave it practically a controlling interest, and the United States brought suit to enjoin the voting of such stock, on the ground that its acquisition was for the purpose of suppressing competition between the two companies in interstate commerce, and of monopolizing such commerce or a part thereof, in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). At that time the Southern Pacific Company owned and operated a steamship line between New York and New Orleans, and rail lines from the latter place to the Pacific Coast, and by way of San Francisco to Portland, Or. It also owned and operated the line of the Central Pacific Railroad Company between San Francisco and Ogden, Utah, from which point it connected eastward with the line of the Union Pacific and also with another competing line. The main line of the Union Pacific extended from Omaha to Ogden, with a branch from Kansas City westward to a connection with the main line. It also, through subsidiary companies, owned and operated a line from a connection with its main line to Portland, and from there operated steamship lines to the Orient and to San Francisco. For through freight for the Pacific Coast originating east of its Missouri river terminals it was dependent on other roads, with which it there connected, and practically all of such freight for San Francisco was forwarded from Ogden over the Central Pacific line, 800 miles long, for which the Southern Pacific received about four-tenths of all the freight from Omaha or Kansas City westward. The rail and water line of the Union Pacific from Ogden to San Francisco by way of Portland was 1,700 miles long, its steamer service was irregular, and the amount of freight sent that way was negligible. The two companies were competitors to a small extent for Oriental business, for business from the Atlantic seaboard to Portland and vicinity, and also, through branches and connecting lines to and from other common points; but the total amount of such competitive business done by the Southern Pacific during the year ending in 1901 amounted to only 0.88 per cent. of its entire tonnage, and that done by the Union Pacific but 3.10 per cent. of its entire tonnage. While the Union Pacific maintained agents in the East to solicit business, it was chiefly from connecting carriers, and it received little more in freights for such business than did the Southern Pacific. *Held*, that the two roads were not substantial competitors for interstate or foreign business, in such sense that the purchase of the stock by the Union Pacific, for the purpose of giving it an assured connection with San Francisco, which it could control, constituted a direct restraint upon such commerce, in violation of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.\*]

**4. MONOPOLIES (§ 24\*)—ANTI-TRUST ACT—SUIT FOR VIOLATION.**

The purchase by an interstate railroad company of a majority of the stock of another company operating a competing line affords no ground for the granting of an injunction under Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), where such stock was sold prior to the suit.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.\*]

**5. MONOPOLIES (§ 16\*)—ANTI-TRUST ACT—VIOLATION.**

The purchase by an interstate railroad company of stock of another company operating a competing line, where it was insufficient in amount to give control of its competitor, and no attempt was made to exercise such control, does not effect a combination in restraint of interstate commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.\*]

**6. MONOPOLIES (§ 16\*)—ANTI-TRUST ACT—CONTRACTS PROHIBITED.**

A contract to strangle a threatened competition, by preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic, is one in restraint of interstate commerce, and in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.\*]

**7. MONOPOLIES (§ 16\*)—ANTI-TRUST ACT—CONTRACT BETWEEN RAILROAD COMPANIES.**

The Union Pacific Railroad Company, through a subsidiary company, had projected and partly built a line of road between Salt Lake City and Los Angeles, when a controversy arose over a portion of the right of way through the mountains between that company and another, which also desired to build a road between the same points, which was finally settled by an agreement to unite and build a road in which each party should own a half interest, with a further agreement respecting rates on through business. The Union Pacific Company at that time owned a controlling interest in the Southern Pacific Company, which owned and operated a line through Los Angeles to San Francisco, and one from there to Ogden, near Salt Lake City. *Held*, that the new line, which was direct, and much more serviceable and convenient for the public, was not a natural competitor of the Southern Pacific Company with respect to business between Los Angeles and Salt Lake City in such sense as to constitute the agreement under which it was built a combination in restraint of interstate commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), nor was it unlawful thereunder, on the ground that it prevented the building of two lines, instead of one, it appearing that there was but one practicable route through the mountains, over which it was not feasible to construct two lines, nor because of the minor and incidental provisions relating to the exchange of business.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.\*]

**8. MONOPOLIES (§ 24\*)—ANTI-TRUST ACT—COMBINATIONS OR CONSPIRACIES IN RESTRAINT OF INTERSTATE COMMERCE.**

Contracts entered into by a railroad company, not in themselves unlawful as in restraint of interstate commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200),

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

*held* not to evidence a combination or conspiracy to restrain such commerce, in view of evidence showing that they did not have such effect.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.\*]

Hook, Circuit Judge, dissenting.

In Equity. Suit by the United States against the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, the Oregon Railroad & Navigation Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, the Atchison, Topeka & Santa Fé Railway Company, the Southern Pacific Company, the Northern Pacific Railway Company, the Great Northern Railway Company, the Farmers' Loan & Trust Company, Edward H. Harriman, Jacob H. Schiff, Otto H. Kahn, James Stillman, Henry H. Rogers, Henry C. Frick, and William A. Clark. Decree for defendants.

This suit is grounded upon the anti-trust law of Congress approved July 2, 1890 (26 Stat. 209), to dissolve an alleged contract, combination, or conspiracy in restraint and monopoly of interstate and foreign trade between the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, and the Oregon Railroad & Navigation Company on the one hand, and the Southern Pacific Company, the Northern Pacific Railway Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, and the Atchison, Topeka & Santa Fé Railway Company on the other hand. Edward H. Harriman, Jacob H. Schiff, Otto H. Kahn, James Stillman, Henry H. Rogers, Henry C. Frick, and William A. Clark, through whom it is averred the combination was created or is maintained, are also made defendants.

The specific charges are: That in 1901 and subsequently the Union Pacific Company, acting by itself or through a subsidiary corporation owned and controlled by it, acquired a controlling interest in the capital stock of the Southern Pacific Company, for the purpose of directing its operations and suppressing competition theretofore existing between the two in interstate and foreign commerce and monopolizing the same; that in the same year it, with like purpose, acquired a majority of all the stock of the Northern Pacific Railway Company, and subsequently induced the San Pedro, Los Angeles & Salt Lake Railroad Company and its promoters, the defendant William A. Clark and his associates, to desist from constructing an independent line of railroad between San Pedro, Cal., and Salt Lake City, Utah; that in 1904 the defendants Harriman, Schiff, Kahn, Stillman, Rogers, and Frick purchased stock of the Atchison, Topeka & Santa Fé Railway Company, of the face value of \$30,000,000, and thereby secured the election of Frick and Rogers, who were directors of the Union Pacific Company, as members of the board of directors of the Santa Fé Company, and later, in the year 1906, the Union Pacific Company, through the Oregon Short Line, purchased stock of the Santa Fé Company, of the face value of \$10,000,000; and that these purchases were so made for the purpose of eliminating competition of the Santa Fé Company and monopolizing for the Union Pacific Company interstate and foreign commerce. These and some other minor charges, which will be referred to later, are relied upon to establish conspiracies in violation of the act. The prayer is that the defendants, who purchased the stocks, be enjoined from voting or otherwise acting as owner of them, and the other corporate defendants be enjoined from permitting them to vote the stocks or paying dividends upon the same, and for general relief.

The answer puts in issue all the material averments of the bill, and the cause is submitted to the court for a final decree on the pleadings and proof. The essential facts are these:

Prior to 1901 the Union Pacific Company owned and operated a main line of railroad, extending from Omaha on the east to Ogden on the west, with a branch extending from Kansas City on the east, through Denver, to a connection with its main line at Cheyenne; owned the capital stock of the Ore-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gon Short Line Company, which operated a railroad extending from the main line at Granger, Wyo., to Huntington, Or.; and owned or controlled the capital stock of the Oregon Railroad & Navigation Company, which operated a line of railway extending from Huntington to Portland, where it connected with lines of steamships operated by it, running to some Oriental ports and to San Francisco. The steamship line across the sea had just been organized, and had not engaged in business until 1900 or 1901. It was neither organized nor equipped for general traffic, but only for transporting grain and flour originating on the line of the Oregon Railroad & Navigation Company in competition with the Northern Pacific and Great Northern Railroads. Its sailings were scheduled every 30 days, but were in fact irregular and uncertain. The tonnage of Oriental traffic over this line was infinitesimal compared to the total tonnage of the system, being only .083 of 1 per cent. of it. The steamship line from Portland to San Francisco was likewise an inadequate provision for any regular traffic and particularly transcontinental traffic. Its sailings were irregular and unreliable, so that the Union Pacific Company had under its ownership, or control through subsidiary lines, a transportation route, as just described, from Omaha and Kansas City to some Oriental ports and to San Francisco, by way of Portland.

The Union Pacific had connections at Omaha with the Chicago, Milwaukee & St. Paul, the Chicago & Northwestern, the Chicago, Burlington & Quincy, and other railways leading to Chicago, and connecting at that point with many, if not all, the great trunk lines leading to New York and intervening points. It also had connections at Kansas City with the Missouri Pacific, Wabash, Chicago & Alton, and other railways leading to St. Louis, and connecting there with trunk lines extending to New York and intervening points. It also had divers important feeding-in or branch lines along its route.

In 1901 the Southern Pacific Company owned or controlled a line of steamships operating between New York and New Orleans, and a line of railway extending from New Orleans, through Louisiana, Texas, New Mexico, Arizona, and California, to San Francisco, and thence through Oregon to Portland, with several branch lines along its route extending into tributary territory. It also owned all the capital stock of the Central Pacific Railroad Company, which owned the line of railway extending between San Francisco and Ogden and had a majority of the stock of the Pacific Mail & Steamship Company, which operated lines of steamships between San Francisco to and from Panama and Oriental ports; so that the Southern Pacific Company had a transportation route over land and sea extending from New York, via San Francisco, to two terminal points, Ogden, Utah, and Portland, Or. It also connected at New Orleans with the Illinois Central, Louisville & Nashville, Queen & Crescent, and other roads, which opened up to it the traffic of the Middle states, and owned a line of railway extending from New Orleans to Ft. Worth, Tex., and to connections there with roads leading to Colorado and Utah common points.

The Atchison, Topeka & Santa Fé Railway Company in 1901 owned or controlled a main line of railway extending from Chicago, through Illinois, Missouri, Kansas, Colorado, New Mexico, Arizona, and California, to San Francisco.

The Northern Pacific Railway Company in 1901 owned a line of railway extending from Lake Superior and St. Paul, through Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, to Seattle and the Pacific Coast, and through ownership of a controlling interest in the capital stock of the Chicago, Burlington & Quincy Railroad Company, which operated lines of road in Minnesota, South Dakota, Iowa, Illinois, Wisconsin, Missouri, Nebraska, Kansas, California, and Wyoming, it controlled the transportation of that company. The last-named company connected at several points with the Union Pacific, and was a natural and important feeder for it.

The San Pedro, Los Angeles & Salt Lake Railroad Company was organized in 1902 for the purpose of constructing a line of railway extending from San Pedro, Cal., across the states of California and Nevada in a northeasterly course, to Salt Lake City.

From El Paso, Tex., on the Southern Pacific line, the Texas & Pacific Railroad ran across the state of Texas to Texarkana, and there connected with



the rails of the St. Louis, Iron Mountain & Southern Railroad, which extended to St. Louis. At St. Louis the last-named road connected with the Wabash, for the East, and the Missouri Pacific, for Pueblo, Colo., and there connected with the Denver & Rio Grande Railroad, which ran to Ogden. These last-mentioned roads constituted what is known as the Gould System, and, operating under one general management, swung around from a point on the Southern Pacific at El Paso to another point on the Southern Pacific at Ogden. The last-named company constituted its only connection into California, and afforded its only opportunity for participation in transcontinental business.

In 1898 the Union Pacific Company, which had been in the hands of a receiver since 1893, was reorganized, and Mr. Harriman and his associates came into control. They soon adopted and put into execution plans of a stupendous character for the rehabilitation and reconstruction of the road, involving an expenditure of many millions of dollars. Apart from possible rights conferred by the acts of Congress approved July 1, 1862 (12 Stat. 489), July 2, 1864 (13 Stat. 356), and June 20, 1874 (18 Stat. 111 [U. S. Comp. St. 1901, p. 3577]), known as the "Pacific Railroad Acts," the Union Pacific Company had no independent right of co-operation by through route or joint rates with the Southern Pacific for the Pacific Coast trade, and in fact no other direct connection was open to it for that trade except the Southern Pacific road itself. The Rio Grande and its allied lines and connections with trunk lines from the east at St. Louis was available to the Southern Pacific as a connection at Ogden for business for the Atlantic seaboard and Middle states. To meet a menace occasioned by this situation and secure a reliable and permanent arrangement for Pacific Coast business, Mr. Harriman, acting for the Union Pacific Company, first tried to purchase from the Southern Pacific Company the old Central Pacific line, extending between Ogden and San Francisco, and, failing in this, entered into negotiations with C. P. Huntington in his lifetime for the purchase of a large block of the capital stock of that company, owned by him. Being unsuccessful in this, he renewed his efforts to secure that stock from Mr. Huntington's heirs and devisees after his death, in 1900. In this effort he had a competitor in George Gould, acting for the Gould interests. It resulted, in 1901 and 1902, in the purchase for the Union Pacific Company of 900,000 shares, and these, with the shares of some preferred stock afterwards issued and taken by it, made a holding of a little over 46 per cent. of the total outstanding issue of Southern Pacific stock. This was a holding sufficient, according to the usual conduct of corporate affairs, to insure to the Union Pacific Company control in the management of the Southern Pacific Company.

In 1901 the Northern Pacific Company acquired a controlling interest in the Chicago, Burlington & Quincy Railroad, which was a natural and actual feeder to the Union Pacific Company. After an unsuccessful effort to secure from Mr. Hill, who acted for the Northern Pacific Company, a partial interest in that purchase, in order to insure a continuation of the fair and equitable relations which had theretofore existed between the Union Pacific and the Burlington roads, Mr. Harriman purchased for the Union Pacific Company a majority of the capital stock of the Northern Pacific Company, including in his purchase more of the preferred than of the common stock. The preferred, by action of the board of directors of the latter company, was soon retired. The Northern Securities Company was afterwards organized, and the common stock transferred to it. Upon its dissolution in 1905, the Union Pacific Company was required to accept a part of the stock of the Great Northern Railway Company in lieu of some of its former holdings in the common stock of the Northern Pacific Company. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739. If the Union Pacific Company acquired any controlling or influential interest in the management of the Northern Pacific Company, these things resulted in the loss thereof. Finally, in the years 1908 and 1909, holdings of the Union Pacific Company in Northern Pacific or Great Northern stock entirely ceased.

In 1904 the defendants Harriman, Rogers, Stillman, Frick, Kahn, and Schiff purchased for themselves as individuals \$30,000,000 in par value of the common stock of the Atchison, Topeka & Santa Fé Railway Company, and

later in 1906 the Union Pacific Company invested \$10,000,000 of its idle money in the preferred stock of that company. The individuals who purchased and owned the common stock secured the election of two of their syndicate, the defendants Frick and Rogers, as members of the board of directors of the Santa Fé Company. They were at that time also members of the board of directors of the Union Pacific Company. The holding of the last-mentioned company of \$10,000,000 in the preferred stock of the Santa Fé Company was about 5 per cent. of the total outstanding stock of the latter company. This was all disposed of in 1909.

Some time after the acquisition by the Union Pacific Company of the Southern Pacific stock, the latter company became involved in a controversy with the Phoenix & Eastern Railroad Company, the owners of a short line of road in Arizona. Litigation ensued, and resulted in the sale of the Phoenix & Eastern Railroad to the Southern Pacific Company. About that time there was a consolidation of a short line of road (about 90 miles) in the north-western part of California with the Southern Railway Company. This consolidation was made pursuant to the laws of the state of California.

Prior to 1890 the Union Pacific Company through its subsidiary company, the Oregon Short Line, constructed a line of railroad extending from Salt Lake City in a southwesterly direction to Milford, a point near the state line between Utah and Nevada, a distance of about 206 miles, and plans were made for an extension of the road further southwestwardly and ultimately to Los Angeles. Grading had been done at a heavy cost on this extension for a further distance of 117 miles, a part of the way being through a rugged and narrow defile in the mountain, when, on account of financial embarrassments culminating in the receivership of the Union Pacific and Oregon Short Line Companies, work had to be abandoned. In the meantime a tax deed purporting to convey title to the graded road had been secured by defendant Clark and his associates, who sought to construct a part of a line of railway projected by them between Salt Lake City and Los Angeles over it. This provoked proceedings in the Land Department and courts by the Oregon Short Line to assert its rights, which resulted favorably to its contention. *Utah N. & C. R. Co. v. Utah & C. Ry. Co. (C. C.) 110 Fed. 879.*

Pending subsequent controversies between the parties, an adjustment was reached whereby the two promoters, the Oregon Short Line and the Clark interests, proceeded jointly to construct and operate a single line, each taking one-half interest in the stock of the San Pedro, Los Angeles & Salt Lake Company, which owned and operated it. It was not completed, and no commerce passed over it, until 1905. In the further adjustment of their differences, certain permanent provisions relating to joint, through, and local rates were made, favorable to the interests of the Union Pacific Company and its allied roads as a system.

Prior to 1901 agents of the Union Pacific, Southern Pacific, and Santa Fé roads were actively engaged in New York and elsewhere in securing business between New York, Pittsburg, and interior points to the Pacific Coast. The Union Pacific Company, having no through route, had to depend upon connections with other roads at either end of its line, and to share with them the revenue resulting from the traffic secured in such proportions that out of the through rate it received but a minor part; for instance:

On traffic from New York to San Francisco, via Omaha and Ogden, it received of the through rate only..... 34.4%  
 Its connections east of Omaha received..... 35.5%  
 And the Southern Pacific, from Ogden to destination, received.... 30.1%

On traffic from New York to San Francisco, via Kansas City and Ogden, it received of the through rate only..... 30.5%  
 Its connections east of Kansas City received..... 38.6%  
 And the Southern Pacific, from Ogden to destination, received.... 30.9%

On traffic from Cincinnati to San Francisco, via Omaha and Ogden, it received..... 40.4%  
 Its connections east of Omaha received..... 24.4%  
 And the Southern Pacific, from Ogden to destination, received... 35.2%

On traffic from Chicago to San Francisco, via Kansas City and Ogden, it received of the through rate only..... 43.6%  
 Its connections east of Kansas City received..... 14.2%  
 And the Southern Pacific, from Ogden to destination, received... 42.2%

From these fairly illustrative instances it appears that, on transcontinental traffic from New York and important interior points by way of the Union Pacific road to San Francisco, the connections of the last-mentioned road on both ends received practically two-thirds of the total freight rate; the Southern Pacific itself receiving about the same proportion of it as the Union Pacific did. On the other hand, the Southern Pacific received on freight from New York common points to San Francisco by way of New Orleans on its own route all the through rate, and on freight from Cincinnati, Chicago, and other interior points to San Francisco via New Orleans the total through rate less the small portion required by the initial carriers for transportation from point of origin to New Orleans.

Many witnesses testified generally that the Union Pacific and Southern Pacific were prior to 1901 competing lines for transcontinental business and had separate soliciting agents in New York and elsewhere. The proof amply shows that they were active in securing routings of freight and passengers to California, but that they did it in two ways: One by direct solicitation of shippers and passengers, and the other by securing and fostering friendly relations with the initial carriers at the points of origin of the traffic. The initial carrier commonly was able to and did determine the routing of all traffic. Notwithstanding the right of the shipper in the abstract to do so, the initial carrier practically settled the question so as best to serve its own interest.

In so far, however, as the initial carrier was influenced by the shippers and they by the soliciting agents, the result was this: As between the Southern Pacific and the Union Pacific, the agents of the former exercised their influence in favor of their through route by way of New Orleans; but, as between the Union Pacific and the Santa Fé, the agents of the Southern Pacific exercised their influence in favor of the Union Pacific route, as it thereby secured for itself a haul of 800 miles over its own road from Ogden to San Francisco, the last connecting link into California.

The actuating intent and purpose of the Union Pacific Company in acquiring the Huntington stock was to secure a permanent and reliable connection at Ogden for through traffic over the Central Pacific line to the Pacific Coast, and thereby to save the necessity for constructing a road of its own from Ogden to San Francisco.

The facts relating to less important competition (1) between the Atlantic seaboard and interior points on the one hand and Portland, Or., on the other, (2) between the Atlantic seaboard and Colorado and Utah common points, (3) between Portland and Utah, Colorado, and Nevada common points, (4) between San Francisco and Portland, (5) between San Francisco and Montana and Idaho common points, and (6) between New York and interior common points and the Orient, will be specifically referred to so far as necessary in the opinion.

Frank B. Kellogg and Cordenio A. Severance (George W. Wickersham, Atty. Gen., on the brief), for the United States.

N. H. Loomis, P. F. Dunne, and D. T. Watson (H. F. Stambaugh and John M. Freeman, on the brief), for defendants.

Before SANBORN, VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). [1]  
 To bring any transaction within the condemnation of the first section of the anti-trust law, it must be a contract, combination, or conspiracy in restraint of interstate or international commerce. This restraint

must be substantial in character and the direct and immediate effect of the transaction complained of. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and cases cited. The most important feature of the complaint in this case, and the one chiefly relied upon by counsel for the government in support of their contentions, is the purchase in 1901 by the Union Pacific Company of a controlling interest in the capital stock of the Southern Pacific Company. Its consequences are alleged to have been the destruction or restriction of free competition in transcontinental commerce. Whether such consequences followed depends upon whether these companies were or could have been independent and substantial competitors before the transaction in question occurred. *Kimball v. Atchison, T. & S. F. R. Co. (C. C.)* 46 Fed. 888. Most obviously, if they were not and could not then have been such competitors, the securing of control of both by one did not destroy or stifle competition. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679.

The question then is: Was the line of the Union Pacific Company, extending only from Omaha and Kansas City on the east to Ogden on the west a competing line prior to 1901 for transcontinental business with the Southern Pacific Company, whose line extended from New York on the east over the sea to New Orleans, and thence by rail to San Francisco and Portland on the west? The question is not whether it constituted a continuous line over which traffic might possibly be moved from the Atlantic seaboard or interior to the Pacific Coast, but whether it constituted a feasible route over which it could enter naturally and profitably into competition with the Southern Pacific route for that traffic.

Claim is not made that it was such a competitor for any business originating on or near to its main line, but only for business originating in New York or Pittsburg common points, 1,000 or more miles away from its line. Its traffic between New York and interior points, on the one hand, and Portland, Or., on the other, was of trifling importance, amounting for the fiscal year preceding the purchase of the Huntington stock to only 0.46 per cent. of its total tonnage. Accordingly its competitive relation to the Southern Pacific route with respect to traffic in and out of San Francisco, the chief gateway for transcontinental business, will first be considered.

It had a connection at Granger with its subsidiary lines, the Oregon Short Line and the Oregon Railroad & Navigation Line, extending to Portland, and there with a line of steamboats irregularly and infrequently running between that port and San Francisco. But this detour through Portland and over the sea was long, unreliable, and unsatisfactory, and afforded no opportunity for fair and remunerative competition with the Southern Pacific for San Francisco trade. It was about 1,700 miles in length, as against 800 miles in direct line from Ogden to San Francisco. In fact, prior to 1901 it had never been employed in any substantial way as an outlet for the Union Pacific's west-bound freight into San Francisco. It is inconceivable, therefore, that the Huntington stock was purchased to prevent, or had the

effect of preventing, in any substantial way, free competition with so devious and impracticable a route.

We shall accordingly dismiss it from further consideration so far as transcontinental business is concerned, and pass to the important question upon which argument was concentrated: Whether the right, privilege, or practice, whatever it may have been, of connecting with the rails of the Southern Pacific at Ogden and of using that company's line between Ogden and San Francisco, together with the right, privilege, or practice of connecting at Omaha and Kansas City with the lines of other railroads, which by themselves and by successive connections led to the points of origin of the traffic, constituted the Union Pacific a competitor of the Southern Pacific for that traffic. It is certain the Union Pacific by itself could do none of that business. It extended neither to its origin nor destination. It depended for success upon its connections with other railroads at the east and with its alleged competitor at the west end of its own line.

[2] Prior to the enactment of the provisions of the fourth section of the act of June 29, 1906 (34 Stat. pt. 1, p. 590 [U. S. Comp. St. Supp. 1909, p. 1159]) known as the "Hepburn Act," there was no way of coercing railroad companies into establishing through routes or joint rates with each other. In *Southern Pacific v. Interstate Com. Com.*, 200 U. S. 536, 553, 26 Sup. Ct. 330, 334, 50 L. Ed. 585, the Supreme Court speaking of a time antedating the Hepburn act, said:

"It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The commerce act recognizes such right, and provides for the filing with the commission of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads. It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses."

Whether, therefore, the great Eastern lines and their connections, which gathered up the west-bound freight, should favor the Union Pacific, the Southern Pacific, or the Santa Fé routes, as their final connection into San Francisco, was optional with them. If they favored the Union Pacific, the terms of their arrangement, whether for a reasonable participation by each in the through rates, or on the basis of local rates for the service of each, or otherwise, were not within the power of the Union Pacific itself to determine, or of the courts, in the absence of legislative authority, to enforce. If, perchance, the Union Pacific had for a time a voluntary arrangement with the Chicago, Milwaukee & St. Paul, the Michigan Central, and the New York Central for a through route and joint rates on traffic destined from New York common points to Ogden and thence to San Francisco, can it be true that that fact by itself would have constituted the Michigan Central a competitor of the Southern Pacific for

that traffic within the intent and meaning of the anti-trust law? If not, it does not seem to us that the Union Pacific Company, another intermediate link, like it, in the same temporary through route, could have been such a competitor. But we do not rest our conclusion on this feature of the case alone.

[3] In view of the fact that the Southern Pacific owned and operated the road from Ogden to San Francisco, with which alone (except for the circuitous and impracticable route via Portland and the sea to San Francisco) the Union Pacific could have connected, and over which alone it could have carried its traffic into San Francisco, we are unable to understand how the Union Pacific could have been an independent competitor with the Southern Pacific for business over that road into San Francisco. While the Union Pacific was entirely dependent upon the Southern Pacific for its connection westward, the Southern Pacific was not at all dependent upon the Union Pacific for its connection eastward. The Denver & Rio Grande Company and its allied lines under one control had a through route extending from Ogden, through Denver, Kansas City, and St. Louis, to Chicago and other interior points, and thence by many available connections to New York and the seaboard. This was obviously a most attractive and powerful rival of the Union Pacific Company, and a constant menace to its success. The latter was in no position to coerce any action by the Southern Pacific. Its hands were tied.

But, it is argued, it could retaliate by using its influence to induce initial carriers or shippers to route transcontinental freight by way of Portland and the sea to San Francisco. This being such a long and unreliable route, little success could have been reasonably expected in such retaliation. If the Rio Grande should have been favored by the Southern Pacific as its Eastern connection, the Union Pacific, in the language of the witnesses, would have been practically bottled up at Ogden. With the advantage possessed by the Southern Pacific as an initial carrier to deflect all east-bound traffic to another line at Ogden, and with the right to exact on all east or west bound traffic local rates, instead of a fair and just proportion of an established through rate, the Southern Pacific would easily have put a quick and decisive ending to any hostile rivalry or competition, if such had been hazarded by the Union Pacific. This absolute dependence by the latter upon the Southern Pacific for a distance of 800 miles of its only through route, to say nothing of its dependence upon the voluntary action of its Eastern connections already pointed out, in our opinion, rendered any equal or profitable competition between them impossible. No real rivalry in the nature of things could have subsisted as long as the success of one was dependent upon the consent or favor of the other. Instead of the situation being competitive, the two roads really acted together and co-operated between themselves and with their connections in securing as much of the transcontinental traffic, each for the other, according to their respective facilities, as they could get, and participated in the total revenue on a basis of comparative service rendered. Their relations were like those of a limited partnership, rather than those of hostile competitorship.

But it is said the Pacific Railroad acts, *supra*, obligated the Union Pacific and Central Pacific (the predecessor in right of the Southern Pacific so far as the road from Ogden to San Francisco is concerned) to the establishment of through routes and maintenance of joint rates, and take these roads out of the operation of the rule announced in the case of *Southern Pacific Company v. Interstate Com. Com.*, *supra*. But we do not so interpret them. Those acts required the two roads, the one from Ogden east to Omaha and Kansas City, and the other from Ogden west to San Francisco, or their predecessors, to be "operated and used for all purposes of communication, travel and transportation so far as the public and government are concerned, as one continuous line" (section 12, Act July 2, 1862, 12 Stat. 495), and also required them in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others \* \* \*" (section 15, Act July 2, 1864, 13 Stat. 362).

The act of 1862 not only provided for the continuous operation of the roads, but empowered them to consolidate (section 16); and so likewise did the act of 1864 (section 16). These acts were obviously intended to secure a permanent physical connection between the roads and to provide generally for equal accommodations to the public on the basis of independent carriers; but we discover in them no provisions or machinery by which the Southern Pacific, as successor to one of them, could have been compelled by the courts or otherwise to make agreements governing interchange of traffic or through rates, or fixing the division of such through rates between the two roads. Section 15 of the act of 1864 is not substantially different, so far as the matter under consideration is concerned, from section 3 of the interstate commerce act of 1887 (24 Stat. 380). They both forbid discrimination in rates between connecting lines. Section 3 has been held by the Interstate Commerce Commission and by the Court of Appeals of this circuit not to invest the commission or the courts with power to compel carriers to make contracts or agreements for through billing of freight or for joint rates. On the contrary, it was held that such matters are left to the voluntary determination of the interested carriers. *L. R. & Mem. R. R. Co. v. E. Tenn., etc., Co.*, 3 Interst. Com. R. 1; *Little Rock & M. R. Co. v. St. Louis & S. W. Ry. Co.*, 63 Fed. 775, 11 C. C. A. 417. See, also, to the same effect, *Oregon Short Line, etc., v. Northern Pacific R. Co.* (C. C.) 51 Fed. 465, 474, and *Chicago & N. W. Ry. Co. v. Osborne*, 52 Fed. 912, 914, 3 C. C. A. 347.

The voluminous evidence of officers, agents, and shippers to the effect that active competition existed between the Union Pacific and Southern Pacific roads prior to 1901 must be considered in the light of the legal and physical relations of the roads to each other and of other related facts. Whether there was competition or not, in view of all these things, is a mixed question of law and fact, and not susceptible of determination by the preponderance of proof as an issue of fact only. Without doubt there was active competition, but

it was chiefly in co-operation with initial lines, which had the routings of freight, and for the benefit of such initial lines and their connections to Omaha or Kansas City, as well as for the benefit of the Union Pacific Company itself. Even so far as it was for the benefit of the latter company, it operated necessarily for the benefit of the Southern Pacific to an extent of about eight-twentieths of the haul after the Union Pacific took it at Omaha or Kansas City. In this condition of things, the opinions of any number of witnesses as to whether the two were competing lines within the meaning of the law is of little aid, and the general statement of those witnesses that the two roads had separate soliciting agents throws little, if any, light upon the ultimate issue.

The immediate and actuating intent and purpose of the Union Pacific Company in acquiring the Huntington stock, and thereby the control of the operations of the Southern Pacific line, were, according to the proof, to secure a permanent working and reliable connection at Ogden over an existing road for its through traffic; a connection not dependent upon the grace of a dominant copartner, but one within its own control. We recognize the proposition that, if the necessary and direct result of the purchase of the Huntington stock was to destroy or substantially suppress free and natural competition, before then existing between the two companies, or if that purchase put it within the power of the Union Pacific Company to destroy or suppress such competition, the latter-named company would undoubtedly be held to have intended the natural and reasonable consequences of its act, and, notwithstanding the dominant purpose just mentioned, would have violated the anti-trust law. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Co. v. United States*, 193 U. S. 197, 328, 332, 357, 24 Sup. Ct. 436, 48 L. Ed. 679.

Our conclusion is that all the facts of this case, considered in their natural, reasonable, and practical aspect, and given their appropriate relative signification, do not make the Union Pacific a substantial competitor for transcontinental business with the Southern Pacific in or prior to the year 1901. We therefore pass to a consideration of some less important matters relied upon by the government to establish destruction of competition between those companies.

It is contended that it was destroyed or suppressed in transcontinental business between the Atlantic seaboard and Middle states, on the one hand, and Portland and Willamette Valley common points, on the other hand. The route of the Southern Pacific for this business was by its own line via New Orleans and San Francisco to Portland, and that of the Union Pacific was by its own line from Omaha and Kansas City to Ogden, together with its connections and subconnections eastward from Omaha and Kansas City, and its subsidiary lines, the Oregon Short Line and Oregon Railroad & Navigation Company running northwestwardly into Portland and the Valley. The geographical relation of these routes to each other, and the dependence of one of them, at least, upon voluntary arrangements with other lines, would seem to render natural and fair competition between them for the Portland trade impossible; but the



slight volume of the traffic here involved affords a controlling and decisive consideration. For the year ending June 30, 1900, the tonnage of the Southern Pacific Company in this trade was only 0.10 per cent. of its total tonnage. For the same year the tonnage of the Union Pacific Company in this trade was only 0.46 per cent. of its total tonnage.

Again, it is contended that the control of the Southern Pacific Company acquired by the Union Pacific Company suppressed free competition between them for business between the Atlantic seaboard and Colorado and Utah common points. The route of the Southern Pacific available for this traffic was from New York to New Orleans or Galveston by sea; thence over its own line to Ft. Worth, Tex.; thence over its connection, the Colorado & Southern, to Denver; thence over another connection, the Denver & Rio Grande, into Utah.

The route of the Union Pacific Company available for it was its own line from Kansas City and Omaha to Denver and Ogden, with its numerous initial connections and subconnections, and also a line by sea from New York to Newport News and Savannah; thence by connections at those places with such railroads as would favor them through the interior of the country to the beginning of its own rails at Kansas City or Omaha.

Physically and practically speaking, in view of the circuitry of the route of the Southern Pacific and of the necessary dependence of both companies upon volunteer connections, real rivalry between them for this traffic does not seem to have been possible; but here again the traffic itself was of little volume and comparatively unimportant. For the year ending January 30, 1900, the tonnage of the Southern Pacific in this business was only 0.19 per cent. of its total tonnage. For the same year the tonnage of the Union Pacific in this traffic was only 0.47 per cent. of its total tonnage.

A like contention is made concerning the traffic between San Francisco, on the one hand, and Portland and points in the Willamette Valley, on the other hand; but this traffic was also small. For the year ending June 30, 1901, the tonnage of the Southern Pacific in this traffic was only 0.36 per cent. of its total tonnage, and the tonnage of the Union Pacific Company in it for the same period was only 1.27 per cent. of its total tonnage.

A similar contention is made concerning the traffic from Portland and Willamette Valley common points, on the one hand, and Ogden and its common points, on the other. The route of the Southern Pacific Company for this business was by the so-called Shasta route from Portland to Sacramento, and thence via the old Central Pacific route to Ogden. This was a long and circuitous route, compared to that of the Union Pacific Company from Portland via Oregon Railroad & Navigation Company and Oregon Short Line to Ogden. Not only is this so, but the business was trifling. For the year ending June 30, 1901, the tonnage of the Southern Pacific in it was only 0.01 per cent. of its total tonnage, while that of the Union Pacific was only 0.35 per cent. of its total tonnage.

A like contention is made concerning traffic from San Francisco, on the one hand, and points in Montana, Idaho, Eastern Oregon, and

Washington, on the other hand, Without commenting upon the un-competitive character of those routes for this business, it suffices to call attention to the insignificance of the traffic itself. For the year ending June 30, 1900, the tonnage of the Southern Pacific Company in it was only 0.02 per cent. of its total tonnage, while that of the Union Pacific Company for the same time was only 0.23 per cent. of its total tonnage.

Claim is also made that the control which the Union Pacific Company acquired by the purchase of the Huntington stock suppressed free competition between them for the Oriental traffic. Many considerations arising out of the relations of the two roads to the trans-pacific steamship lines which carried the traffic from the coast have conduced to the conclusion reached; but bearing in mind that we are not considering this case in view of the present Oriental traffic, but in view of what it was 10 years ago, when the transaction complained of occurred, we find adequate reason for it in the small amount of this business also. For the year ending January 30, 1901, the tonnage of the Southern Pacific in handling it was only 0.20 per cent. of its total tonnage, while that of the Union Pacific both through San Francisco and Portland gateways was only 0.41 per cent. of its total tonnage.

The aggregate of all the business done by the Union Pacific and Southern Pacific Companies over all these routes for the years specified, which we believe fairly represent the general conditions prevailing at or before the Huntington stock was purchased, was for the Southern Pacific Company 0.88 per cent. of the entire tonnage of that system, and for the Union Pacific Company 3.10 per cent. of its aggregate tonnage. Tables in evidence also disclose that the total revenue derived from the traffic over these minor routes by the Southern Pacific Company for the year preceding the year of the Huntington purchase amounted to only 1.25 per cent. of the total revenue of that system.

Certainly the desire to appropriate the trifling business done by the Southern Pacific Company on these minor lines, or to suppress a competition in traffic which was in the aggregate of such small proportions, could not have been the inspiration of the vast outlay involved in the purchase of the Huntington stock. Neither was the suppression of competition in this infinitesimally small proportion of the business of both companies a substantial or natural consequence of that important transaction. It did not amount to a direct and substantial restraint of either interstate or international commerce. It was at best only contingently, incidentally, and infinitesimally affected by it. This is not sufficient to bring it within the condemnation of the anti-trust law. *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; *Northern Securities Co. v. United States*, *supra*; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428; *Phillips v. Iola Portland Cement Co.*, 61 C. C. A. 19, 120 Fed. 593; *Arkansas Brokerage Co. v. Dunn & Powell*, 97 C. C. A. 454, 173 Fed. 899; *United*

States v. Standard Oil Company (C. C.) 173 Fed. 177, and cases cited.

[4] This concludes consideration of the effect of the transaction chiefly relied upon by the government in this case. But it is contended that the purchase by the Union Pacific of a controlling interest in the stock of the Northern Pacific Company was also violative of the anti-trust law. Without dwelling on the reason for the purchase of this stock, disclosed in the preceding statement of facts, it is sufficient to say that, if any controlling interest was thereby acquired, it was lost some time before this suit was instituted, and that none of that stock is now held by or for the Union Pacific Company. As there is no showing of any like ambitious project in this respect for the future, we fail to discover any opportunity or reason for the injunctive relief on this account.

[5] The transaction of 1904, by which a syndicate of men interested in the Union Pacific Company purchased for their individual account \$30,000,000 in face value of the stock of the Santa Fé Company, and the investment in 1906 of \$10,000,000 by the Union Pacific in acquiring 5 per cent. of that stock are not claimed to have conferred any actual power of control upon the Union Pacific over operations of the Santa Fé Company. The proof does not disclose that any such control was acquired or attempted to be exercised. Even if the motive of the purchasers was to gain some inside information concerning the operations of the great competitor of the Union Pacific Company, they chose an entirely lawful way for doing it, and their acts afford no reason for judicial condemnation.

[6] Much of the argument relating to the construction of the San Pedro route is addressed to the proposition that, because the San Pedro line was not completed at the time the Huntington stock was purchased, and because there was no competition then existing between the roads in question, there could have been no contract, combination, or conspiracy in restraint of it. The contention of the government in this particular, that a contract to strangle a threatened competition by preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic, would be in violation of the anti-trust law, may well be conceded. *United States v. Patterson* (C. C.) 59 Fed. 280; *Interstate Com. Com. v. Philadelphia & R. Ry. Co.* (C. C.) 123 Fed. 969; *Thomsen v. Union Castle Mail S. S. Co.*, 92 C. C. A. 315, 166 Fed. 251; *Pennsylvania R. Co. v. Commonwealth*, 3 Sadler (Pa. Sup. Ct. Cases) 83, 91, 7 Atl. 374.

[7] But this concession does not settle the question before us. The San Pedro line, as originally projected and as ultimately constructed, does not appear to have been naturally competitive with the Union Pacific, Southern Pacific, or any of the subsidiary lines. It is practically a continuation of the Union Pacific or Oregon Short Line southwardly, and, generally speaking, its course is at right angles, rather than parallel with, either the Union Pacific or Southern Pacific line. If it, as an existing route, had been acquired by the Union Pacific, it would have served rather as a short cut from Los Angeles to

Salt Lake City, to avoid the circuitous route between those points via San Francisco, than as a natural competitor for any of the business of that route. While it was calculated to deprive the Southern Pacific of a long haul on traffic destined between Los Angeles and Salt Lake City and beyond, it would be unfortunate indeed if that fact should have prevented its construction, especially when it was practically at right angles with the Southern line, and much shorter and much better adapted to serve the public. In these circumstances it, as projected and built, was not, in our opinion, naturally competitive with the Southern Pacific line, as alleged in the bill.

It is however, contended that in the adjustment of differences between the Union Pacific and its allied or subsidiary companies with the Clark interests, resulting in the construction of one line between Salt Lake City and Los Angeles, instead of two, as projected, there was a suppression of competition which would have existed between the two, if they had built separately. We, however, are unable to discover anything in the transaction except a laudable purpose to adjust differences and construct a line of railroad between the two points which would serve their joint interests as well as those of the public. The evidence discloses that it was not feasible to construct two lines of road over the only practicable route through the canyon in the mountains, known as "Meadow Valley Wash." This, with other reasons of a practical nature, fully justified the abandonment of the project of constructing two lines and the consolidation of them into one.

Some minor agreements fixing the relations between the new San Pedro line and the other lines composing the system of the Union Pacific, as well as the provisions for fixing through and local rates, were made; but these are so incidental to the main transaction, already found not to have violated the interstate commerce act, as to warrant no further consideration. If it be true, as already pointed out, that the San Pedro line was not naturally competitive with the Union Pacific or Southern Pacific lines, none of these incidental things would disturb legitimate competition within the purview of the anti-trust law.

The evidence discloses certain transactions between the Southern Pacific Company, on the one hand, and the Phoenix & Eastern and the California & Northwestern Railroad Companies, on the other hand, which are claimed to have been in restraint of competition between them; but as they affect local transportation only, and are not complained of in the bill as substantive wrongs, and as neither of the two last-mentioned companies are made parties to this action, it is not perceived how any independent relief with respect to them can be granted. We therefore refrain from considering them, except in so far as they afford relevant evidence on issues joined in the case.

[8] Having now found that the several contracts or transactions specifically complained of in this case did not offend against the anti-trust law, it seems hardly necessary to discuss the claim, little debated by counsel, that they evidenced a combination or conspiracy to do so. In determining whether a combination or conspiracy in violation of the first section of the anti-trust act, namely, to restrict competition and thereby restrain commerce, was entered into, the facts already

found may properly be supplemented by reference to actual consequences and results. These often reflect the original meaning and purpose of preceding transactions. The proof shows that after 1901, as well as before, the rates for transcontinental traffic were the same over both the Union Pacific and Southern Pacific lines, and that there has since then been with respect to either of these lines no impairment of service, no deterioration of the physical properties, no discontinuance of efforts to satisfy the public, and no complaints of shippers of any inferior or inadequate service.

The large number of initial carriers striving for that traffic have continued their active solicitation for business over the line which assured them the longest haul or otherwise benefited them most, and although some agents of the two roads, which before 1901 were separate, are now joint, they have continued to exercise their influence to secure business for either road according to its availability, and always in opposition to other active competitors, like the Santa Fé and Denver & Rio Grande roads. A substantial majority of the stock of the Southern Pacific Company has been held by parties other than the Union Pacific Company; but we fail to find any complaint by such holders of any discrimination against their road or of any failure to properly promote its welfare. None of the minor points charged to have been deprived of competitive opportunities by the Huntington purchase are shown to have suffered as a result of that purchase. On the contrary, hundreds of millions of dollars have since 1901 been expended on these roads. Their physical condition has been vastly improved, and their efficiency for public service as well as for private profit has been greatly enhanced. The whole proof, taken together, we think, fails to disclose any conspiracy to restrain interstate or foreign commerce, in violation of the first section of the act.

The same considerations lead to the conclusion that no combination or conspiracy to monopolize or attempt to monopolize trade or commerce among the states or with foreign nations was entered into. Moreover, the fact that the Union Pacific Company did not secure or undertake to secure the control of the Santa Fé road, a thoroughly sufficient, well-equipped, and powerful rival for transcontinental business, or the Denver & Rio Grande road, a potential, and later an actual, powerful rival for the same business, affords additional and conclusive evidence of no such combination or conspiracy. The purchase by the Union Pacific Company, soon after acquiring the Huntington stock, of a majority of the capital stock of the Northern Pacific Company, tends to the opposite conclusion; but, in view of the main reason for its acquisition and its disposition by the Union Pacific Company, we are indisposed to give to that purchase alone any considerable significance.

The conclusions of fact already stated dispose of this case without the necessity of determining the question, much debated in brief and argument, whether securing control of the Southern Pacific Company by purchasing stock of individual owners could in any view of the case have contravened the anti-trust law. On the facts of this case, with all their reasonable and fair inferences, we conclude that the government has failed to substantiate the averments of its bill.

Mr. Justice VAN DEVANTER, while a Circuit Judge, participated in the hearing, deliberation, and conclusion in this case, and he now concurs in this opinion.

The bill must be dismissed, and a decree will be entered to that effect.

SANBORN, Circuit Judge, concurs.

HOOK, Circuit Judge (dissenting). Briefly stated, the decision of the court, in which I am unable to concur, is that the Union Pacific and Southern Pacific Railroads, universally regarded as parallel in a broad geographical and legal sense, for about 2,000 miles, were not competitors in 1901 for transcontinental or other traffic, and therefore their merger in that year was not contrary to the Sherman anti-trust act. I agree with the court upon the minor features of the case, including, in a general way, that of the control of the San Pedro line by the Union Pacific Company. The latter is much as if a railroad company, with a line from the west through Omaha or Kansas City to Chicago, should obtain control of a branch from Omaha or Kansas City to St. Louis. In the absence of a more direct competitive relation than appears here, the Sherman act should not be held to cover such tangential acquisitions.

But the chief complaint of the government is of an unlawful contract or combination in restraint of trade and commerce, by which the Union Pacific and Southern Pacific transportation systems are held under a single control, and competition between them is suppressed or destroyed. The combination was effected through the purchase by the Union Pacific of part of the capital stock of the Southern Pacific. Upon this two important questions arise. The first, which is one of law, is whether the purchase by one railroad company of corporate stock of another, less than the majority, but sufficient in amount according to the practical experience of men to enable the purchaser to dominate or control the policies and operations of the other, is a form of combination within the prohibitions of the Sherman act. The conclusion of the court being against the government on another ground, it was unnecessary to determine this question; but as I do not assent to the conclusion, and as the question lies at the threshold of the government's case, I should briefly express my view concerning it.

There is no substantial difference between the holding of the corporate stocks of two companies by a third, such as was condemned in the Northern Securities Case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and the holding by one of those two of the stock of the other. The form is somewhat different, but the effect, which is the chief concern of the law, is the same. If prior competition disappears as a direct and natural result, trade and commerce are restrained. If it is unlawful in the one case, it must be so in the other. It would be idle to hold that, while two competing railroad companies cannot lawfully submit to a common control through a separate stockholding organization, they may do so by dispensing with that medium. That would be regarding shadows and letting the substance go. The

language of the Sherman act in this particular is broad. It covers every contract and combination in restraint of interstate and foreign trade or commerce, *whether in the form of trust or otherwise*. The essential, effective character of the arrangement is to be regarded, rather than its casual vestiture; the substance, rather than the form. In *Harriman v. Northern Securities Co.*, 197 U. S. 244, 297, 25 Sup. Ct. 493, 49 L. Ed. 739, it was assumed that the act could be violated by the direct holding of stock of a competing corporation.

I grant it is a serious thing to disturb a great business transaction like that shown in the case at bar; but, given the power of Congress to legislate, and clear words to express what a judge conceives to have been its purpose, his duty is plain, whatever he may think of the wisdom of the law. Even if public regulation is believed to be a wiser solution of the important economic problem than enforced competition, with its necessary wastes and burdens, nevertheless his judgment of a law embodying the latter policy should proceed as with distinct approval of its selection. It is quite clear that, with the growth and development of governmental regulation of common carriers engaged in interstate commerce, there is decreasing reason for holding them subject to the Sherman act, and it may be that as regards rates of transportation the Interstate Commerce Commission could perform its duties with equal justice to the public and greater justice to the railroads if they were released. But certainly that is for Congress, not the courts. The judicial function is properly exercised when the Sherman act is construed and applied as though it were the only legislative remedy on the statute books.

The other question in the case is decided by the court against the government. It is whether the two great transportation systems, the Union Pacific and the Southern Pacific, were in a substantial sense competitors in interstate and foreign commerce. This question involves the relative location of their lines on land and sea, and not only the parts they actually performed, but also those they were naturally capable of performing, in the movement of traffic. Albeit in part within the domain of judicial knowledge, this seems to me to be a pure question of fact. Some hundreds of witnesses, practical railroad men and shippers of wide experience, testified upon it, and a great mass of evidence was taken, showing almost without dispute that, using the term "competition" as business men understand and use it, there was active, vigorous, and substantial competition between the Union Pacific and the Southern Pacific before the former obtained control of the latter. But the court holds the question of competition to be one of mixed law and fact, not determinable by the evidence alone, and as such it is answered against the government.

Roughly stated, the situation was this: In 1901, when the stock purchase was made, the Union Pacific had lines of railroad from the Missouri river, at Council Bluffs, Iowa, and Kansas City, Mo., to Cheyenne, Wyo.; thence a line through Ogden, Utah, to Portland, Or., lines of steamers from Portland to San Francisco, Cal., and from San Francisco and Portland to Oriental ports; also certain rights under an act of Congress (13 Stat. 356) with respect to the Central Pacific Railroad, which was controlled by the Southern Pacific, from

Ogden to San Francisco. At the Missouri river the Union Pacific had many connections with the principal cities of the country and the Atlantic seaboard by the roads of other companies directly interested in routing west-bound traffic by its line as against the Sunset Route, so-called, of the Southern Pacific. On the other hand, the Southern Pacific had a steamship line from New York to New Orleans, La., thence a railroad to Southern California and up through San Francisco to Portland, the above-mentioned railroad from Ogden to San Francisco, a steamship line from San Francisco to the Orient, and a steamship line from San Francisco to Panama, being the Pacific link of the Panama rail and water route from New York to San Francisco. The Southern Pacific also had at New Orleans connections similar to those of the Union Pacific by the roads of other companies directly interested in routing west-bound traffic by its line as against that of the Union Pacific. The most important competition, so termed by railroad men and shippers, between the two companies, was for transcontinental business. There was also active competition at intermediate points, where considerable traffic originated. The two companies were distinct in control, management, and operation, with separate officers, directors, traffic and operating officials, commercial agencies, and soliciting agents. Since the combination common officers and directors of traffic and operation were elected or appointed, competitive commercial agencies were consolidated or abolished, the activities of the two systems have been in close harmony, not in rivalry, and competition has disappeared.

Reduced to the simplest terms the conclusion of the court that the two companies were not competitors and the Sherman act was not violated is based on these two grounds: (1) Trade and commerce were not restrained, because before the combination the competitive interstate and foreign traffic of the two railroad companies was not a substantial percentage of their total traffic, including in such total the traffic entirely within the several states, over which Congress had no control. (2) Trade and commerce were not restrained because before the combination one of the lines of railroad, the Union Pacific, was an intermediate one in a through route, and depended for competitive traffic upon the business interests of connecting carriers, and therefore could not by itself alone, unaided by the concurrence of its natural allies, make a joint through rate over the entire route. In other words, each party to a contract or combination between railroad companies, which the government assails as being contrary to the Sherman act, must have owned or controlled an entire through route over which competitive traffic moved. That it may have performed an essential part, or have been a necessary factor, in the transportation, is insufficient. That connecting carriers may have voluntarily joined it in making through rates for the traffic is immaterial.

With the greatest deference to my Brothers, I am so profoundly impressed with the conviction that these conditions are without substantial relevance to the question before us that I am constrained to dissent from the opinion of the court. Moreover, their introduction so greatly narrows the act of Congress, which, however it may be



regarded, is the law of the land, that very little is left of it when applied to railroads. *Under one or both of those tests, the Union Pacific could probably have lawfully purchased control of all the great parallel railroad systems in the United States.* It could doubtless have been shown in most instances that the interstate and foreign traffic of each, for which it competed with the Union Pacific or with any of the others, was but a small percentage of its total traffic of all kinds, and we know that all of them depended upon connecting lines at least for transcontinental and much other traffic, and could not, unaided, have made joint through rates with respect to it. Nor is it clear that what could have been done in 1901 might not as well be done to-day. It is suggested that by the passage of the Hepburn act (June 29, 1906) Congress empowered the Interstate Commerce Commission to prescribe through routes and joint rates where connecting carriers have refused, and therefore a different rule respecting competition has since prevailed. I am wholly unable to perceive the material pertinence of that act, much less its controlling effect. The matter of compulsory joint rates is purely adventitious, except as business may be facilitated over a combined route. A joint through rate merely implies a single charge, less than the aggregate of the locals, for a continuity of transportation over two or more connecting lines. Carriers always had the power to make such rates, and commonly did so with allies of their own selection; but whether the traffic movement was under joint rates or combinations of local rates does not seem to me to determine the existence or nonexistence of competition. If rival lines or routes contended for the traffic, and it moved, by single line or by combination of connecting lines, there was competition. If not, it must be that until 1906, when the Hepburn act was passed, the Southern Pacific, with its through water and rail route from New York to San Francisco, never had a competitor for transcontinental traffic in any of the great railroad systems in the United States or in all combined.

The traffic for which the Union Pacific and Southern Pacific competed in 1901, and which one or the other secured, was of enormous volume when considered by itself. It ran into millions of dollars, and with the natural development of the country and the growth of commerce, reasonably to have been foreseen, it has since then greatly increased. The competition was direct, not incidental, and the business for which they strove was appreciable or substantial, not insignificant. But tables of figures are given by defendants from which it appears that the interstate and foreign traffic between competitive points secured by each was but a small percentage of the tonnage of its entire system, and it is therefore argued that the competition to which the act of Congress applies was relatively so small there could have been no restraint or suppression in a substantial sense, and hence no intent to restrain or suppress it. The comparisons being with the total tonnage of the railroads, obviously an element is included which is wholly beyond the power of Congress, namely, the traffic local to the states. The logical conclusion from this view must be that the Sherman act is not violated whenever the trade or commerce within its operation, affected by the contract or combination, however great in

volume, is overshadowed by that exclusively within the jurisdiction of the states. In other words, though substantial competition in interstate or foreign commerce has been actually suppressed, it must be held there was no intention to suppress it. The magnitude of the traffic shown by the proofs was too great, and the competition for it too earnest and active, to dismiss it as merely incidental to the principal business of the companies, and as not furnishing a motive for the merger or combination. A contention somewhat similar was made by defendants in the Northern Securities Case. It was there argued (193 U. S. 261, 262, 24 Sup. Ct. 436, 48 L. Ed. 679) that the entire interstate commerce of the two railroads, the Great Northern and the Northern Pacific, the rates on which could be controlled by them without other competition or consent of connecting lines, was less than 3 per cent. of their total interstate commerce, and that the restraint could not in any event affect more than that per cent. of their commerce of that character. The argument, however, was without avail.

In a broad and substantial sense, in the sense in which the terms are used in constitutions and statutes and in railroad and business circles, the Union Pacific and Southern Pacific lines were parallel and competing. That they were so regarded by practical men having to do with transportation in its various phases is shown, I think, by an overwhelming mass of evidence. But, had no witness testified regarding it, we should come to the same conclusion. There are occasions when courts in the exercise of their judicial functions are entitled to look out into the world of affairs to observe whether there is not a common knowledge of the subject before them, so universal and pervading as not to admit of testimonial controversy. That is termed "judicial notice," and it proceeds upon the assumption that a judge should not be blind to what all others see and understand. It embraces the great currents of trade and commerce in his country—the general movements of products and manufactures—as completely as it does the important features of its physical geography, the location of the cities, the ports, the navigable waters, and the lines of railroad.

The question whether a combination of two transportation lines is contrary to the Sherman act is not always to be reduced to a close consideration of the number of tons of competitive freight they carried within a given period, much less the precise relation of the competitive tonnage to their total business of all kinds. Were they, at the time of the combination, in a substantial degree competitive factors in interstate and foreign commerce? Were they so laid upon land and sea as inherently to possess a substantial competitive capacity for the movement of such traffic? It is not merely the extent to which that capacity was utilized yesterday, but the extent to which the transportation facilities were naturally capable of being utilized; and reasonable, not speculative, regard should be had for the developments of to-morrow. Were it otherwise, Congress in the making of laws would be denied that ordinary foresight which men engaged in business commonly possess and practice. Competition, as the antithesis of monopoly, is the influence which those in the same line of business have on each other, and that influence may as well be manifested in

an existing capacity and preparedness as in the degree of active exercise. A moment's reflection will show this is old doctrine in the judicial construction and application of laws against monopolies and restraint of trade. A railroad company may have great, if not controlling, influence on competition, regardless of the amount of the traffic it actually carries at the time. With a line of railroad scarcely less permanent than a navigable waterway, it stands equipped and ready to do the business when conditions arise, and the duty to do it comes from the very character of its corporate being and the source of its powers and franchises. It may at once be both a curb and a spur to other lines—a curb as regards rates, and a spur as regards quality of service, which are the two great points at which transportation touches the public interest. The influence of the Mississippi river and its navigable tributaries upon the trade and commerce of St. Louis is well known, yet of the enormous freight tonnage into and out of that city, largely interstate, scarcely one-half of 1 per cent. moves by water. To be more exact, of the total rail and river traffic in 1910, nearly 52,000,000 tons, but thirty-six hundredths of 1 per cent., was transported by water; in 1909, but sixty-seven hundredths of 1 per cent. of that year's tonnage. But who would contend that if the rivers were the subject of private ownership, instead of being common highways for the use of all, their control by a railroad company could not restrain trade or commerce because, as measured by relative percentages, the competition appeared to be so slight?

When the argument was made at the hearing that, because the Union Pacific was an intermediate, not a through line, it was not a competitor for traffic moving over it and its connections for which it could not have made a joint through rate, counsel admitted that the rule contended for would have made it lawful under the Sherman act for all intermediate lines in transcontinental transportation, such as the Chicago, Rock Island & Pacific from Chicago to El Paso, the Atchison, Topeka & Santa Fé from Chicago to Mojave (before it gained entrance to San Francisco), the Missouri, Kansas & Texas from St. Louis and Kansas City to Texas points, the St. Louis & San Francisco from St. Louis and Kansas City to the Southwest, the Missouri Pacific with the Denver & Rio Grande from St. Louis to Ogden, and the Union Pacific to have combined and agreed among themselves, as was done in the Trans-Missouri Freight Association Case, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, if they confined their combination to transcontinental traffic; in other words that those intermediate railroads could not be competitors for the traffic, and a confederation with respect thereto could not be unlawful. It seems to me that a statement of the contention shows its unsoundness. Anything that affects the rate over a substantial part of a transportation route is calculated to affect the charge as an entirety; and so of the other features of railroad competition. The competition of the all-water route by the Atlantic and Pacific Oceans with the all-rail transcontinental routes in the United States is so fully recognized that it is safe to say almost every car load rate to the Pacific coast from the territory between the Missouri river and the Atlantic seaboard exhibits a recognition of its influence. And yet it is contended that the

Union Pacific in the direct line of traffic movement, with 1,000 miles of railroad from the Missouri river to Ogden, and nearly 900 miles thence to Portland, with its steamship lines, is not a competitor for transcontinental traffic.

The practical aspect of the question is shown by the cases in which railroad companies have asserted the existence of competition from rival lines or routes of transportation as evidencing conditions justifying discriminations and preferences under the interstate commerce act—that the rates objected to as discriminative *were controlled by competition*, and if they abandoned the rates they would lose the business. An instance of this appears in *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The Texas & Pacific Railroad from New Orleans to El Paso, Tex., and the Southern Pacific Railroad thence to San Francisco, formed a through route over which traffic, both foreign and domestic, moved. The Texas & Pacific Company successfully defended its right to charge and receive more for its proportion of the through rate on traffic originating in New Orleans than it charged and received on import traffic originating in London and Liverpool and billed through New Orleans over the same route to San Francisco, and it did so on the ground asserted that the rate from the English cities to San Francisco was determined by competition with the following routes: By vessel around the Horn; by vessel and by rail across the Isthmus of Panama; and (162 U. S. 216, 16 Sup. Ct. 674, 40 L. Ed. 946) by vessel and by rail across Canada. Were all those transportation agencies subject to the laws of the United States, could it with reason be urged that a contract or combination between them, suppressing a competition which actually existed, would not contravene the Sherman act, because all but one of them were composed of connecting links severally owned or controlled? If that which men engaged in transportation recognize as substantial competition in shaping their policies and their conduct is not so regarded in the courts, the statute will not have the operation intended by its enactment. Laws are generally framed to apply to the everyday affairs of men, who are not given to the study of nice differences and distinctions, and that should always be borne in mind in determining their meaning.

But it is said there was no competition, because the Union Pacific depended upon the Southern Pacific line from Ogden to San Francisco. It is true that much of the transcontinental traffic of the Union Pacific went that way; but it is not unusual for railroad systems to connect at points and interchange business, though they are active competitors in other respects. In fact, a large proportion of them are so related. Competition, within the laws which seek to preserve it, does not imply absolute nonintercourse, as between hostile armies, which exchange no prisoners and give no quarter. Moreover, the use of the Ogden line was neither a necessity to the Union Pacific nor a pure favor or concession by the Southern Pacific. Aside from the mutual benefits from the interchange of traffic, the former had its own line from Ogden, by way of Portland, which, though not as desirable, was more than an important strategic advantage necessary to be reckoned with. But were all this otherwise, the undeniable fact remains,

after stripping the case of all debatable considerations, that the Union Pacific secured this west-bound traffic by active competition, and had transported it as competitive for 1,000 miles before it reached Ogden.

I think that upon the main feature of the case the government is entitled to a decree.

UNITED STATES v. E. I. DU PONT DE NEMOURS & CO. et al.

(Circuit Court D. Delaware. June 21, 1911.)

No. 280.

1. MONOPOLIES (§ 24\*)—ANTI-TRUST ACT—SUIT FOR INJUNCTION.

A member of a combination in restraint of interstate commerce, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), who has in good faith withdrawn from such combination, is not subject to a suit for injunction under section 4 of the act; nor, if such member is a corporation, is the fact that a minority part of its stock is owned by members of the combination sufficient to sustain such a suit, in the absence of proof that such ownership is employed to aid the combination.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.\*]

2. MONOPOLIES (§ 24\*)—ANTI-TRUST ACT—INJUNCTION.

A minority stockholder in a corporation, who is not an officer and takes no part in the management of its business, is not subject to a suit for injunction under Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), because the corporation may be a party to a contract or combination to restrain or monopolize interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.\*]

3. MONOPOLIES (§ 20\*)—ANTI-TRUST ACT—CONSTRUCTION—"COMBINATION IN RESTRAINT OF TRADE."

The provisions of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), making unlawful any combination "in restraint of trade or commerce among the several states" or to monopolize any part of such trade or commerce, do not make every combination in restraint of competition in interstate trade unlawful, but there may be a restraint of competition that does not amount to a restraint of trade within the meaning of the act. On the other hand, a combination cannot escape the condemnation of the act merely because of the form it assumes, and a single corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with such corporation, puts a restraint on interstate commerce, and monopolizes or attempts to monopolize a part of such commerce, in a sense that violates the act.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276; vol. 8, p. 7606.]

4. MONOPOLIES (§ 20\*)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.

In 1872 seven of the largest manufacturers of powder and other explosives in the United States organized what was called the "Gunpowder Trade Association," which, at its meetings and through committees, fixed prices which the constituent members were required to observe under penalty of fines. It also apportioned territory between its members, authorized the cutting of prices in particular localities in order to drive competitors out of the market or force them to come into the association, and apportioned the losses, if any, from such price cutting, between the members. Subsequently other companies were taken into the association, until there were 17 members; and it was continued with some changes in the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fundamental agreement, but none in its purposes or methods, until 1902. At that time E. I. du Pont de Nemours & Co., then the most influential member of the association, passed under a new management, was reorganized into the E. I. du Pont de Nemours Company, and its controlling stockholders and officers inaugurated the policy of acquiring the assets of other corporations and vesting ownership of their plants and the control of their business in their own company. So successfully was this policy carried out, by the use of the methods of the association, that within five years such company had acquired the stock of and caused to be dissolved 64 corporations engaged in the manufacture of powder and other explosives, and controlled from 64 to 100 per cent. of the trade of the United States in the different kinds of explosives sold, and also, directly or through subsidiary corporations, as stockholders, controlled all of the other members of the association which was then dissolved. *Held*, that the formation of such a corporation and its subsidiaries and the adoption of the new policy was merely the continuance in a different form of the illegal association, and that it constituted a combination in restraint of interstate commerce and to monopolize a part of the same, which was unlawful under Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.\*]

**5. MONOPOLIES (§ 26\*)—SUIT TO RESTRAIN UNDER ANTI-TRUST ACT—RELIEF.**

Where an existing combination in corporate form has been adjudged unlawful, as in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and to have monopolized and to be monopolizing a large part of the interstate trade in a particular commodity, it is the duty of the court, under the power conferred by section 4 of the act to "prevent and restrain" its violation, not only to enjoin further violation of the act, but to render its decree effective by dissolving the illegal combination.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 26.\*]

**6. MONOPOLIES (§ 24\*)—SUIT FOR INJUNCTION UNDER ANTI-TRUST ACT—PARTIES.**

To a suit under Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), to restrain violation of the act by corporations alleged to constitute a combination in restraint of or to monopolize interstate commerce, mortgagees of such corporations are not necessary parties, but may be brought in if it appears that their interests will be affected by the decree.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.\*]

In Equity. Suit by the United States against E. I. du Pont de Nemours & Co. and others. Decree of dismissal as to certain defendants, and for the United States as to all others.

John P. Nields, U. S. Atty., George W. Wickersham, Atty. Gen., William S. Kenyon, Asst. Atty. Gen., and James Scarlet and William A. Glasgow, Jr., Sp. Asst. Attys. Gen., for the United States.

Frederic Ullmann, for defendants American Powder Mills, Miami Powder Co., and Ætna Powder Co.

M. B. & H. H. Johnson, for defendant Austin Powder Co.

Frederick Seymour, for defendant Equitable Powder Mfg. Co.

David T. Marvel and David T. Watson, for defendant Henry A. du Pont.

Burton B. Tuttle, for defendant King Powder Co.

John C. Spooner, James M. Townsend, George S. Graham, William S. Hilles, and William H. Button, for remaining defendants.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LANNING, Circuit Judge. This is a suit in equity instituted by the United States under the Sherman anti-trust act against 43 corporate and individual defendants for the purpose of obtaining a decree adjudging the defendants guilty of maintaining a combination or conspiracy in restraint of interstate commerce and of monopolizing or attempting to monopolize such commerce, or a part thereof, and awarding an injunction to prevent and restrain further violations of the act. Thirty-six answers have been filed by 41 of the defendants. Two of the defendants—Austin Powder Company and Metropolitan Powder Company—have filed no answers. The petition and answers fill a volume of over 500 pages. We do not deem it necessary to present a detailed statement of the facts alleged in the pleadings. The petition is so admirably framed and the answers meet the allegations of the petition so fairly that there is no difficulty in determining the issues of fact or of law. Then, too, while the proofs fill a dozen volumes, we have had such valuable aid from counsel in their briefs and their oral arguments that we have easily reached the conclusion that there is no serious controversy as to the essential facts.

The case, as we view it, is to be decided upon evidence about which there is practically no dispute. Our task is by a study of unimpeached documentary and other evidence to ascertain (1) what were the relations of the defendants when this suit was commenced; (2) whether those relations are inimical to the law; and, if so, (3) what the relief shall be. That task will be simplified if, in the first place, we determine which of the defendants are clearly shown to have had no connection at the time of the commencement of this suit with any combination or conspiracy of the nature described in the petition; for, as the only relief we can grant in this proceeding is injunctive, the petition must be dismissed as to any defendant who was not violating the law, or threatening to violate it, when the suit was commenced. One may be indicted for a former connection with a combination or conspiracy violative of the anti-trust act; but, after he has in good faith withdrawn from such a combination or conspiracy, he is no longer a subject of the injunctive power of a court of equity.

Ætna Powder Company of Indiana, Miami Powder Company of Ohio, and American Powder Mills of Massachusetts have filed a joint and several answer, in which they deny that they were parties to any of the agreements mentioned in the petition when this suit was commenced, and aver that, at the time of the commencement of the suit, none of them had any shares of capital stock or other interest in any of the other defendant companies; that, as between themselves, they were not competitors, since one of them was a manufacturer of gunpowder for sporting purposes only, another of black powder for blasting purposes only, and the remaining one of dynamite and fuses only; and that they have not sold and do not sell any of their commodities at prices fixed or dictated by any of the other defendants. The proofs amply support the averments of the answer, and establish the fact to be that, although all of these companies did in former years enter with others of the defendants into certain trade agreements to be more

particularly referred to hereafter, they withdrew therefrom in 1906, and that for at least seven months before the commencement of this suit none of them had any connection, direct or indirect with any of the alleged unlawful combinations set forth in the petition.

It is charged that the Equitable Powder Manufacturing Company was incorporated in January, 1892; that E. I. du Pont de Nemours & Co., a partnership then existing in Delaware, acquired 49 per cent. of its capital stock; that the stock is now held by one of the defendants; that shortly after its incorporation the Equitable constructed a powder mill in Illinois, where it has ever since manufactured and sold in interstate trade gunpowder and other high explosives; that ever since its organization competition in the shipment and sale of gunpowder and other explosives between that company and others of the defendants has been suppressed and eliminated; that the prices for its commodities have been fixed by the parties to the alleged combination; that E. I. du Pont de Nemours & Co., the partnership referred to, and its successors, have ever since dominated and controlled the Equitable by virtue of the ownership of 49 per cent. of its capital stock; and that the Equitable has been and now is a party to the alleged combination. The answer of the Equitable admits that the partnership referred to purchased 49 per cent. of its capital stock, but says the purchase was made from certain of its stockholders four years after its incorporation, and denies that it was a party to the purchase, or that competition between it and other parties had been suppressed or eliminated, or that its prices have been fixed by any other parties to this proceeding, or that its business has been dominated or controlled by the partnership referred to or its successors, or that it has been, or is, a party to any combination or conspiracy. It also avers that it has not been a member of any trade association since July 1, 1903, that it is not, and for a long time before the commencement of this proceeding had not been, a stockholder in any other powder company, and that its business has long been carried on in competition with that of the other defendants and other manufacturers and vendors of black gunpowder and black blasting powder. The evidence of Mr. F. W. Olin, the president of the Equitable, who was called as a witness for the government, establishes the truth of the averments of the answer. There is no doubt that the Equitable withdrew from the Gunpowder Trade Association four years before this suit was commenced, and that it now has no connection whatever with any combination of vendors of explosives. It is true that 490 of its 1,000 shares of capital stock are owned by one or more of the defendant companies; but the averment of the government's petition that the business of the Equitable is dominated and controlled by any combination is not shown to be the fact. A business is not necessarily controlled by the mere purchase of a minority interest in it; nor is there any proof that the Equitable has at any time since July 1, 1903, directly or indirectly aided any of the defendants in efforts to control the trade in explosives, or submitted or been subjected to external coercion of any kind. We are not at liberty, by the extraordinary writ of injunction, to interfere with the ownership of the 490 shares of the Equitable, in the



absence of proof that that ownership is employed to aid the combination described in the government's petition.

Previous to 1897 Austin Powder Company, of Cleveland, Ohio, was a party to several contracts alleged by the United States to have been violative of the anti-trust act; but the only fact affecting that company, alleged in the petition or proved, that existed at the commencement of this suit, is the ownership by one of the other defendant corporations of 266 of the 800 shares of its capital stock. There is no proof that the ownership of this minority interest in the capital stock of the Austin has been used for any unlawful purpose. While the Austin has filed no answer, it appears that, by an agreement with counsel for the government, it reserved the right to move to dismiss the petition as to it.

King Powder Company, of Cincinnati, Ohio, Marcellus Powder Company, of Marcellus, N. Y., and Ohio Powder Company, of Youngstown, Ohio, were incorporated in 1878 and 1881. They erected mills in New York and Ohio, and it is charged that members of the Gunpowder Trade Association waged against them such a destructive warfare that between 1883 and 1886 the prices of explosives within their fields of competition were reduced below the cost of manufacture, that the owners of the capital stocks of the Marcellus and the Ohio companies were compelled to sell their stocks to certain members of the Gunpowder Trade Association, that those two companies were subsequently dissolved, and that King Powder Company was forced into an agreement by which its business was controlled by the Gunpowder Trade Association, which association was formed under an agreement dated April 29, 1872, and continued under other agreements dated August 23, 1886, December 19, 1889, and July 1, 1896. King Powder Company was a party to all these agreements, but we need not here consider their effect, since it conclusively appears that on September 5, 1898, it refused longer to adhere to any "schedule on paper," and declared it should thereafter be guided "by the market price set by our competitors." It appears, also, that on January 29, 1901, King Powder Company entered into a contract by which it agreed to sell to E. I. du Pont de Nemours & Co. of 1899 (a corporation of Delaware which succeeded the partnership of the same name) and Lafin & Rand Powder Company the whole of its output, except what should be used by a certain other company, for the period of 25 years; and it is charged that in April, 1901, these two vendees caused King Mercantile Company to be organized, acquired a majority of its capital stock, and used it as an instrumentality for controlling the output of King Powder Company and eliminating the latter company as a competitor. But it is also unnecessary to inquire into the legality of these transactions, for on December 21, 1906, the agreement of January 29, 1901, was formally rescinded by mutual consent of all the interested parties. There is no proof that King Powder Company, after December 21, 1906, was a party to any trade agreement concerning the manufacture or sale of gunpowder or other explosives. On the contrary, the uncontradicted proof is that for seven months before this suit was commenced King Powder Company was

absolutely independent in the conduct of its business, and during that time neither did anything, nor threatened to do anything, in any wise violative of the anti-trust act.

The plant of Anthony Powder Company, Limited, a partnership association of Michigan, was destroyed in 1906 by an explosion. On June 26, 1907, it issued a call for a stockholders' meeting to convene on July 30, 1907, for the purpose of considering the question of dissolving the association and distributing its assets. On the date last mentioned a resolution to dissolve was adopted. The proceedings to dissolve were in progress when this suit was commenced. It was then doing no business, but was proceeding according to law to wind up its affairs.

The American E. C. & Schultze Gunpowder Company, a corporation of Great Britain, had established, prior to November, 1903, at Oakland, N. J., a plant where it was manufacturing and selling smokeless sporting powder. On November 9, 1903, by a written instrument, it leased its plant to E. I. du Pont de Nemours Powder Company of Delaware for 99 years, at an annual rental of £3,750. sterling, with an option of purchase to the lessee. In 1906 the lease was assigned to the E. I. du Pont de Nemours Powder Company of New Jersey (incorporated under the laws of New Jersey in 1903), which company has elected to purchase the plant, and has already paid a part of the purchase money therefor. We find nothing in these facts, so far as the British company is concerned, violative of the anti-trust act.

The Peyton Chemical Company, a corporation of California, does not appear to have been, at the time of the commencement of this suit or at any other time, engaged in manufacturing or selling explosives of any kind, or to have taken any part in fixing the prices of explosives, or had connection with any scheme for controlling any part of the trade in explosives. It does appear that 3,000 of its 6,350 shares of stock are owned by one of the principal defendants, but that alone is insufficient to warrant injunctive relief as against Peyton Chemical Company.

Henry A. du Pont is one of the individual defendants. Previous to 1902 he had frequently represented E. I. du Pont de Nemours & Co. at the meetings of the Gunpowder Trade Association. In 1902 he sold the major part of his interest in that company to other members of the du Pont family, though he acted for a time thereafter as an officer of two of the du Pont corporations. In June, 1906, more than a year before this suit was begun, he resigned all his official positions in the defendant corporations, and since that time has had neither real nor nominal connection with the management of any of the defendant corporations, or with any trade agreement or combination concerning the manufacture or sale of explosives of any kind. His stockholdings in the defendant corporation, after February, 1902, were comparatively small, and as, after June 8, 1906, he was not a director or officer in any of them, and took no part in the management of any of them, he cannot be held individually responsible for the unlawful acts, if any there were, of any corporation of which he was a stockholder. It was impossible for him alone to dominate the busi-

ness of any of the defendant corporations. There is no evidence that he attempted to do so, or that, after June 8, 1906, he had any connection, direct or indirect, with the shaping of policies or the management of the business of any of them. At the time of commencing this suit he was doing nothing, nor was he threatening to do anything, which furnishes the subject-matter of injunctive relief as against him.

Henry F. Baldwin is another individual defendant, who, it is alleged by the United States, was, at the time of the filing of the petition, a director of one of the du Pont companies and one of the managers of its business. By his answer Baldwin avers that he was a director of the company mentioned for some time previous to June 14, 1907, but that on that day he resigned, and has not since been a director of, or in any way interested in the management or control of, any of the defendant corporations. There is no proof that his answer is incorrect, or that any injunction should be granted as against him.

Before this suit was commenced the capital stocks and properties of other defendant corporations had been acquired by one of the du Pont companies, and they had been dissolved and were no longer in existence. These were the California Powder Works of California, the proceedings to dissolve which were practically completed when this suit was commenced; the Conemaugh Powder Company of Pennsylvania, dissolved April 30, 1906; the Metropolitan Powder Company of California, which has filed no answer and was dissolved September 21, 1905; and the E. I. du Pont Company, incorporated August 1, 1903, under the laws of Delaware, and dissolved July 1, 1907.

For the reasons stated, we think it is clear that the petition should be dismissed as to the following fifteen defendants: Ætna Powder Company, Miami Powder Company, American Powder Mills, Equitable Powder Manufacturing Company, Austin Powder Company, King Powder Company, Anthony Powder Company, Limited, American E. C. & Schultze Gunpowder Company, Peyton Chemical Company, Henry A. du Pont, Henry F. Baldwin, California Powder Works, Conemaugh Powder Company, Metropolitan Powder Company, and E. I. du Pont Company of August 1, 1903.

The remaining defendants are: (1) Hazard Powder Company, a corporation of Connecticut; (2) Laflin & Rand Powder Company, a corporation of New York; (3) Eastern Dynamite Company, a corporation of New Jersey; (4) Fairmont Powder Company, a corporation of West Virginia; (5) International Smokeless Powder & Chemical Company, a corporation of New Jersey; (6) Judson Dynamite & Powder Company, a corporation of California; (7) Delaware Securities Company, incorporated September 20, 1902, under the laws of Delaware; (8) Delaware Investment Company, incorporated September 20, 1902, under the laws of Delaware; (9) California Investment Company, incorporated April 7, 1903, under the laws of Delaware; (10) E. I. du Pont de Nemours & Co. of Pennsylvania, incorporated September 11, 1903, under the laws of Pennsylvania; (11) du Pont International Powder Company, incorporated December 14, 1903, under the laws of Delaware; (12) E. I. du Pont

de Nemours Powder Company, incorporated May 19, 1903, under the laws of New Jersey; (13) E. I. du Pont de Nemours & Co., incorporated February 26, 1902, under the laws of Delaware; (14) Thomas Coleman du Pont; (15) Pierre S. du Pont; (16) Alexis I. du Pont; (17) Alfred I. du Pont; (18) Eugene du Pont; (19) Eugene E. du Pont; (20) Henry F. du Pont; (21) Ireneé du Pont; (22) Francis I. du Pont; (23) Victor du Pont, Jr.; (24) Jonathan A. Haskell; (25) Arthur J. Moxham; (26) Hamilton M. Barksdale; (27) Edmond G. Buckner; and (28) Frank L. Connable.

By its petition the United States considered the combination which it alleges the defendants have maintained with reference to six periods, extending from the year 1872 until the commencement of this suit. We shall consider it with reference to two periods, the first extending from 1872 to February, 1902, and the second from February, 1902, to the commencement of this suit, which was July 30, 1907. We make this division for the reason that in February, 1902, as we shall presently see, there was a very important change in the management of the companies in which the du Pont family had been and then was interested. Tracing the history of interstate commerce in gunpowder and other explosives through these two periods, we shall be able to answer the first of the three questions before us, which is:

[1, 2] First. *What were the relations of the 28 defendants last above named when this suit was commenced?*

Much of the first of the two periods antedates July 2, 1890, when the anti-trust act became a law. We are not debarred, however, from considering the methods by which interstate commerce in explosives may have been controlled before the enactment of that law, for it may be that an examination of those methods will disclose facts which will materially aid us in determining the purpose of the trade agreements and the incorporations that followed the enactment of the law and the real relations of the defendants when this suit was commenced. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. —, decided May 15, 1911. We shall, therefore, in the first place, sketch as briefly as clarity of statement will permit, the history of the interstate commerce in explosives from 1872 to February, 1902.

On April 29, 1872, at a meeting of manufacturers of gunpowder in New York City, there was organized the "Gunpowder Trade Association." Its members, seven in number, were Hazard Powder Company of Connecticut, Laflin & Rand Powder Company of New York, E. I. du Pont de Nemours & Co. (a partnership then existing in Delaware), Oriental Powder Mills of Maine, Austin Powder Company of Ohio, American Powder Company of Massachusetts, and Miami Powder Company of Ohio. Articles of association were adopted providing that the association should be composed of all manufacturers of gunpowder in the United States who were then or might thereafter be admitted thereto; that of its seven members the Hazard Company, the Laflin & Rand Company, and the du Pont partnership should at all meetings of the association be entitled each to ten votes, the Oriental

to six votes, and each of the other three companies to three votes; that the association should meet quarterly for the purpose of establishing prices, if need be, and hearing and deciding appeals, and determining all questions relative to the trade that might be submitted to it; that a council of five persons should be elected; that the council should meet weekly for the consideration and decision of infractions of agreements and questions of discrepancy and deviations from prices in the different home markets; that appeals from the council should be determined and the minimum prices for powder of the various sorts should be fixed by the association; and that funds necessary for carrying out the provisions of the articles should be assessed in proportion to the votes to which the members, under the terms of the articles, were respectively entitled.

On February 11, 1875, at a regular quarterly meeting of the Gunpowder Trade Association in New York City, representatives of all seven of its members being present, a committee was appointed to consult with the California Powder Works in the matter of its entrance into the markets of the Eastern states. At an adjourned meeting on March 17, 1875, the committee reported that an agreement had been made with the California Powder Works regulating the trade of both of the parties, that it was thought best to preserve the agreement amongst the confidential records of the association, and that, in accordance with the terms of the agreement, the association should adopt a series of rules regulating sales and prices of powder in what was called the "neutral ground," being Utah, Montana, Wyoming, Colorado, and New Mexico. By these rules, which the association immediately adopted, certain agents of the companies constituting the Gunpowder Trade Association fixed the prices of powder delivered in the states and territories composing the "neutral ground," the California Powder Works became bound thereby, and a fine was prescribed for every violation of the rules. On May 3, 1876, the committee of the Gunpowder Trade Association previously appointed to confer with the Sycamore Manufacturing Company reported that that company had promised to observe the rates fixed by the association. On August 2, 1876, the association amended the agreement of April 29, 1872, by authorizing fines to be imposed upon its members for violations of the agreement and prescribing a method of procedure for the trial of alleged offenders before the association and the collection of the fines. On February 11, 1880, the California Powder Works and the seven companies composing the Gunpowder Trade Association entered into a new agreement, in lieu of the one dated February 11, 1875, restricting the right of the members of the association to carry on their trade in certain of the Pacific states and territories, and the right of the California Powder Works to trade in any part of the United States east of the "neutral ground," regulating sales within the neutral territory, and fixing the fines to be paid by those who should violate the terms of the agreement. As illustrations of the power exercised by the association under the agreement of April 29, 1872, out of many that might

be mentioned, we refer to some excerpts from the proofs reproduced in the margin.<sup>1</sup>

Previous to August 23, 1886, the Gunpowder Trade Association, composed of the seven members above mentioned, heard and disposed of several hundred complaints of violations of the agreements above referred to and imposed many fines. Other companies, not parties to those agreements, had for some years been waging a warfare with the members of the Gunpowder Trade Association. Among these were the Sycamore Manufacturing Company of Tennessee, the Lake Superior Powder Company of Michigan, the King's Great Western Powder Company (whose name was subsequently changed to the King Powder Company) of Ohio, the Ohio Powder Company of Ohio, and the Marcellus Powder Company of New York. On the date last mentioned (August 23, 1886) these five companies united with the seven companies who had formerly constituted the Gunpowder Trade Association in a new trade agreement the purpose of which, as expressed in its language, was to regulate the business of the parties thereto, including the prices at which powder should be sold, to the end that the parties might avoid unnecessary loss by "ill-regulated or unau-

<sup>1</sup>At a special meeting of the Gunpowder Trade Association on October 18, 1876, the following resolutions were adopted:

"Whereas, the reduced prices for blasting powder recently made by certain parties in the coal fields of Ohio, Illinois, and Iowa not only tend to demoralize the general trade but to impair the proper interests of this Association: It is therefore deemed advisable to adopt the following:

"Resolved—That the price of blasting powder in the Youngstown district, which includes the counties of Trumbull and Mahoning, Ohio, and Mercer and Lawrence, Penn., also the Akron and Massillon districts, comprising the coal fields of Summit, Medina, Wayne, Stark, Tuscarawas counties, Ohio, be fixed at \$2.50 per keg—car load lots at \$2.40 per keg.

"Resolved—That the price of blasting powder in the coal districts of Illinois and Iowa be \$2.60 per keg, car load lots \$2.50 per keg.

"Resolved—That the foregoing resolutions apply to the consumption in the coal fields only in the states mentioned, that they are passed in self-defense for mutual protection, and to the intent that each associate may be enabled to hold his own trade.

"Resolved—That the Hazard Powder Company be permitted to sell blasting powder as low as \$2.00 per keg in the Middlefield district.

"Resolved—That the committee on prices be authorized in their judgment to revise and regulate prices at all points where cuts are made or attempted by any outside parties—notice of such change in prices to be wired to each associate not less than twenty-four hours before the same goes into effect."

At the stated meeting of the association on February 5, 1879, the following was adopted:

"On motion of Col. du Pont, that prices at Memphis, Nashville, and such other points as are affected by the prices of King's powder, be modified as the price committee shall decide."

The compendium of rules of June 1, 1881, contained the following:

"Associates not already in the enjoyment of trade in the Lake Superior district shall refrain from selling powder therein, or to go to that district. Lake Superior Powder Co. to confine its sales of powder to consumers within its proper district."

On August 3, 1881, the association adopted the following:

"On motion, that each associate shall instruct in writing his representative agent at Denver not to sell any powder to agents of the Giant Powder Co. at any price."

thorized" competition. The agreement excepted from its operation trade with foreign countries, with the government of the United States, and with parties within the anthracite regions\* of the state of Pennsylvania, apportioned amongst its twelve parties the maximum yearly trade allowed to them respectively, provided for a supplementary agreement with the California Powder Works concerning sales in the Pacific states and the "neutral territory," provided for sworn statements of sales to be delivered annually by each of the twelve parties to designated representatives, created a board of arbitration to settle disputes between the parties, provided for the execution of supplementary agreements relating to prices to be maintained for the sales of powder and the general harmonious arrangement of the powder trade, and also provided, finally, that since the Laffin & Rand Powder Company, one of the twelve parties to the agreement, owned a majority of the capital stock of the Schaghticoke Powder Company the former company would guarantee that the latter company would respect and comply with the provisions of the agreement as though it were a party thereto, and that all sales by the Schaghticoke Powder Company should be considered as sales of the Laffin & Rand Powder Company. Supplementary agreements were subsequently entered into with the California Powder Works and by the agents of the parties to the agreement of August 23, 1886, for the regulation of the powder trade in particular localities. New Orleans, Louisville, Cincinnati, and Chattanooga, especially, were affected by such supplementary agreements. It is not improbable that there were other supplementary agreements affecting other places, for it appears that the agreements were furnished in printed blank forms. Their purpose was to regulate the trade by establishing and maintaining uniform prices and giving effect to the principal agreement of August 23, 1886.

The agreement of August 23, 1886, expired by its own terms on December 31, 1889. In anticipation of its expiration the same twelve parties who had executed it, on December 19, 1889, executed a new agreement, called the "Fundamental Agreement," for a term beginning January 1, 1890, and ending June 30, 1895, with an added provision that it should continue thereafter from year to year unless terminated in the manner therein provided for. As this Fundamental Agreement continued to be observed with more or less fidelity by the parties to it, not only before but for several years after the enactment of the anti-trust act, its provisions are of especial interest. Its principal parties were the copartnership, E. I. du Pont de Nemours & Co., and the corporations, Hazard Powder Company and Laffin & Rand Powder Company. These three parties were, in some of the provisions of the agreement, grouped as one collective party and called the "Three Companies." The agreement recited that the twelve parties made and sold gunpowder for blasting or sporting purposes, or both, and declared its purpose to be to regulate in a convenient and desirable manner the business of the parties thereto, to avoid unnecessary loss in the

sale and disposition of their powder by "ill-regulated or unauthorized competition and underbidding of the agents of the parties" thereto, and to protect consumers and the public from unjust fluctuations in prices and from unjust discriminations. It excepted from its operation trade with foreign countries, trade with the government of the United States, and trade in blasting powder in the anthracite regions of Pennsylvania. The portion of the United States subject to the operation of the agreement was divided into seven districts, within each of which, it was declared, uniform prices should generally prevail. Yearly allotments of trade were made to the "Three Companies" as one collective party, and to each of the other nine parties. The trade in the "neutral belt" and in certain of the Pacific states was to be regulated by a supplementary agreement with the California Powder Works. Periods for settlements in the division of trade were fixed, and sworn statements of sales were required to be furnished by each of the parties (the "Three Companies" being considered as one party) to the board of trade, a body established by the agreement, whose duty it was, *inter alia*, to adjust the differences in sales according to the money values permitted to each party in the division of trade, and to require payment into the treasury of the association by the debtor parties and make distribution thereof amongst all parties according to their rights under the agreement. The board of trade consisted of five members, who were elected by the parties to the agreement at their annual meetings. The board was required to meet quarterly, and was authorized to fix prices, to vary or change the same at any time and for any place, to meet contingencies for the protection of the common interests of the parties to the agreement, to enforce rules and regulations adopted by the parties by any measure it might deem necessary, and to hear and adjudge cases of grievances. General meetings of the parties to the agreement were provided for, and the association at any of its general meetings was authorized to review or reverse the acts of the board of trade and to instruct it upon any matter. It was also provided that any party to the agreement who should suffer excessive loss by an overt act of the board of trade—as by the reduction of a price at a place in treatment of a "local disturbance of trade"—should receive such compensation for the damage sustained by it as might be recommended by the board of trade and agreed to at a general meeting. Supplementary agreements by the parties were authorized relating to the fixing of prices and the control of the trade. It was further agreed that sales by the Schaghticoke Powder Company should be considered as sales of the Laffin & Rand Powder Company and the latter company guaranteed compliance with the provisions of the agreement by the Schaghticoke Company.

In 1895 the copartnership, E. I. du Pont de Nemours & Co., and the Laffin & Rand Powder Company, who then owned a majority of the capital stocks of the Repauno Chemical Company and the Hercules Powder Company, decided to consolidate those two com-



panies and the Atlantic Dynamite Company in one corporation, called the Eastern Dynamite Company, which they caused to be organized under the laws of New Jersey with an authorized capital stock of \$2,000,000 (200,000 shares), all of which was issued to the stockholders of the three companies thus brought into subsidiary relations to the Eastern Dynamite Company. By this amalgamation of interests centralization of control of the dynamite business previously carried on by the three companies was secured. Later the Eastern Dynamite Company purchased the stocks of a large number of other powder, dynamite, and chemical companies, and thereby obtained control of them.

Previous to July 1, 1896, the Chattanooga Powder Company, with mills in Tennessee, the Equitable Powder Manufacturing Company, of New Jersey, with a plant in Illinois, the Southern Powder Company, having mills in Georgia, and the Phoenix Powder Manufacturing Company, of West Virginia, with mills in New Jersey, West Virginia, and Illinois, developed competing businesses with one another and with the parties to the Fundamental Agreement of December 19, 1889. Against them, the Hazard, the du Pont, and the Sycamore companies carried on a sharp contest. Negotiations with their representatives, in May, 1896, resulted in allotments of the trade to them, and on August 20, 1896, these four companies, with the California Powder Works and the twelve parties to the Fundamental Agreement of December 19, 1889, being seventeen parties in all, entered into another Fundamental Agreement concerning the manufacture and sale of powder for blasting and sporting purposes, which was dated July 1, 1896, and was in its general terms not unlike the agreement of December 19, 1889. Some time between August 20 and September 24, 1896, however, the board of trade was supplanted by what was thereafter known as the "advisory committee."

On October 26, 1897, an agreement was entered into by ten American manufacturers, eight of whom were parties to the agreement of July 1, 1896, and two European manufacturers, which related to explosives of all kinds, provided that the European parties should not complete works then building in New Jersey, and that the American parties should bear all expenses theretofore incurred in connection therewith, contained mutually restraining provisions as to the erection of factories in the United States and Europe, divided the trade of the world territorially between the American and the European parties, contained provisions for fixing prices, provided a fund for the purpose of protecting the common interest against outside competition, fixed fines and penalties for breaches of the agreement, and contained sundry other provisions for the regulation and control of the trade. This agreement was in existence throughout the period of the war with Spain and until 1906.

On October 21, 1899, the E. I. du Pont de Nemours & Co. was incorporated under the laws of Delaware with an authorized capital stock of \$2,000,000. The incorporators of this company were the members of the previous copartnership of the same name—Eugene

du Pont, Francis G. du Pont, Henry A. du Pont, Alexis I. du Pont, Charles I. du Pont, and Alfred I. du Pont. The business and property of the copartnership were sold to the corporation, and each partner received a proportion of the capital stock equal to his interest in the copartnership. Eugene du Pont had been the manager of the partnership business for 10 years. He naturally became the president of the corporation. He was also a member of the advisory committee of the associated manufacturers for years prior to January, 1902, in which month he died. Upon Eugene's death the remaining stockholders, excepting Alfred, were strongly disposed to sell out to the Laflin & Rand Powder Company. Alfred solicited the interest of Thomas Coleman du Pont and Pierre S. du Pont, neither of whom had theretofore been interested in the business, and these three persons—Alfred, Thomas, and Pierre du Pont—made to the stockholders an offer to purchase, which was accepted. Thus was it that in February, 1902, the du Pont powder industry passed into the control of those who at present dominate it. For 30 years trade agreements had been in existence, in every one of which the du Ponts were active parties. There were times when the parties to these agreements broke away from and disregarded them, but usually the fines and penalties imposed on the violators preserved the integrity of the organization. The association of manufacturers of powder and other explosives had probably never been stronger than it was in February, 1902, when the change in the management of the du Pont works took place. It had for years arbitrarily fixed prices in the different parts of the United States, waging a disastrous warfare against competitors until they were coerced into terms satisfactory to the association or brought into the association. In express language, the trade agreements disclosed the purpose of fixing prices, and at the meetings of the association, and of its council, board of arbitration, board of trade, and advisory committee, measures were often devised to limit the output of the members of the association and to crush competition by manufacturers not members of the association. When Thomas Coleman du Pont, Pierre S. du Pont, and Alfred I. du Pont purchased the du Pont business, they came into possession of a business that had been developed under trade agreements which the learned counsel for the defendants admit contravene at least the first section of the anti-trust act. One of these agreements—the one dated July 1, 1896—was still in force, and it is important to know how the associated parties conducted their business affairs after the death of Eugene du Pont in January, 1902.

On February 26, 1902, Thomas Coleman, Pierre S., and Alfred I. du Pont caused to be organized, under the laws of Delaware, a new corporation, called E. I. du Pont de Nemours Company with an authorized capital stock of \$20,000,000. This new company (hereafter called the du Pont Company of 1902) then issued its promissory notes for the sum of \$12,000,000 and 119,970 shares of its capital stock, whose par value was \$11,997,000, to E. I. du Pont de Nemours & Co. of 1899 for the property, assets, and good will of the latter company, excepting certain parcels of its real estate, and the stockholders

of the latter company amongst whom the notes and stock of the new company had been distributed in proportion to their holdings of stock in the company of 1899, caused 89,400 shares of the stock of the new company to be transferred to Thomas Coleman, Pierre S., and Alfred I. du Pont. The stock so transferred to these three gentlemen gave them the control of the du Pont Company of 1902, and that control they have ever since had. About 40 per cent. of the property acquired from the corporation of 1899 by the du Pont Company of 1902 consisted of five plants used in manufacturing and selling the du Pont explosives, namely, one at Wilmington, Del., one at Sycamore, Tenn., one at Mooar, Iowa, one at Carney's Point, N. J., and one in the anthracite region of Pennsylvania. About 60 per cent. consisted of stocks in other corporations which manufactured and sold explosives of various kinds. It owned all of the stock of the Hazard Powder Company, consisting of 10,000 shares, which company had but one operating plant; the greater part of its assets consisting of stocks in other companies. The du Pont Company of 1902 was therefore at first both a holding and an operating company. Its interest as a holding company exceeded its interest as an operating company. Indeed, its interest as an operating company continued but little over a year, for by October 1, 1903, it had conveyed all its tangible assets to other corporations for the stocks of those corporations. On April 2, 1902, Thomas Coleman du Pont, president of the du Pont Company of 1902, was elected a member of the advisory committee of the association organized under the trade agreement of July 1, 1896. On October 2, 1902, at the annual general meeting of the manufacturers' association, Mr. T. C. du Pont being in the chair, a revised compendium of rules was recommended to the advisory committee for adoption and on November 7th that committee adopted the compendium. It authorized the advisory committee to appoint a special committee which should have authority, between the meetings of the advisory committee, to increase rebates on existing contracts for blasting powder and to recommend sales below the schedule prices to buyers under contract, and contained other drastic provisions for eliminating competition and controlling the trade. Mr. T. C. du Pont was a member of this special committee. At this time the du Pont Company of 1902 owned stocks in the Austin Powder Company, Birmingham Powder Company, California Powder Works, Chattanooga Powder Company, Consumers Powder Company, Eastern Dynamite Company, Enterprise Powder Company, Equitable Powder Manufacturing Company, Fairmont Powder Company, Indiana Powder Company, Laffin Powder Manufacturing Company, Lake Superior Powder Company, Mahoning Powder Company, Northwestern Powder Company, Ohio Powder Company, Oriental Powder Mills, and Phoenix Powder Manufacturing Company. It owned, as above stated, all the capital stock of the Hazard Powder Company, and that company owned stocks in the Eastern Dynamite Company, Hecla Powder Company, Lake Superior Powder Company, Ohio Powder Company, Oriental Powder Mills, and Phoenix Powder Manufacturing Company. Of these companies the du Pont Company of 1902 controlled only the Fairmont

and the Oriental. Pierre S. du Pont says that he and his associates felt, at the time they took over the property of the du Pont Company of 1899, that they commanded but little of the business of these other corporations. In the course of their investigations they discovered that the Laflin & Rand Powder Company was largely interested by reason of its stockholdings in many of these other corporations, and that the du Pont Company of 1902 and the Laflin & Rand Company, together, could control them. He declares that their plants were pretty thoroughly scattered about the country and were well located, that freights on explosives are very high, so that it is impossible to ship them to any great distance without undue expense, and that the plants were desirable ones to control. The plan was then conceived of purchasing the capital stock of the Laflin & Rand Powder Company, consisting of 10,000 shares, which company, it will be remembered, had been a party to each of the trade agreements of April 29, 1872, August 23, 1886, December 19, 1889, and July 1, 1896, and had participated in the enforcement of the methods of the association of manufacturers for the elimination of competition and the control of the trade. If the du Pont Company of 1902 and the Hazard and the Laflin & Rand companies could be united in corporate form it was as apparent then as it is now that the advantages that had been obtained under the trade agreements could be more firmly and more certainly retained. Accordingly, the following plan for securing control of the Laflin & Rand Company was devised:

On September 20, 1902, under the laws of Delaware, there were organized the Delaware Securities Company, with an authorized capital stock of \$8,000,000, and the Delaware Investment Company, with an authorized capital stock of \$2,500,000. Of certain persons, who held 5,524 shares, or a majority, of the stock of the Laflin & Rand Company, a part also held 950 shares of the stock of the Moosic Powder Company. That part refused to sell their holdings in the Laflin & Rand Company unless the purchaser would also take the 950 shares of the Moosic stock. Accordingly, T. C. du Pont obtained an option on the majority of the stock of the Laflin & Rand Company and on the 950 shares of the Moosic stock. In payment for the 5,524 shares of the Laflin & Rand stock and for his services T. C. du Pont, who, under his option, had acquired the 5,524 shares of the Laflin & Rand stock, received from the Delaware Securities Company \$3,998,000 (par value) of its stock and \$2,209,600 of its bonds; that is to say, over \$1,100 in such stock and bonds for each share of the stock of the Laflin & Rand Company. Much the larger part of the stock of the Delaware Securities Company, and therefore the control of that company, was transferred to the du Pont Company of 1902. In payment for the 950 shares of the Moosic stock and for his services T. C. du Pont, who, under his option, had acquired that stock also, received from the Delaware Investment Company \$2,498,000 (par value) of its stock and \$2,500,000 of its bonds, of which stock much the larger part, and therefore the control, was transferred to the du Pont Company of 1902. The bonds of the Delaware Securities Company and the Delaware Investment Company were secured by the Laflin & Rand stock and the Moosic stock so purchased, and by stock of the East-

ern Dynamite Company, the Hazard Powder Company, and the du Pont Company of 1902, loaned for that purpose by T. C. du Pont. By this arrangement it will be observed the Laffin & Rand Company was controlled by the Delaware Securities Company, and the Delaware Securities Company by the du Pont Company of 1902. At the time of this purchase the Laffin & Rand Company owned 1,410 of the 3,000 shares of the Moosic; consequently, the acquisition of the additional 950 shares of the Moosic, whose par value was \$95,000, and for which was paid stock and bonds of the par value of \$4,998,000, gave to the du Pont Company of 1902 control, also, of the Moosic Powder Company. This was a seemingly excessive price to pay for such control, and is strong evidence of a purpose to destroy competition and promote monopoly; for in less than a year afterward the whole of the capital stock of the Moosic Powder Company (\$300,000) was transferred to E. I. du Pont de Nemours & Co. of Pennsylvania for \$889,458.95 of the stock of the holding company.

Some time previous to 1902 the Fairmont Powder Company had been organized under the laws of West Virginia. The combination then existing under the trade agreement of July 1, 1896, instituted a contest against the Fairmont. Prices were reduced and in the year 1902 the du Pont Company of 1902 obtained the Fairmont's stock. These transactions were completed in October, 1902; that is, in the same month in which the revised compendium of rules for the government of the associated companies, above referred to, went into effect. Mr. T. C. du Pont, one of the purchasers of the du Pont business in February, 1902, without previous experience in the powder or explosives business, but with an ability that commands high admiration, succeeded, within the period of six months after his election as a member of the advisory committee of the associated companies, in cementing the principal parties to the trade association in a union much more able to cope with competitors and to secure control of the trade in powder and other explosives than any of the associations that had preceded it. The effects of the consolidation were soon evident. In December, 1902, Mr. Arthur J. Moxham, then president of the Hazard Powder Company, delivered an address at a general meeting of the associated companies in which, after reviewing the history of the explosives trade for some years and concluding that the advance in prices from 1896 to 1902 had been too small, he said:

"It does not suffice to say that at to-day's prices there is a fair margin of profit, because the fact is that at to-day's prices there ought to be something more than a fair margin. There should be a heavy margin of profit, and in the fact that there is not we see a menace to the future of the business. The present phenomenal prosperity cannot last. If past history is to guide us, we must assume that it will be followed by a period of reaction. During this period of reaction the price of powder must come down heavily. When the demand comes from our customers to reduce the price when everything else is being reduced, it will be no answer to say that we did not advance it when we could. During periods of depression the purchaser, not the seller, is in control of the market, and the irresistible logic of all past history shows that his control is absolute. In a country of such trade irregularities as that of the United States, it is only by a high profit during periods of prosperity that a fair return to capital can be maintained in face of the minimum that follows the period of trade distress."

His recommendation, therefore, was that prices should be advanced, and they were advanced immediately in nearly the whole of the United States, thus showing the confidence of the associated companies in their ability to control the explosives business in this country.

In 1903 the Consumers' Powder Company, the Enterprise Powder Manufacturing Company, the Moosic Powder Company, and the Oliver Powder Company, all corporations of Pennsylvania, were merged into E. I. du Pont de Nemours & Co. of Pennsylvania, the capital stock of the last-mentioned company having been increased for that purpose from \$20,000 to \$2,000,000 and a majority of it being now owned by the next-mentioned company. On May 19, 1903, the E. I. du Pont de Nemours Powder Company (hereafter called the du Pont Company of 1903) was organized under the laws of New Jersey, with an authorized capital of \$50,000,000 of preferred and common stock. Thereupon the du Pont Company of 1902 assigned all its stockholdings in other companies (about 35 of them) to the du Pont Company of 1903, and took in exchange therefor \$30,200,000 (a majority) of the preferred and common stock of the du Pont Company of 1903. In 1903, also, the California Investment Company was organized under the laws of Delaware with an authorized capital stock of \$400,000, the majority of which stock is now owned by the du Pont Company of 1903, and through it the du Pont Company of 1903 obtained control of the Judson Dynamite & Powder Company, a corporation of California, with its authorized capital stock of \$2,000,000. In December, 1903, the du Pont International Powder Company was organized, under the laws of Delaware, with an authorized capital stock, preferred and common, of \$10,000,000, the majority of which is owned by the du Pont Company of 1903. Through the du Pont International Company the du Pont Company of 1903 acquired control of the International Smokeless Powder & Chemical Company with its issued preferred and common stock of \$9,600,000, which acquisition gave it control of all the trade in military smokeless and ordnance smokeless powders except the part of the trade due to certain powders manufactured by the United States government.

The advisory and special committees of the trade association held numerous meetings between September 24, 1896, and June 30, 1904. Eugene du Pont had been one of the members of the advisory committee and had participated in its clearly revealed policy of acquiring control of the explosives trade under the trade association agreement of July 1, 1896—an agreement which, as previously stated, counsel for the defendants have frankly conceded violated the anti-trust act. There was no diminution of effort to perfect such control after Eugene du Pont's death. On the contrary, after Thomas Coleman, Pierre S., and Alfred I. du Pont had come into the management of the du Pont business, and Thomas Coleman du Pont had been elected as the successor of Eugene in the advisory committee, and become a member of the special committee, the advisory and special committees, as above stated, continued their meetings and fixed special prices and special rebates in multitudes of cases and apportioned the trade in explosives amongst the members of the trade association. In a letter

from the secretary of the special committee to the secretary of the advisory committee, dated as late as June 16, 1904, it appears that the former committee recommended special prices for certain contracts entered into by one of the du Pont companies, and by the Hazard, Laffin & Rand, Oriental, Ohio, Birmingham, Miami, Chattanooga, Phoenix, and Indiana Powder companies, with varying allowances for rebates from the prices so fixed. This policy of fixing prices in particular cases, affecting particular localities, was one which the independent manufacturers of explosives could not easily cope with. The evidence shows that in October, 1905, a committee of independent powder and dynamite manufacturers met Mr. Jonathan A. Haskell, president of the Laffin & Rand Powder Company and vice president of the du Pont Company of 1903, and Mr. Charles Patterson, director of sales for the du Pont Company of 1903, for a conference concerning the low prices at that time prevailing. Mr. Koller, one of the members of the committee of the independents, says that at the conference Mr. Haskell declared that in the past the policy of the interests represented by him had been to buy up plants, but that in the future the "survival of the fittest" would determine who should have the trade. Mr. Haskell admits that he informed this committee that the interests represented by him had discontinued the practice of making agreements to fix prices, and he adds in his testimony that the change in policy was made in 1904.

After the incorporation of the du Pont Company of 1903, a sales board was created. This board, composed of a director of sales and assistant directors, coexisted with the advisory and special committees until June 30, 1904, when the committees were superseded by the sales board, which thereafter exercised the power of fixing prices and policies for the corporations that had, by the methods already outlined, been brought together under one corporate management. In July, 1904, there was no further need of advisory or special committees, or of the trade association formed under the agreement of July 1, 1896. All the advantages of the trade association agreement were now much better secured by the series of corporate transmutations that had followed the introduction of T. C. du Pont and Pierre S. du Pont into the explosives business. Between 1902 and the commencement of this suit in July, 1907, many of the corporations whose property and business had been acquired by the above-mentioned methods were dissolved, and thereby the relations of the combined companies were simplified and the assurances of the perpetuity of their power were increased. We have verified the tabulated statement contained in the brief for the government, and we find that in 1907 the du Pont Company of 1902, through its subsidiary corporation, controlled in the United States of the trade in—

Black blasting powder.....	64	per cent.
Salt peter blasting powder.....	72	" "
Dynamite .....	72	" "
Black sporting powder.....	73	" "
Smokeless sporting powder.....	64	" "
Smokeless military and ordnance powder, exclusive of what the U. S. government itself made.....	100	" "

Certain exhibits furnished by the defendants show that previous to September 22, 1907, the du Pont Company of 1903 and the Eastern Dynamite Company had acquired control of 64 different corporations which between April 30, 1904, and September 22, 1907, they caused to be dissolved. The names of these corporations, with the dates when they were respectively dissolved, are stated in the margin.<sup>2</sup> The petition of the government charges that the policy of acquiring the assets of other corporations and then dissolving them was for the purpose of establishing a monopoly in one corporation. The du Pont Company of 1902, the du Pont Company of 1903, Thomas Coleman du Pont and Pierre S. du Pont admit, by their joint and several answer, that their policy was eventually to vest absolute ownership of all the plants, manufactories and tangible property acquired by the methods above mentioned in one corporation, and then to dissolve the subsidiary corporations. They say, further, that as soon as they can legally do so it is their purpose to dissolve the Laffin & Rand Powder Company, the Hazard Powder Company, the Eastern Dynamite Company, the Delaware Securities Company, and the Delaware Investment Company. It is perfectly clear that in 1902 the plan was originated of bringing under one corporate control as many as possible of the corporations engaged in the explosives business. The achievement of the object was the easier because of the

<sup>2</sup> The following is a list of corporations, controlled by the du Pont Company of 1903 and the Eastern Dynamite Company, with the dates when they were dissolved. The list is extracted from Government Exhibits 391 and 392, which the defendants prepared:

Blue Ridge Powder Co.....	Dissolved April 30, 1904.
U. S. Dynamite Co.....	" " " "
Laffin Powder Mfg. Co.....	" May 2, "
Hudson River Powder Co.....	" June 3, "
Acme Powder Co.....	" " 30, "
Columbia Powder Co.....	" " " "
Dittmar Powder & Chemical Co.....	" " " "
Mt. Wolf Dynamite Co.....	" " " "
Rock Glycerine Co.....	" " " "
Sterling Dynamite Co.....	" " " "
Atlantic Dynamite Co. of N. J.....	" " " "
" " " N. Y.....	" " " "
Hecla Dynamite Co.....	" " " "
Hercules Powder Co.....	" " " "
Repauno Chemical Co.....	" " " "
Repauno Mfg. Co.....	" " " "
Clinton Dynamite Co.....	" July 1, "
A. Kirk & Son Co.....	" " " "
Robina Fuse Co.....	" " " "
Weldy Dynamite Co.....	" " " "
Oliver Dynamite Co.....	" " " "
Monarch Powder Co.....	" Aug. 1, "
Forcite Powder Co. of N. J.....	" Jan. 1, 1905.
" " " N. Y.....	" " " "
New York Powder Co. of N. J.....	" " " "
" " " N. Y.....	" " " "
Electric Powder Co.....	" Jan. 31, "
Joplin Powder Co.....	" March 1, "
Shenandoah Powder Co.....	" " " "
Brooklyn Glyc. Mfg. & Ref. Co.....	" April 30, "



conditions created by the existence from July 1, 1896 of the trade association formed under the agreement of that date. Before 1902 the plan was to destroy competition and obtain a monopoly by the enforcement of drastic provisions in trade agreements, and from 1902 to 1907 it was to achieve the same ends by substituting corporate forms and powers for trade agreements. The success of the plan is evident. Pierre S. du Pont, in his testimony given October 21, 1909, said that the du Pont Company of 1903 had then paid dividends amounting to \$11,000,000 and had a surplus in its treasury of \$12,000,000 or \$13,000,000. It is true that many of the corporations brought into the combination were not large. A considerable number of them, possibly, did little, if any, interstate trade. It is not denied, however, that many of them carried on an extensive commerce among the states. Indeed, it conclusively appears that it is a common practice for manufacturers of explosives to ship their products, dangerous and expensive as the business is, from state to state, and for a manufacturer in one part of the country to ship his products to, and sell them in, other parts in competition with manufacturers there. Shipments by the Hazard Powder Company from Connecticut to Georgia and Alabama to compete there with the Chattanooga and other powder companies are examples of interstate trade disclosed by the evidence.

Pennsylvania Torpedo Co.....	Dissolved	April	30,	1905.
A. S. Speece Powder Mfg. Co.....	"	"	"	"
Giant Mfg. Co.....	"	June	30,	"
Standard Exp. Co., Limited.....	"	"	"	"
Metropolitan Powder Co.....	"	Sept.	21,	"
Climax Powder Mfg. Co.....	"	"	22,	"
Explosives Supply Co.....	"	"	"	"
American Stor. & Deliv. Co.....	"	"	"	"
Atlantic Mfg. Co.....	"	"	"	"
Hudson River Wood Pulp Mfg. Co.....	"	"	"	"
National Torpedo Co.....	"	"	"	"
Producers Powder Co.....	"	"	"	"
Chattanooga Powder Co.....	"	"	"	"
Lake Superior Powder Co.....	"	"	"	"
Ohio Powder Co.....	"	"	"	"
American Forcite Powder Mfg. Co.....	"	"	30,	"
Hecla Powder Co.....	"	"	"	"
Anthracite Powder Co.....	"	"	"	"
Globe Powder Co.....	"	"	"	"
Marcellus Powder Co.....	"	"	"	"
H. Julius Smith Elec. Fuse Co.....	"	Dec.	31,	"
James Macbeth & Co.....	"	"	"	"
Phoenix Powder Mfg. Co.....	"	"	"	"
Conemaugh Powder Co.....	"	April	30,	1906.
Enterprise High Explosive Co.....	"	July	1,	"
Schaghticoke Powder Co.....	"	Nov.	1,	"
California Vig. Powder Co.....	"	"	28,	"
California Powder Works.....	"	Jan.	1,	1907.
Western Torpedo Co.....	"	"	"	"
Oliver Powder Co.....	"	March	25,	"
Thompson Torpedo Co.....	"	April	27,	"
E. I. du Pont Co.....	"	July	1,	"
King Mercantile Co.....	"	"	"	"
Mahoning Powder Co.....	"	Sept.	22,	"

Summarizing the facts as to the relations of the 28 defendants, which are the subject of our present inquiry, we find that:

The Hazard Powder Company has issued 10,000 shares, all of which are owned by the du Pont Company of 1903.

The Laflin & Rand Powder Company has issued 10,000 shares, of which at least 5,524 shares are owned by the Delaware Securities Company, and almost the whole of the stock of the latter company is owned by the du Pont Company of 1903.

The Eastern Dynamite Company has issued 20,000 shares, of which the majority is owned by the Hazard, the Laflin & Rand, and the du Pont Company of 1903.

The Fairmont Powder Company has issued 750 shares, of which the majority is owned by the du Pont Company of 1903.

The International Smokeless Powder & Chemical Company has issued preferred and common stock to the amount of \$9,600,000, the majority of which, through the du Pont International Powder Company, is controlled by the du Pont Company of 1903.

The Judson Dynamite & Powder Company has issued 20,000 shares which are owned by the California Investment Company. The stock of this latter company is owned by the du Pont Company of 1903.

The Delaware Securities Company, created for the acquisition of stock of the Laflin & Rand Powder Company, has an authorized capital stock of 80,000 shares, of which a majority is owned by the du Pont Company of 1903.

The Delaware Investment Company, created for the acquisition of 950 shares of the Moosic Powder Company, has an authorized capital stock of 25,000 shares, of which the majority is owned by the du Pont Company of 1903.

The California Investment Company, created for the acquisition of the stock of the Judson Dynamite & Powder Company, has an authorized capital stock of 4,000 shares, a majority of which is owned by the du Pont Company of 1903.

E. I. du Pont de Nemours & Co. of Pennsylvania has an authorized capital stock of 20,000 shares, the majority of which was issued for stocks in subsidiary corporations in Pennsylvania, and passed ultimately into the control of the du Pont Company of 1902 and then into the control of the du Pont Company of 1903.

The du Pont International Powder Company has an authorized capital stock of \$10,000,000, preferred and common, a majority of which is owned by the du Pont Company of 1903.

The du Pont Company of 1903 is the owner of the capital stocks, or a majority of the capital stocks, of the corporations above mentioned.

The du Pont Company of 1902 is the owner of the capital stock of the du Pont Company of 1903, and therefore controls all twelve of the above-mentioned corporations as its subsidiaries.

The defendants Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry F. du Pont, Irene du Pont, Francis I. du Pont, Victor du Pont, Jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M.

Barksdale, and Frank L. Connable are each directors of the du Pont companies of 1902 and 1903, or of one of them. Thomas Coleman du Pont is also president of both of them. Edmond G. Buckner is an active director of the International Smokeless Powder & Chemical Company.

It is clear that these 28 defendants are associated in a combination for carrying on interstate commerce in powder and other explosives.

[3] We come, therefore, to the consideration of the second question, which is:

Second. *Is the combination which we have found to exist one that is obnoxious to the provisions of the anti-trust act?*

The act declares that every combination, in the form of a trust or otherwise, in restraint of trade or commerce among the several states, is illegal, and that it is a crime for any person to monopolize, or attempt to monopolize, or combine with others to monopolize, any part of such trade or commerce. From early times it has been a rule of the courts not to construe a legislative act in a literal manner, where it is clear that by such construction the legislative purpose will be defeated. A statute which treats of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," if literally construed would apply to bishops; but by the application of the "rule of reason" bishops are excluded from the terms of such an act because, being of a higher order than any of the functionaries specifically mentioned, it is concluded that the legislative purpose does not extend to bishops. "If an act of Parliament gives a man power to try all causes that arise in his manor of Dale, yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel." 1 Black. Com. 91. In *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, the Supreme Court had before it the construction of the act which declares it to be—

"unlawful for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia."

The question was whether the act was applicable to a contract between Holy Trinity Church and an alien, by which the alien agreed to remove from England to New York and enter into the service of the church as its rector and pastor. Mr. Justice Brewer, speaking for the court, said:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants,

strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

A number of bills were introduced in the Fiftieth Congress (in August and September, 1888), designed to make unlawful every combination "to prevent competition" and "to prevent full and free competition" in the sales of articles transported from one state to another. None of them was enacted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-First Congress a bill which declared unlawful every combination "to prevent full and free competition" in such sales. After much debate the bill was, on March 27, 1890, referred to the committee on judiciary, and on April 2, 1890, that committee reported it back to the Senate with an amendment striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination "to prevent competition." What it condemns is every combination in restraint of trade or commerce among the several states, etc. When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of "preventing competition" either in the purchase or sale of commodities; but the amendment was disagreed to. While there is a "general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body" (*United States v. Freight Association*, 166 U. S. 318, 17 Sup. Ct. 540, 41 L. Ed. 1007), that rule "in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted" (*Standard Oil Co. v. United States*, 221 U. S. 50, 31 Sup. Ct. 512, 55 L. Ed. —, decided May 15, 1911).

There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the anti-trust act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate

trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain "trade or commerce among the several states." To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

The recent decisions of the Supreme Court in *Standard Oil Co. v. United States*, and *American Tobacco Co. v. United States*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. —, make it quite clear that the language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common-law restraint of trade. This fact was plainly recognized in *United States v. Joint Traffic Association*, 171 U. S. 505, 567, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, where Mr. Justice Peckham said:

"We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term."

While all this is true, the recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the anti-trust act merely by the form it assumes or by the dress it wears. It matters not whether the combination be "in the form of a trust or otherwise," whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violates the anti-trust act.

[4] The record of the case now before us shows that from 1872 to 1902, a period of 30 years, the purpose of the trade associations had been to dominate the powder and explosives trade in the United States, by fixing prices, not according to any law of supply and demand, for they arbitrarily limited the output of each member, but according to

the will of their managers. It appears, further, that although these associations were not always strong enough to control absolutely the prices of explosives, their purpose to do so was never abandoned. Under the last of the trade association agreements—the one dated July 1, 1896, and which was in force until June 30, 1904—the control of the combination was firmer than it had before been. Succeeding the death of Eugene du Pont in January, 1902, and the advent of Thomas Coleman du Pont and Pierre S. Du Pont, the attempt was made to continue the restraint upon interstate commerce and the monopoly then existing by vesting, in a few corporations, the title to the assets of all the corporations affiliated with the trade association, then dissolving the corporations whose assets had been so acquired, and binding the few corporations owning the operating plants in one holding company, which should be able to prescribe policies and control the business of all the subsidiaries without the uncertainties attendant upon a combination in the nature of a trade association. That attempt resulted in complete success.

Much the larger part of the trade in black and smokeless powder and dynamite in the United States is now under the control of the combination supported by the 28 defendants above named. That combination is the successor of the combination in existence from 1896 to June 30, 1904. It is a significant fact that the trade association, organized under the agreement of July 1, 1896, was not dissolved until June 30, 1904. It had been utilized until that date by Thomas Coleman du Pont, Pierre S. du Pont, and Alfred I. du Pont in suppressing competition and thereby building up a monopoly. Between February, 1902, and June, 1904, the combination had been so completely transmuted into a corporate form that the trade association was no longer necessary. Consequently the trade association was dissolved, and the process of dissolving the corporations whose capital stocks had been acquired, and concentrating their physical assets in one great corporation, was begun. Before the plan had been fully carried out this suit was commenced. The proofs satisfy us that the present form of the combination is no less obnoxious to the law than was the combination under the trade association agreement, which was dissolved on June 30, 1904. The 28 defendants are associated in a combination which, whether the individual defendants were aware of the fact or not, has violated and still plans to violate both section 1 and section 2 of the anti-trust act. We conclude that it is our plain duty to grant such a decree as will prevent and restrain further violations of the act.

[5] Third. *The third and last question therefore is: What shall be the nature of the decree?*

It must be one of dismissal of the petition as to all of the defendants except the 28 who are found to be interested in and supporters of the unlawful combination.

It is contended by counsel for the defendants that there can be no decree against the 28 defendants, for the reason that the title to the property held by the defendant corporations cannot be impaired by any decree of this court. "The most that the government in any event can claim," say the counsel, "is that prior to the organization of the

present defendant companies there did exist contracts and combinations in restraint of trade, and possibly a monopoly of the explosives industry in the United States, and that such combinations and monopoly were participated in by some of the corporations which were later purchased by the present defendants, and possibly that some of the properties that were owned by the corporations that were purchased by the present defendants had been acquired by such corporations as a result of such combinations and monopoly. \* \* \* Even so, the corporations had title to such properties, and if such combinations and monopolies no longer exist the title to such property must be good in subsequent purchasers thereof." To support this argument *Brooks v. Martin*, 2 Wall. 71, 17 L. Ed. 732, and other cases, are referred to.

But we have found that the corporations organized after the advent into the explosives business of Thomas Coleman du Pont and Pierre S. du Pont are a part of an existing combination in restraint of interstate trade. The du Pont Company of 1902 co-operated with the advisory and special committees of the trade association from April 2, 1902, to June 30, 1904, in fixing prices, apportioning trade amongst the members of the association, allowing rebates, and forcing competitors to submit to their rule. The du Pont Company of 1903 was created to aid the combination in concentrating its power and fastening its hold on the monopoly which it had sedulously built up, and which brought to its members in the short period of six years the enormous profit of \$11,000,000 in dividends and \$12,000,000 or \$13,000,000 in its surplus account. We do not propose by our decree to deal with titles to property. Our power is defined in the fourth section of the anti-trust act. That section invests us "with jurisdiction to prevent and restrain violations" of the act. The same section provides that the petition may contain a prayer that the violation of law therein alleged "shall be enjoined or otherwise prohibited." It is our purpose, as it is our duty, to exert the power thus conferred on us to the extent necessary to "prevent and restrain" further violations of the act. In other words, the relief we can give in this proceeding is preventive and injunctive only. If our decree, limited to that purpose, shall necessitate a discontinuance of present business methods, it is only because those methods are illegal. The incidental results of a sweeping injunction may be serious to the parties immediately concerned; but, in carrying out the command of the statute, which is as obligatory upon this court as it is upon the parties to this suit, such results should not stay our hand. They should only challenge our care that our decree be no more drastic than the facts of the case and the law demand.

The dissolution of more than 60 corporations since the advent of the new management in 1902, and the consequent impossibility of restoring original conditions in the explosives trade, narrows the field of operation of any decree we may make. It should not make the decree any the less effective, however. In the *Standard Oil Case* Mr. Chief Justice White said:

"It may be conceded that ordinarily, where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*,

196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies twofold in character becomes essential: (1) To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute; (2) the exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

Both of these remedies are as clearly demanded in the present case as they were in the Standard Oil Case. The existing combination in the explosives trade is one in restraint of interstate commerce. Its sales board fixes prices and exercises powers which Mr. Haskell, its chairman, admits are even more extended in their scope than were the powers of the advisory and special committees which the sales board superseded on June 30, 1904, after co-operating with them from July, 1903. It has also attempted to monopolize and is attempting to monopolize, and has monopolized, and is now in the possession of a monopoly of, a large part of the explosives trade in the United States. Our decree must therefore be one which will forbid future acts violative of the law and compel a dissolution of the combination existing in violation of the law. To stop the business of the combination immediately, however, might be attended with very disastrous consequences. The defendants, or some of them, for example, furnish military and ordnance powders to the United States government. We understand, also, that they furnish explosives used in the construction of the Panama Canal. Their ability to continue so to do should not be destroyed before the expiration of a reasonable time for adjusting their business to the changed conditions. In the Standard Oil and American Tobacco Cases six months were allowed for making the changes necessitated by the decrees entered therein. What time should be allowed in the case now in hand, and what other details should be embodied in the final decree, we cannot now determine.

The present decree will therefore be interlocutory. It will adjudge that the 28 defendants are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of section 1 of the anti-trust act, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved. The interlocutory decree will further adjudge that this court, in order to obtain such further information as shall enable it to frame a final decree which shall give effective force to its adjudication, will hear the petitioner and the defendants on the 16th day of October next as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination which shall be submitted by the petitioner and the defendants, or any of them, to the end that this court may ascertain and determine upon a plan or method for such dissolution



which will not deprive the defendants of the opportunity to re-create, out of the elements now composing said combination, a new condition which shall be honestly in harmony with and not repugnant to the law. The interlocutory decree will further adjudge that both parties shall have leave to take such additional proofs as they may deem proper to be used at the hearing aforesaid. It is not to be inferred, however, that this court will sanction or supervise any new condition that defendants may re-create, or perform any other act which shall be merely administrative in its nature. *Hayburn's Case*, 2 Dall. 409, 1 L. Ed. 436; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *Gordon v. United States*, 117 U. S. 702, appendix.

[6] We have not overlooked the motion of the defendants to dismiss the petition for want of necessary parties. It appears that certain of the defendant corporations have outstanding bonds secured by mortgages or trust deeds, held by trust companies who are not defendants. As already stated, this suit is not designed, primarily, to deal with or dispose of property rights. We see no reason for bringing in mortgage or other creditors. If, hereafter, it becomes necessary to safeguard their rights, appropriate action can then be taken.

#### Interlocutory Decree.

This cause coming on to be heard before the three Circuit Judges of the Third judicial circuit in the Circuit Court of the United States for the District of Delaware, under the provisions of the expediting act of February 11, 1903, in the presence of George W. Wickersham, Attorney General of the United States, William S. Kenyon, assistant to said Attorney General, and James Scarlet and William A. Glasgow, Jr., special assistants to said Attorney General, and Frederick Ullmann for the defendants the American Powder Mills, the Miami Powder Company, and the Ætna Powder Company, M. B. & H. H. Johnson, for the defendant the Austin Powder Company, Frederick Seymour, for the defendant the Equitable Powder Manufacturing Company, David T. Marvel and David T. Watson, for the defendant Henry A. du Pont, Burton B. Tuttle, for the defendant the King Powder Company, and John C. Spooner, James M. Townsend, George S. Graham, William S. Hilles, and William H. Button, for the remaining defendants, and the court having read the pleadings and proofs and heard the argument of counsel, and duly considered the same; and it appearing to the court that the petitioner, the United States of America, is entitled to the relief hereinafter mentioned:

It is thereupon, on this 21st day of June, A. D. 1911, ordered, adjudged, and decreed, and this court, by virtue of the power and authority duly conferred on it by law, does hereby order, adjudge, and decree as follows, to wit:

1. That the petition be dismissed as to the following defendants, namely: Ætna Powder Company, Miami Powder Company, American Powder Mills, Equitable Powder Manufacturing Company, Austin Powder Company, King Powder Company, Anthony Powder Company, Limited, American E. C. & Schultze Gunpowder

Company, Peyton Chemical Company, Henry A. du Pont, Henry F. Baldwin, California Powder Works, Conemaugh Powder Company, Metropolitan Powder Company, and E. I. du Pont Company of August 1, 1903.

2. That the remaining 28 defendants, namely, Hazard Powder Company, Laflin & Rand Powder Company, Eastern Dynamite Company, Fairmont Powder Company, International Smokeless Powder & Chemical Company, Judson Dynamite & Powder Company, Delaware Securities Company, Delaware Investment Company, California Investment Company, E. I. du Pont de Nemours & Co. of Pennsylvania, du Pont International Powder Company, E. I. du Pont de Nemours Powder Company, E. I. du Pont de Nemours & Co., Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry F. du Pont, Irene du Pont, Francis I. du Pont, Victor du Pont, Jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M. Barksdale, Edmond G. Buckner, and Frank L. Connable, are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of section 1 of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved.

3. That this court, in order to obtain such further information as shall enable it to frame a final decree which shall give effective force to its adjudication, will hear the petitioner and the defendants on the 16th day of October next as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination which shall be submitted by the petitioner and the defendants, or any of them, to the end that this court may ascertain and determine upon a plan or method for such dissolution which will not deprive the defendants of the opportunity to re-create, out of the elements now composing said combination, a new condition which shall be honestly in harmony with and not repugnant to the law.

4. That both parties have leave to take such additional proofs as they may deem proper to be used at the hearing aforesaid.

5. That, until the entry of final decree herein, said 28 defendants hereinabove last named are, and each of them is, and the agents and servants of them are jointly and severally hereby enjoined from doing any acts or act which shall in any wise further extend or enlarge the field of operations or the power of the aforesaid combination.

[Signed]

GEO. GRAY,  
JOS. BUFFINGTON,  
W. M. LANNING,

Circuit Judges of the Third Judicial Circuit.

## UNITED STATES v. 11,150 POUNDS OF BUTTER.

(District Court, D. Minnesota, Third Division. June 7, 1911.)

**Food (§ 24\*)—REGULATION—STANDARD—SECRETARY OF AGRICULTURE—POWERS.**

Though Act Cong. Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), authorized the Secretary of the Treasury to prescribe rules and regulations for carrying it into effect, it did not authorize him to promulgate a rule construing Act May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1909, p. 865), declaring that butter should be confiscated if it contained an abnormal quantity of moisture, by providing that it should be confiscated if it contained more moisture than 16 per cent.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.\*]

Action by the United States against 11,150 Pounds of Butter. Dismissed.

At the close of the testimony on the part of the government, counsel for defendant moved to dismiss the action on the ground that the government had failed to make out a case, and that there is no evidence as to what constitutes an abnormal quantity of water, milk, or cream.

C. C. Hought, U. S. Dist. Atty.

Lightner & Young, for defendant.

WILLARD, District Judge (orally). As I have said before in the discussion of this motion, I entertain no doubt concerning the power of Congress to confer upon the Secretary authority to make a rule or regulation fixing a standard; but the question in this case is: Did Congress confer such power upon the Secretary? It is conceded that such power is not conferred in any express terms, and that, if it is conferred at all, it is conferred by that clause of the act which gives the Secretary power to make rules and regulations to carry the act into effect. Act Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. Supp. 1901, p. 2228).

The validity of rules and regulations made by secretaries of departments under similar statutes has been before the Supreme Court in quite a large number of cases. The latest decision, filed on the 1st day of May of this year, is found in the case of the United States v. Grimaud et al., 220 U. S. 506, 31 Sup. Ct. 483, 55 L. Ed. —, where the court said:

"From the beginning of the government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But, when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

"Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimina-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion. *Interstate Commerce Commission v. Ill. Cent. R. R.*, 215 U. S. 452 [30 Sup. Ct. 155, 54 L. Ed. 280]; *Interstate Commerce Commission v. Chicago, Rock Island, etc.*, R. R., 218 U. S. 88 [30 Sup. Ct. 651, 54 L. Ed. 946]. Congress provided that after a given date only cars with drawbars of uniform height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. *St. Louis & Iron Mountain R. R. v. Taylor*, 210 U. S. 287 [28 Sup. Ct. 616, 52 L. Ed. 1061]. In *Union Bridge Co. v. United States*, 204 U. S. 364 [27 Sup. Ct. 367, 51 L. Ed. 523], in *re Kollock*, 165 U. S. 526 [17 Sup. Ct. 444, 41 L. Ed. 813], and *Buttfield v. Stranahan*, 192 U. S. 470 [24 Sup. Ct. 349, 48 L. Ed. 525], it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams, to sell unbranded oleomargarine, or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules was then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But, confining themselves within the field covered by the statute, they could adopt the regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect."

That case related to a regulation made by the Secretary of Agriculture with regard to forest reserves. The regulation was sustained, but the authority given to the Secretary was much more broad and explicit in that case than in this case. By various statutes he was authorized to—

"make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations; \* \* \* and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction."

This is something more than a mere statement that the Secretary may make rules and regulations for the purpose of carrying the law into effect.

The court, speaking of the regulations there in question, further said:

"As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.'"

In *re Kollock*, 165 U. S. 526, on page 533, 17 Sup. Ct. 444, on page 446 (41 L. Ed. 813), had to do particularly with section 6 of the Oleomargarine Act of August 2, 1886. That section expressly conferred upon the Commissioner of Internal Revenue power to prescribe the stamps and brands to be affixed to the packages. The court said:

"The criminal offense is fully and completely defined by the act, and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail. The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense."

The law under consideration in *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, expressly authorized the Secretary of the Treasury "to fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States."

In *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, and in *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 31 Sup. Ct. 603, 55 L. Ed. — (May 15, 1911), the court discussed section 18 of the River & Harbor Act of March 3, 1899, c. 425, 30 Stat. 1153 (U. S. Comp. St. 1901, p. 3545). That act expressly authorized the Secretary of War to determine whether any railroad or other bridge over navigable waterways was an unreasonable obstruction to navigation. It was not held in those and other bridge cases that a law authorizing the Secretary to make rules and regulations to carry into effect acts of Congress relating to his department would justify him in making a general rule relating to all bridges, declaring what should be considered as an unreasonable obstruction to navigation.

In *St. Louis & Iron Mountain Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, the law involved was the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174).

"Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce."

Section 5 of the act expressly authorized the Interstate Commerce Commission to determine the standard height of drawbars for freight cars.

In *Roughton v. Knight*, 219 U. S. 537, 31 Sup. Ct. 297, 55 L. Ed. — (February 20, 1911), the court said:

"But the act did not prescribe the method by which one so situated might avail himself of the proposal. It was therefore competent for the Land Department to adopt rules and regulations for the administration of the act in this particular, and this was done, and these rules are found in 24 Land Dec. Dep. Int. 592, 593."

In *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 220 U. S. 94, 31 Sup. Ct. 621, 55 L. Ed. — (May 29, 1911), there was under discussion an order of the Commission requiring the railroad companies to make certain reports connected with the Act of March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), relative to labor of employes. The order was held valid because Congress had given to the Commission not only authority to execute the act, but express authority to require reports.

Referring again to the *Grimaud Case*, the court said that the Secretary of Agriculture could not make rules and regulations for any and every purpose, and cited the case of *Williamson v. United States*, 207 U. S. 462, 28 Sup. Ct. 163, 52 L. Ed. 278. That was a case relating to the land laws. The Secretary of the Interior had made a regulation prescribing a form, according to which upon final proof under the timber and stone act the applicant was required to state under oath that he had not alienated the land or made any contract to alienate it.

The law itself required him to make such an affidavit when he entered the land; but the court held that there was nothing in the law which required him to make such an affidavit upon final proof, held that the Secretary of the Interior had no power by regulation to add anything to the law, or to require anything which the law itself did not require, and declared the regulation void.

The regulation in this case impresses me as being of the same character. Act Cong. May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1909, p. 865), said that butter should be confiscated if it contained an abnormal quantity of moisture; the Secretary says that it shall be confiscated if it contains more than 16 per cent. The Secretary has stricken out the word "abnormal," and has inserted the words "more than 16 per cent." To my mind this is not a regulation for the purpose of carrying the law into effect; it is rather a rule for the construction of the law. It is a change in the law; it is fixing a standard which Congress never intended that the Secretary should have the power to fix. While the execution of the law must be given to the administrative department, its construction must be left with the courts. Could the Secretary by rule define the meaning of the word "absorption"? There is a variety of words in this law, the definition of each one of which must be left to the courts as questions arise thereunder, and the decisions of the courts upon these questions cannot be foreclosed by a regulation of the department declaring that certain words must be construed in a manner previously determined by it, unless Congress has given to the Secretary express power to define them. No such power is found anywhere in this law.

The government has introduced no evidence to show that the quantity of moisture in this butter was abnormal. The only evidence which it has presented tends to show that the quantity exceeded 16 per cent., and the claim of the government is that such evidence conclusively shows a case for confiscation. If the regulation fixing the standard is not conclusive, the district attorney makes no claim that it is prima facie evidence of what an abnormal quantity of moisture is, and does not ask to go to the jury upon that theory of the rule.

The motion is granted, and the case is dismissed, without prejudice.

BURTON v. BAY STATE GAS CO. OF DELAWARE.  
(Circuit Court of Appeals, First Circuit. June 22, 1911.)

No. 919.

**CORPORATIONS (§ 559\*)—RECEIVERSHIP—EFFECT AS TERMINATING CONTRACT OF EMPLOYMENT.**

Primary and ancillary decrees appointing a receiver for a corporation with full powers to exercise all of the rights pertaining to the corporation and its officers relating to the management of its business and property, and enjoining it and its officers and directors from transferring its money or property, had the effect of terminating a contract previously made by the corporation employing a general counsel at a yearly salary, which was terminable at will, and no action or notice by its officers or directors was necessary to effect such termination; their powers having been suspended.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241-2252; Dec. Dig. § 559.\*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Appeal by Richard J. Burton, executor of Parker C. Chandler, deceased, intervener, from an order disallowing a claim against the Bay State Gas Company of Delaware, defendant. Affirmed.

W. K. Barton, for appellant.

Homer Albers (Orvil W. Smith, on the brief), for appellee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. The appellant is executor of the will of the late Parker C. Chandler, Esquire, formerly counsel for the appellee. The executor appeals from a decree of the Circuit Court to the effect that a contract between the Bay State Gas Company of Delaware and said Chandler, whereby said Chandler was employed as general counsel at \$5,000 a year, with an allowance of \$3,000 a year for expenses, was terminated by receivership proceedings, and was not in force after July 1, 1903.

The executor contends that this contract was continuously in force during the period from April 15, 1903, to December 26, 1907 (when it was terminated by notice of the election of a successor), and that for this entire period compensation is due at the rate agreed.

The Circuit Court allowed the claim for services and expenses to July 1, 1903, and disallowed the claim for the period thereafter.

The principal question upon this appeal is whether after July 1, 1903, there was still in force a contract for the services of Mr. Chandler as general counsel, at the above rate of compensation.

At a meeting of the board of directors of the appellee on November 18, 1902, Mr. Chandler was elected "as general counsel for the company," and he was paid at the above-named rate up to April 15, 1903. The term for which he was appointed was not specifically named.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

The appellant contends:

"The employment of Mr. Chandler as general counsel specified no term of service and was for an indefinite period."

For our present purposes this contention may be accepted. Whether the appointment was for an indefinite period, or, in view of former dealings, for the period of a year unless sooner terminated at the will of either party, or for the entire period of a year, we need not discuss.

The appellant has made no claim on quantum meruit or for breach of a contract for a year's services, but has deliberately chosen his ground.

Having established the existence of a contractual relation between the parties, which was recognized by the Gas Company in its payment of April 15, 1903, and in the decree of the Circuit Court by the allowance of the claim to July 1, 1903, the burden is upon the appellant to show that this relation continued after July 1, 1903. The Circuit Court found that it was terminated by the appointment of a receiver.

A receiver for the company was appointed May 26, 1903, in the district of Delaware. On June 8, 1903, an ancillary receiver was appointed in the district of Massachusetts, and on July 1, 1903, an ancillary receiver was appointed in the Southern district of New York.

It is conceded by the appellant that Mr. Chandler's contract with the company could be terminated at will either by himself or by the company. In other words, the termination of the contract by the voluntary act of the company would have impaired no obligation and destroyed no right vested in Mr. Chandler.

The decrees in this district and in the Southern district of New York were assented to by Mr. Chandler as counsel for the appellee, the Gas Company.

Furthermore, it is apparent that, if through proceedings in equity and through a receivership the corporation was involuntarily deprived of its powers to make further contracts or to deal further with its property, a decree to this effect would impair no right of Mr. Chandler. A contract at will could subsist only so long as each party was of ability to contract. If the intervention of third parties through proceedings in equity destroyed or impaired to a substantial degree the power of the Gas Company to continue the same relations with Mr. Chandler, this infringed none of his rights.

That the decrees whereby primary and ancillary receivers were appointed divested the corporation and its directors of all powers to institute suits, and conferred such power upon the receiver, is conceded by the appellant's brief. Here alone is such a limitation of the ability of the corporation to contract in respect to legal service as is inconsistent with the former relation between the corporation and its counsel.

Furthermore, the decree appoints a receiver of all the property of the corporation to hold the said property and income under and pursuant to the orders of the court.

It is evident that no power remained in the corporation to impose a continuous charge upon this property without the consent of the



court or of the receiver. Granting that the appointment of a receiver was not for the purposes of dissolution and winding up, but a "litigating receivership," for defined purposes and temporary in its character, and that the corporation could still be sued upon its contracts, and that legal services might be necessary for the corporation itself pending the receivership, it does not follow that its ability to maintain during the receivership the former contractual relation was preserved.

The receivership so changed the subject-matter of the contract between the company and its counsel that, even if there still remained the opportunity for Mr. Chandler to perform some services, and if some services were in fact rendered, there cannot be implied from this alone a continuing agreement to pay for these limited services the same rate of compensation that was agreed upon, while the corporation was of full legal capacity, as a just compensation for its general counsel.

The argument that the contract once made continued in force until formal notice was given by the officers of the corporation of its desire to terminate it we cannot accept. Full notice of the legal inability of the corporation to avail itself of his services as before was given by the decrees, two of which were assented to by the corporation through Mr. Chandler himself.

The master made the following findings:

"(12) That the decrees, primary and ancillary, appointing the receiver provide. \* \* \*

"And it is further ordered that the said defendant and its officers, agents, directors, and employes are hereby enjoined from exercising any of the franchises or rights of the said defendant or from collecting, transferring, or assigning any of its assets, moneys, or funds to any person other than the said receiver until this court shall otherwise order.

"And it is further ordered that the receiver shall, in the first instance, have full power to employ and discharge, and to fix the compensation of such officers, agents, attorneys, and employes as he may deem necessary to aid him in the discharge of his duties. \* \* \*

"And it is further ordered that the said receiver is hereby invested with full power to do and perform all acts expedient and necessary to carry the above powers into effect and with all the powers vested in receivers in like cases with full power to exercise all of the rights of and pertaining to the defendant the Bay State Gas Company (of Delaware), or to its officers, agents, directors, and employes, with and in respect to stocks of other corporations belonging to said defendant."

"(5) And it is further ordered that the defendant, and its officers, agents, directors, and employes, are hereby enjoined from interfering with said receiver in the performance of the trust hereby committed to him, or from transferring or intermeddling with any of the funds or property of defendant."

"(13) I find that said Parker C. Chandler, as counsel for the Bay State Gas Company of Delaware, was present at the hearing at which the ancillary receiver was appointed in this jurisdiction, June 8, 1903, and as such counsel assented to such appointment, and also that he was present and assented to the appointment of the ancillary receiver in the Southern district of New York on July 1, 1903.

"(14) I further find that the receiver of the Bay State Gas Company of Delaware neither employed nor authorized his counsel, Mr. Whipple, to employ said Parker C. Chandler."

After the entry of injunctive orders of such breadth, the failure of the directors or other officers of the corporation to notify their gen-

eral counsel of their desire to terminate or restrict the scope of his former employment is of no significance.

In this case we are not required to consider the effect of a receivership upon an existing contract for a specific term extending beyond the date of the receivership. The question is merely as to the date of the termination of a contract at will to pay at a given rate for specified services.

Mutual assent, express or implied, is as necessary for the continuance of such a contract as for its inception, and assent of the corporation cannot be implied after the limitation of its powers by the decrees. Nor is a question of the right of the corporation to be represented by counsel pending the receivership, or of its ability to employ and agree, with or without the consent of the court, to compensate counsel for services, during the receivership, involved in this case. There is a distinct disclaimer of all claim for the value of such services as were actually rendered. The case is rested solely upon the ground that the same contractual relation that existed before the receivership was continued by the assent of parties after the decree appointing a receiver, regardless of the limitation of the powers of the corporation, its directors, officers and agents, by the injunctive orders contained in said decree.

We are of the opinion that this contention is erroneous. Whether the contract terminated earlier than July 1, 1903, we are not called upon to consider. The conclusion of the Circuit Court that it was not in force after July 1, 1903, and the disallowance of the claim for compensation and allowances after July 1, 1903, at the former rate are in our opinion right.

The judgment of the Circuit Court is affirmed, the appellee to recover costs in this court.

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MT. VERNON REFRIGERATING CO. v. FRED W. WOLF CO.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,086.

1. APPEAL AND ERROR (§ 1009\*)—REVIEW—FINDINGS IN EQUITY CASES.

The rule obtaining on writs of error that, when there is any material evidence tending to support the verdict of a jury, the appellate court will not review the evidence, does not obtain in favor of findings in equity cases which come up on a broad appeal, especially when it appears that all the evidence was in the shape of depositions, and not given orally before the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

2. CONTRACTS (§ 155\*)—CONSTRUCTION—CONSTRUCTION AGAINST PARTY PREPARING CONTRACT.

Where a contract was on a regular printed form prepared and used generally by one of the parties, and there is any doubt as to its meaning, it should be construed most strongly against such party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. § 155.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. CONTRACTS (§ 143\*)—CONSTRUCTION—CONSTRUING PROVISIONS TOGETHER.

In construing a contract that is ambiguous, its various provisions are to be construed together, and in the light of the situation of the parties, keeping in mind the object that was sought to be attained.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 723; Dec. Dig. § 143.\*]

4. SALES (§ 119\*)—CONSTRUCTION—CONTRACT FOR PURCHASE OF MACHINE—BREACH.

Defendant was building an ice-making plant, and after it had purchased two gas engines, which was known to complainant, the latter submitted a written proposal, which was accepted, to sell to defendant an ice machine, and also a certain make of drive chain to connect the machine "with the gas engines furnished by the purchaser." The machine was to be installed and tested under the supervision of complainant for 30 days, during which time it was guaranteed to produce 50 tons per day of merchantable ice, and at the end of that time was to be accepted by defendant if satisfactory, and, if not, rejected. The drive chains called for were equipped with a spring compensating device, but complainant induced defendant to accept a different kind without such device, to which it agreed only on condition that the maker would guarantee it to give perfect satisfaction. Such guaranty was not given, but defendant was not informed of the fact. When the plant was started, it was found that the chain whipped to such an extent as to be dangerous, and it was stopped, no ice having been made. Complainant refused to furnish a different chain, insisting that defendant furnish different or more efficient power. Defendant then gave notice to proceed with the test, which was not done, and at the end of 30 days rejected the plant, and complainant brought suit to foreclose a mortgage given to secure notes for the price of the plant. *Held* that, under the facts shown, complainant made the substitution of chains at its own risk, and should have furnished the one called for by the contract before it could charge the failure upon the engines, which it knew were to be used when the contract was made, and which, as the preliminary test showed, produced sufficient power; that, having failed to do so or to proceed with the test, defendant was justified in rejecting the plant, and could not be held liable therefor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 293; Dec. Dig. § 119.\*]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Suit in equity by the Fred W. Wolf Company against the Mt. Vernon Refrigerating Company. Decree for complainant, and defendant appeals. Reversed.

Prior to January 4, 1906, the Mt. Vernon Refrigerating Company, appellant (hereinafter referred to as the Ice Company), purchased of the Elyria Gas Engine Company two gas engines of 100 horse power each. On January 4, 1906, the Fred W. Wolf Company, appellee (hereinafter referred to as the Wolf Company), submitted on one of its regular printed forms a proposition to the Ice Company to furnish it one block ice plant of 50 tons ice-making capacity daily, to be driven from power furnished by the Ice Company, which was known to be two 100 horse power gas engines, the machinery and material, terms and conditions being specified in detail. The proposition was on January 7th accepted by the Ice Company and in that form made the contract between the parties. This contract was on March 24th annulled by mutual consent, and on the same day a second contract, also on a like printed form, was entered into between the parties, differing only from the first in respect to the security to be given by the Ice Company.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The contract of March 24th is the basis of this suit, and provides, among many other things not necessary to mention, the following:

That the Wolf Company was "to furnish, f. o. b. cars at Mt. Vernon, Ohio, in complete shipping order and condition, one block ice plant of fifty tons ice-making capacity daily, consisting of the following machinery and material.

\* \* \*

"Two double acting No. 16 A Wolf-Line Compressors of 14 in. bore x 30 in. stroke. \* \* \*

"Compressors to be driven from power furnished by purchaser [Ice Company].

"For driving the two compressors \* \* \* we propose to furnish Renold silent chain drives, which will include necessary sprocket wheels, bearings, chain, etc., to connect the gas engines furnished by purchaser. \* \* \*

"The machinery herein specified, when operated continuously and in accordance with our instructions, will produce fifty tons of merchantable ice per day of twenty-four hours. \* \* \*

"It is understood purchasers will furnish the required power for operating the machinery and will also furnish an ample supply of condensing water at a temperature not above 60 degrees F. \* \* \*

"After the plant is started, we will furnish an engineer to have charge of its operation for thirty days, during which time we will do the work and produce the guaranteed results herein specified. \* \* \* At the end of the above-mentioned 30 days you shall accept or reject the plant, it being understood, however, that if it shall meet the requirements of this proposition, it shall be accepted. If rejected, you shall notify us in writing thereof and hereby permit us to enter the premises and remove our equipment without charge to you and upon refunding to you whatever money has been paid us. An acceptance after the above-mentioned period shall be in full discharge of agreements hereinbefore contained. It is understood we are to furnish one competent man to superintend and assist in the erection of the machinery herein mentioned, and that the purchasers will supply all other skilled and common labor in sufficient quantity and competency to install the apparatus in a thorough manner. \* \* \*

"It is especially agreed that there are no promises, agreements, or understandings not embodied in this contract."

Four days after the first contract was made, and on January 11, 1906, the Wolf Company entered into correspondence with Morse Chain Company with the view of obtaining information which it subsequently used to induce the Ice Company to agree to substitute the Morse chain power transmission for the Renold silent chain drive provided for in the contract. After much correspondence between the Wolf Company and Morse Company, and between the Wolf Company and the Ice Company, the Wolf Company succeeded in inducing the Ice Company on February 19, 1906, to agree to the change upon the condition that the Morse people guarantee their chain to run and give perfect satisfaction.

The extent of the guaranty given by the Morse Company is contained in its letter of February 25th to the Wolf Company, which, after acknowledging receipt of the order for the chain drives, adds: "The above drives would, we think, prove both efficient and durable and would be glad to make our usual guaranty on same to replace all defects in workmanship or material and keep in operation for a period of one year after date of installation." The extent of this guaranty was not communicated to the Ice Company. The Renold chain was equipped with a spring compensating device, and the Morse chain, substituted for it, was not. This device is intended to neutralize or absorb the variation in the speed of the engines.

The gas engines and the ice machinery had been set by June 15th under the supervision of the Wolf Company, and the Morse chain device was installed for transmitting the power to the ice machinery. On June 19th the condensers were subjected to the air test before being charged with ammonia, as required by the contract, and proved satisfactory, the engines sending the pressure up to 300 pounds. On June 26th the ammonia test was begun under the supervision of the Wolf Company. During this test it was discovered that five or six of the spokes of the sprocket wheel on the compres-

sors were broken. The test was suspended to afford the representative of the Wolf Company an opportunity to correspond with the company, which resulted in sending within a few days to the plant an additional representative of the Wolf Company and also one from the Morse Chain Company. At the joint request of these two representatives, the engines and machinery were again started. These tests developed that the Morse Power Transmission chain whipped to such an extent that it was dangerous, if not impossible, to operate the machinery with it. It is fairly clear that the spokes of the sprocket wheel were broken by this whipping of the chain. The result of this test was unsatisfactory and the experiment admittedly unsuccessful.

From about July 10th, the time it was discovered that the sprocket wheel was broken and that the chain drive whipped to such an extent as to render it dangerous to operate the plant with it, to August 1st, nothing was done by either party toward running the plant. Each was busy in an effort to place upon the other the responsibility of the failure of the machinery to make ice in quantities sufficient to meet the guaranty of the Wolf Company; the Ice Company insisting that the Morse drive chain caused the failure, and that the Wolf Company should provide a different and efficient device for power transmission, and the Wolf Company insisting that the failure was due to the inefficiency of the gas engines, and that the Ice Company should remedy this by either substituting a different power or by furnishing a larger flywheel, or a different power transmission device.

There was evidence on complainant's part that a heavier flywheel would have overcome the variation in the speed of the engine. The manufacturers of the engines, however, declared it impossible to put on flywheels heavy enough to accomplish the required regulation. On August 1st the Ice Company notified in writing the Wolf Company that the 30 days' test of the ice plant would begin August 2d, and that 30 days from that date the Ice Company would accept or reject the plant according to the terms of the contract. The Ice Company ran its engines 12 hours a day for 30 days from August 2d, but not connected with the ice machinery. The Wolf Company made no effort during this time to manufacture ice with this plant, and at the expiration of the 30 days the Ice Company notified the Wolf Company that it rejected the ice manufacturing machinery.

It should be stated that for this ice manufacturing machinery the Ice Company at the time of making the contract paid in cash \$6,250, and executed its three promissory notes for \$6,250 each for the deferred payments to the Wolf Company, due, respectively, on November 1, 1906, and on June and November 1, 1907, with interest at 6 per cent. per annum from date.

These notes were secured by a mortgage on certain real estate and also on certain machinery, goods, and chattels. Under the terms of the notes and mortgages, the notes all matured, and the bill in this case was filed to foreclose the mortgage and apply the proceeds of the property to the satisfaction of the notes with interest, etc.

J. B. Waight and Murray Seasongood (Waight & Moore, Paxton, Warrington & Seasongood, and Ewalt & Ewing, on the brief), for appellant.

John E. Mac Leish (Booth, Keating, Peters & Pomerene and Scott, Bancroft & Stephens, on the brief), for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge (after stating the facts as above). This case is before the court on an appeal by the defendant from a decree against it of the United States Circuit Court for the Southern District of Ohio.

It is a case in equity, and all the evidence was presented in the form of depositions and exhibits.

The first question to which the attention of the court is challenged relates to the extent that an appellate court will review the evidence in passing upon the findings of fact by the trial court.

[1] The rule obtaining on writs of error that, when there is any material evidence tending to support the verdict of a jury, the appellate court will not review the evidence, does not obtain in equity cases which come up on a broad appeal. Especially is this so when it appears that all the evidence introduced before the trial court was in the shape of depositions, and not given before the court orally. *Ridings v. Johnson*, 128 U. S. 218, 9 Sup. Ct. 72, 32 L. Ed. 401; *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271; *Garsed v. Beall et al.*, 92 U. S. 684, 23 L. Ed. 686; *The Santa Rita*, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210; *Waterloo Min. Co. v. Doe*, 82 Fed. 51, 27 C. C. A. 50.

There is practically no controversy as to the material facts in the case. The Wolf Company guaranteed the machinery sold by it to produce 50 tons of merchantable ice daily, when the plant was installed and operated under its direction and management, according to the terms of the contract. The plant was installed under its supervision, and not only failed to produce the guaranteed daily output, but it failed to produce a pound of ice. The nub of the controversy is whether this failure is attributable to the fault of the appellant or the appellee. Was the contract breached by the one or the other of the parties to it? A correct answer to this question depends upon a proper construction of the contract.

[2] As has been stated, the contract entered into was upon a regular printed form of proposal, prepared and generally used by the Wolf Company in the sale of its ice manufacturing machinery, and, if there is doubt as to the true meaning of the contract, it should be construed most strongly against the Wolf Company.

In *Christian v. First Nat. Bank* (8th Circuit) 155 Fed. 709, 84 C. C. A. 57, Judge Van Devanter, speaking for the court, said:

"The language of the agreement is that of the plaintiff and his codepositors, and, if there be any doubt as to its true meaning, it is both just and reasonable that it should be construed most strongly against them. *Noonan v. Bradley*, 9 Wall. 394, 407, 19 L. Ed. 757; *Texas & Pacific Ry. Co. v. Reiss*, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358; *Osborne v. Stringham*, 4 S. D. 593, 57 N. W. 776.

"Of course, effect must be given to the intention of the parties, and, if that is made plain and certain by the agreement, every part of it being duly considered, the considerations and rules of interpretation to which we have referred are without application."

[3] Not only so, but in construing a contract that is ambiguous its various provisions are to be considered together, and in the light of the situation of the parties, keeping in mind the object that is sought to be attained. *McKell v. C. & O. Ry. Co.*, 175 Fed. 321, 99 C. C. A. 109; *Hull Coal Co. v. Empire Coal Co.*, 113 Fed. 256, 51 C. C. A. 213.

[4] Turning now to the contract, we find the facts to be that the Ice Company had purchased two 100 horse power gas engines for the purpose of using them to furnish the power for operating an ice plant

which it proposed to establish. The Wolf Company manufactured and sold ice manufacturing machinery, and it submitted a proposition to the Ice Company to sell to and install for it ice manufacturing machinery, which, when connected with the gas engines according to the terms of the proposition, and operated by it, was guaranteed to produce 50 tons of ice daily. The purpose of the parties was to install an ice plant of 50 tons daily capacity.

Gas engines were to be used as the motive power, and this was known to the Wolf Company as is evidenced by the terms of the contract, as follows:

(1) "For driving the two compressors \* \* \* we propose to furnish Renold silent chain drive \* \* \* to connect to the gas engines furnished by purchaser."

2. The Wolf Company recognized the reservation of the title of the Elyria Gas Engine Company to the two gas engines as per its contract with the Ice Company, dated December 22, 1905.

That the Wolf Company had this information before making the contract is also clearly established by the evidence in the case.

In the light of all the evidence, we think the proper construction of the contract is that the Wolf Company agreed to furnish the Ice Company machinery to manufacture ice to be driven with the power produced by the two gas engines that the Ice Company had purchased, when connected therewith by means of the Renold silent chain drive, and that the Wolf Company contracted to make this connection.

The engines, when tested, produced 300 pounds pressure, which was more than sufficient to drive the machinery.

But it is urged that the speed of the engines was irregular, and that this produced a whipping of the drive chain. If that be true, then the defect was not in the quantity of power produced by the gas engines, but in its quality.

The Wolf Company had been engaged for years in manufacturing ice-making machinery and installing it. This was the first effort that it had made to drive its ice machinery with gas engines. Fred W. Wolf, president of the Wolf Company, expressed grave doubts if it could be successfully done.

Those composing the Ice Company were novices at the business. They had purchased gas engines because natural gas was abundant and cheap in their section, and for that reason they preferred to use it as a fuel.

This was explained to Mr. Wolf, when he expressed a doubt as to the sufficiency of the gas engines, and suggested that steam power be substituted. Nevertheless, the Wolf Company contracted to sell to the Ice Company and install an ice plant to be operated or driven by the Ice Company's gas engines by means of a chain, and guaranteed that it would produce 50 tons of ice daily. That the experiment was a failure is not more than Mr. Wolf had predicted. The failure was not because the gas engines did not produce sufficient power. It was because the power was not uniform, and caused the chain drive to whip.

This characteristic in the power produced by gas engines was known to the Wolf Company, and also, perhaps, to the Ice Company. The latter company had intended to overcome or neutralize this irregularity by the use of a spring compensating device in connection with the Renold chain. This is what it purchased under the contract. For some reason not very clear, but likely because the Morse chain was cheaper than the Renold chain, the Wolf Company pressed upon the Ice Company the proposition to allow it (the Wolf Company) to substitute the Morse for the Renold chain. This the Ice Company, after much correspondence, finally consented to, upon condition that the Morse chain was as good as the Renold chain with the spring compensating device, and that the Morse Company would guarantee its chain to run and give perfect satisfaction. The Ice Company had no communication with the Morse Company, but relied upon the Wolf Company to furnish the machinery bought of it, or something guaranteed to be equally as good and to give perfect satisfaction.

The Morse Company made no such guaranty of its chain to Wolf as was required to be done by the Ice Company as a condition to its consent to make the substitution, but the Wolf Company made the substitution notwithstanding. This, we think, it did at its own risk.

The Wolf Company, having made the substitution of the Morse chain, without the spring device, for the Renold chain with it, and that too in the absence of the guarantee required by the Ice Company, without informing the Ice Company, when it developed that the ice plant could not be run because of the whipping of the Morse chain, should, in good conscience and equity, at least, have applied the spring compensating device and further tested it. This it did not do. Indeed, we think that under the contract and the evidence in this case that before the Wolf Company could be entitled to the relief sought in its bill, if the Morse chain both with and without the spring device had been tried and failed, it should have then furnished the Renold silent chain drive, as originally contracted for.

In view of this record, we are not called upon to determine the question of fact whether a heavier flywheel would have accomplished the required regulation of speed, nor, in case the Renold chain had been tried and found ineffective, what defendant's duty would have been with respect to trying such heavier flywheel.

It is urged that the Ice Company contracted to furnish the required power to operate the plant, and that, if the power furnished by it was insufficient in quantity, that it was the duty of the Ice Company to furnish a different motive power that was sufficient, or, if it was deficient in quality, it was the Ice Company's duty to remedy that by furnishing a means of power transmission that would correct the fault. This insistence is based upon the provision "to furnish the required power" used in the contract, and there would be much force in it if the contract contained only that provision in relation to this subject. This is not the case, however. And that provision must be construed in the light of all the other provisions therein. The words "required power" are limited and defined by the words, which also appear in the contract, "the gas engines furnished by the purchaser,"



that being the motive power already provided when the contract was made, and it is a most reasonable conclusion that that was the motive power the parties understood was to be used in operating the plant.

Meager reference is made in the brief of counsel for appellee to the allowance of its counterclaim. Counsel for appellant state in their brief that:

"The demurrer of appellee was sustained to the cross-bill of appellant and the cross-bill was dismissed. \* \* \* No error is assigned in this court to the action of the trial court in sustaining appellee's demurrer."

There is nothing in the record that warrants us in expressing an opinion as to the validity of the counterclaim, nor as to the action of the trial court in sustaining a demurrer to a cross-bill, since the record does not show any issue joined on the cross-bill, nor is there any assignment which can properly be construed as relating thereto.

From what has been said, it follows that we are of the opinion that the Wolf Company breached its contract with the Ice Manufacturing Company, and that the Ice Company was justified in refusing the machinery, and the decree of the court below will therefore be reversed and the bill dismissed, with costs.

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BECKWITH et al. v. CLARK.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1911.)

No. 3,351.

*(Syllabus by the Court.)*

1. FRAUDS, STATUTE OF (§ 103\*)—CONTRACT OF SALE OF LAND BY LETTERS ADDRESSED TO CONTRACTING PARTIES NOT ESSENTIAL.

A contract to sell and convey land valid under the statute of frauds of Kansas may be made by letters connected by direct references to each of them, one of which is signed by the party to be charged.

It is not indispensable that such letters should be addressed to one of the contracting parties, and an agreement may be sustained which consists of letters of the vendor addressed to a third party who conveys to the vendee the messages they contain, and who writes over his own signature to the vendor the messages the vendee gives him in reply.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 199; Dec. Dig. § 103.\*]

2. SPECIFIC PERFORMANCE (§ 117\*)—PLEADING—IMMATERIAL VARIANCE BETWEEN AVERMENTS AND PROOFS.

A complaint in a bill for specific performance alleged that the contract of sale of the land was made by three letters, the last of which was dated June 25, 1906. The decree rested on proof that the contract was made by one telegram and five letters, the last of which was dated June 30, 1906.

*Held*, the variance was immaterial.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 377-381; Dec. Dig. § 117.\*]

3. COURTS (§ 367\*)—FEDERAL COURTS—STATE RULES OF PROPERTY PREVAIL IN.

Rules or property established by the construction by the highest judicial tribunal of a state of its Constitution or statutes prevail in the national courts where no question of right under the Constitution or

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

laws of the nation and no question of general or commercial law is involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.\*]

Conclusiveness of judgment between federal and state courts. See notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planter's Bank v. City of Memphis*, 49 C. C. A. 468.]

**4. FRAUDS, STATUTE OF (§ 115\*)—CONTRACTS IN KANSAS—SIGNATURE OF PARTY TO BE CHARGED ALONE ESSENTIAL.**

The signature of the party to be charged without the signature of the other contracting party is sufficient to sustain the validity of a contract of sale of land under the statute of frauds of Kansas. Gen. Stat. Kan. 1909, c. 45, § 3838.

[Ed. Note.—For other cases, see *Frauds, Statutes of*, Cent. Dig. §§ 242-250; Dec. Dig. § 115.\*]

**5. VENDOR AND PURCHASER (§§ 188, 172, 196\*)—ACCOUNTING FOR RENTS AND PROFITS AND INTEREST—EXCEPTION WHERE PURCHASE PRICE KEPT READY.**

The general rule is that from the time when a contract of sale of land should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase price is the property of the vendor held in trust for him by the vendee, and that upon specific performance the vendor is liable to account for the rents and profits and the vendee for the interest on the purchase price.

There is this exception to the rule: That where the vendor fails or refuses to convey at the time for performance, and the vendee, to the knowledge of the vendor, deposits and keeps the purchase price subject to the order of the vendor upon his delivery of his deed, and derives no benefit from it, the vendor must account to the vendee for the rents and profits of the land, but the vendee is not liable to account for the interest on the purchase price.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 376, 349-351, 404-406; Dec. Dig. §§ 188, 172, 196.\*]

Appeal from the Circuit Court of the United States for the District of Kansas.

Bill by David O. Clark against Putnam Beckwith and Herbert H. Beckwith, trustees. Decree for complainant, and defendants appeal. Affirmed.

Winslow Evans (John M. Cleary, on the brief), for appellants.

E. C. Sweet (R. R. Rees, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and REED, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree for the specific performance of a contract to sell and convey land which was evidenced by letters. The alleged vendor was Edwin Gaylord of Pontiac in the state of Illinois, who has since died and to whose interest in the land and in this litigation the appellants have succeeded as trustees under his will. The vendee was David O. Clark of Cloud county, Kan., who brought this suit against Gaylord before his death. The issues in the suit were whether or not Gaylord made a contract of sale of the land that was valid under the statute of frauds of Kansas, and whether or not Clark performed his part of the agreement. The case was referred to a special master to hear the evidence, find

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the facts, and recommend a decree. He found the facts alleged by the complainant, and recommended a decree in his favor. Upon a hearing upon exceptions to the master's report the court below confirmed it with the modification that the purchaser should not be required to pay interest upon the purchase price of the property and rendered a decree for the complainant accordingly.

The first reason urged by counsel for the appellants for a reversal of this decree is that the name of the vendee did not appear in the three letters which they contend the complainant alleged in his bill constituted the agreement. The master found that this agreement rested upon 13 letters, each of which was marked at the hearing with one of the first 13 letters of the alphabet. In his bill the complainant averred that prior to June 22, 1906, Gaylord had by means of letters requested Garrett Davidson of Glasco, Kan., to make it known that he was willing to sell all that part of his land in section 24 in a certain township in Cloud county, Kan., east of the railroad and the public highway through it; that Davidson informed the complainant of that fact, and the latter through Davidson, on June 22, 1906, made a written offer to Gaylord to buy the land and pay \$55 per acre for it, Gaylord to retain the landlord's share of the wheat and Clark to have the landlord's share of the corn raised upon it in 1906; that Gaylord on June 25, 1906, replied in writing to that offer accepting it; that by means of subsequent letters they agreed that the county surveyor should ascertain the number of acres of the land and its description; that the surveyor did so, the complainant deposited \$16,500, which was more than the amount of the purchase price, with the First National Bank of Glasco, with instructions to pay the purchase price to Gaylord out of this deposit on receipt of his deed; that the complainant asked Gaylord to execute the deed, and notified him that the purchase price was on deposit with the bank subject to his order on receipt of the deed, but Gaylord refused to perform the contract.

The master found that Garrett Davidson was a farmer in Cloud county, Kan., where the land was situated, in no manner connected with Gaylord or Clark, except in a friendly way; that he received no compensation from either party, but acted for each when requested; that at the instance of Gaylord he mentioned the fact that the land was for sale, and at the instance of Clark he made the offer of \$55 per acre which Gaylord accepted. Appellants specify this finding as error, but the record amply sustains it. The letters clearly disclose the fact that Davidson stood in much the same relation to the contracting parties that the post office bears to correspondents through it. He was the agent of the sender of each message for the purpose of conveying it to the other contracting party. He carried the message of Gaylord that he was willing to sell his land, a message which was contained in a letter from Gaylord to himself, to Clark, and for Clark he sent the latter's message to Gaylord in a letter he wrote himself that he (Clark) would give \$55 per acre for the land. When Gaylord answered in a letter to Davidson that he accepted this offer, Davidson carried this message to Clark, and for the latter he wrote to Gaylord that Clark was the purchaser. The letter he wrote in answer to Gay-

lord's acceptance demonstrated his agency to bear messages for each. He wrote:

"In my telegram I said make deed to David O. Clark. He is the man to whom I have sold it. We (evidently he and Clark), will be satisfied with anything that is right in regard to the fence and the mill."

In this state of the case each of the letters which is connected by direct reference with the other letters that treat of the sale is competent evidence to prove the contract.

[1] It is not essential to a valid agreement by means of letters under the statute of frauds that they should be addressed by one contracting party to the other. *Pomeroy on Contracts*, § 84; *Hollis v. Burgess*, 37 Kan. 487, 494, 15 Pac. 536.

We return to the letters. The first one was written by Gaylord to Davidson, was dated May 19, 1906, and in it he wrote Davidson that he was willing to sell the land in question and asked him to let him know if he was acquainted with any one that was likely to want to buy it. The second letter is Davidson's answer. It is dated June 22, 1906, and in it he writes to Gaylord that he had shown his letter to many, but never had an offer until that day, that he then had an offer of \$55 per acre, Gaylord to have the landlord's share of the wheat crop and the purchaser the landlord's share of the corn crop for the year 1906. The third letter is addressed to Davidson, is dated June 25, 1906, is signed by Gaylord, and in it he writes that he accepts the offer made to him in the letter of June 22, 1906. The fourth letter is Davidson's answer to the letter of June 25, 1906. It is dated June 26, 1906, and in it he writes to Gaylord that he has received his letter of June 25th, accepting his proposition, and that David O. Clark is the man to whom he has sold the land, and to whom Gaylord should make the deed. There was also in evidence a telegram from Davidson to Gaylord dated June 27, 1906, to make the deed to David O. Clark, and a letter dated June 30, 1906, in which Gaylord wrote to Davidson that he had received the latter's letter of June 26, 1906, that his tenant, Palmer, would get the description of the land east of the railroad from the county surveyor and the number of acres in the tract as soon as he could and would forward it to him, and that then he would make the deed. The letters which have been recited disclosed the name of the vendee and the letter of June 30, 1906, which was signed by Gaylord, together with the letters going before it evidenced an agreement, after the name of Clark had appeared in the letter of June 26, 1906, as the purchaser, to sell the land and to make the deed.

[2] Now, the contention of counsel for the appellants here is that the complainant averred in his bill that the agreement was concluded by the letter of June 25, 1906, that no contract was consummated by that letter or at that time because the name of the vendee had not then appeared in the correspondence, and that, although the evidence proved a valid agreement which disclosed the name of the purchaser concluded by the letter of June 30, 1906, five days later, the decree cannot stand because the proof does not correspond with the averments of the bill. The argument is too subtle to be sound. It is true that one may not plead one cause of action and recover upon another, and that

it is as essential that the pleadings as that the proof shall correspond with and sustain the decree. But this rule relates to the substantial averments of a pleading which state the cause of action and to those only. It does not require that the decree or the proof shall correspond with every immaterial detail of the evidence that may be set forth in a pleading. The cause of action here was the breach by Gaylord of his contract to sell and convey this land, and that is the cause of action that was pleaded in the bill and the cause upon which the decree is founded. The essential averments of that cause were those which showed that Gaylord made the agreement to convey the land by means of letters physically or by direct reference to each other connected together, one of which was signed by him, and that he had refused to perform it. It was not material that he consummated his contract on June 25, 1906, by his letter of that date rather than on June 30, 1906, by his letter dated on that day, and this variance between the pleading, and the proof upon which this decree is based presents no ground for its reversal.

Nor was there any error in the receipt in evidence and the consideration of the other letters and telegrams sent subsequent to June 25, 1906, relating to the performance of the contract, because they were material to the question whether or not Gaylord committed a breach of the contract, and even if there had been error in their receipt it is not reviewable now, because no exception to the rulings which admitted them appears in the record.

The next objection to the decree is that none of the letters was signed by Clark, that he was not bound to buy and pay for the land, and that there was no mutuality in the contract. This is an agreement regarding title to real property in the state of Kansas, and it is governed by the law of that state. Rules of property established by the construction by the highest judicial tribunal of a state of its Constitution or statutes prevail in the federal courts where no question of right under the Constitution or laws of the nation and no question of general or commercial law is involved. *Traer v. Fowler*, 75 C. C. A. 540, 542, 144 Fed. 810, 812; *Hoge v. Magnes*, 29 C. C. A. 564, 566, 85 Fed. 355, 357.

[4] The statute of frauds of Kansas provides that:

"No action shall be brought \* \* \* upon any contract for the sale of lands \* \* \* unless the agreement upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing." General Statutes of Kansas 1909, c. 45, § 3838.

In *Guthrie v. Anderson*, 47 Kan. 383, 386, 28 Pac. 164, Anderson brought an action on a contract for the sale of certain land to Guthrie for \$2,000, \$200 in cash and \$1,800 in three months, which Anderson and his wife had signed and Guthrie had not, to recover the deferred payment of \$1,800 after Guthrie had paid \$200, and the Supreme Court held that he could not recover because Guthrie was the party to be charged and he had not signed the agreement. That court proceeded to say:

"If the Andersons desired that Mr. Guthrie should be charged by the writing or memorandum, they should have required him or his agent to have signed the same. The Andersons, who signed the writing or memorandum, are bound thereby, and could not set up the statute in bar. Mr. Guthrie is not bound, because neither he nor his agent signed, and therefore he can plead the statute. At one time it was a serious question whether the courts would specifically execute a writing or memorandum concerning lands, where one party only was bound; that is, where only one party had signed. It was held by some of the courts that in such a case, the writing or memorandum not being mutually binding, one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim. But the authorities now agree that where an action is brought upon a writing or memorandum for or concerning the sale of land, if the party sought to be charged in the action signed the same by himself or agent, he is liable thereon, and he cannot successfully plead as a defense that the plaintiff has not signed. To the party sought to be charged, who has signed, the statute is no defense. *Hawkins v. Holmes*, 1 P. Wms. 770; *Clason v. Bailey*, 14 Johns. [N. Y.] 484-489; *Justice v. Lang*, 42 N. Y. 493 [1 Am. Rep. 576]; *Fry, Spec. Perf.* § 497; *Waterman, Spec. Perf.* § 239; *Rogers v. Saunders*, 16 Me. 92 [33 Am. Dec. 635]; *Sams v. Fripp*, 10 Rich. Eq. [S. C.] 447."

The theory of the rule here declared is that a parol agreement to sell and to pay for the land is not made void by the statute, and therefore there is no lack of mutuality in it, but the only effect of the statute is to prevent any proof of it against a party to be charged who has not signed it. Under this rule of property of the state of Kansas, therefore, conceding that Clark made no written agreement to buy the land, he made a parol promise so to do which was sufficient to give mutuality to the contract and the statute permitted proof of it against Gaylord who was the party to be charged and had signed it. Neither Clark nor his successors in interest could be heard to say that the contract was void because the complainant failed to sign it, for he was not the party to be charged. *Schneider v. Anderson*, 75 Kan. 11, 17, 88 Pac. 525, 121 Am. St. Rep. 356.

Another argument of the appellants is that the minds of the parties never met because Gaylord supplemented his letter of acceptance of June 25, 1906, by another of the same date in which he wrote that the wind pump and fence belonged to Palmer, the tenant, and Davidson answered for Clark, "We will be satisfied with anything that is right in regard to fence and mill." But Gaylord could not sell what he did not own, and, after this information was given to Clark, both parties reaffirmed the contract, Gaylord by written promise to make the deed and Clark by depositing the purchase price in the bank payable to the order of Gaylord upon the delivery of the deed. Counsel say their minds never met because there never was any agreement between them relative to the place of payment of the purchase price.

The proved facts regarding this matter were these: On June 26, 1906, before the number of acres in the tract was ascertained, Clark gave his check for \$16,500 payable to G. H. Bernard, cashier, certified by Bernard's bank, the First National of Glasco, Kan., and directed him to use it to pay for the land bought from Gaylord at the rate of \$55 per acre, and Davidson and the bank then notified Gaylord that this money was at his disposal as soon as his deed of the land was received. On June 27, 1906, Gaylord wrote Davidson that, after he received the purchaser's name, he would have his deed executed, leave it

with D. C. Eylar, president of the Pontiac Bank, that the buyer could get his banker at Glasco to send a draft to the Pontiac Bank for the purchase price with instructions to hold it until he was satisfied that the deed was good, and after the draft was accepted forward the deed to the purchaser. On June 30, 1906, after Gaylord had received Davidson's letter of June 26, 1906, which disclosed the purchaser's name, he wrote to Davidson that he had employed Eylar, the president of the Bank of Pontiac, to help him fix up the deal, and that Eylar would correspond with the officers of the Glasco Bank. He did so. He wrote that he had seen the telegram that \$16,500 was in that bank at the disposal of Gaylord as soon as a good deed was received properly signed, and that he understood that, as soon as Gaylord and his wife made a good deed, the Glasco Bank was to remit to the Pontiac Bank \$16,500 net to Gaylord there without any exchange costs or charges. Bernard, the cashier of the Glasco Bank, wrote in answer to this letter that the Glasco Bank had \$16,500 in its hands to be used to pay for the land bought by Clark which was to be surveyed and measured "so that correct description can be given and the exact amount of land in the tract ascertained," and that the Glasco Bank was to remit for Clark for the credit of Gaylord out of this money on deposit with it a sufficient amount to pay \$55 per acre for the land as soon as the deed was properly executed and in its hands. On July 3, 1906, Eylar wrote in reply that Bernard's letter had been read to Gaylord, that Gaylord "understands the same as you that Mr. Clark is to pay \$55 per acre for what number of acres the tract to be conveyed by Dr. Gaylord and wife contains. \* \* \* I am instructed by Dr. Gaylord to say that whatever number of acres the survey shows he is to have \$55 per acre for, the same to be net to him here, without any charges or deductions, the same as stated in my former letter." On July 6, 1906, Bernard wrote the Pontiac Bank, inclosed in his letter a description of the land which he had obtained from the surveyor and a form of deed, asked that Gaylord execute the deed and send it to the Glasco Bank with instructions as to delivery, and declared that immediately upon its receipt the Glasco Bank would forward its draft for the purchase price for the number of acres shown by the description. On July 14, 1906, Eylar wrote that Gaylord had informed the Pontiac Bank that circumstances were then such that he could not consummate the sale, and that the Glasco Bank was at liberty to release the money which it had on deposit to the party to whom it belonged. Here the correspondence ended, and in our opinion it not only discloses no disagreement, but evidences a perfect concord of the minds of the parties in relation to the time, the place and the manner of the payment, the delivery of the deed, and the performance of the contract to sell. Counsel also contend that the minds of the contracting parties never met upon the number of acres in the tract, and that they never agreed that the county surveyor should ascertain it. The proof is, however, that each party through his agent employed the county surveyor to ascertain and report the number of acres and the description of the land; that he made his first report to Gaylord's agent and informed him that it was not accurate because he had lacked

time to make it so; that he subsequently took the time to make it accurate and reported the accurate description and number of acres to Bernard, he sent that description and number to the Pontiac Bank in his letter of July 6, 1906; and that no objection was ever made by Gaylord to the number of acres so reported, but he absolutely refused to perform his contract. That contract was valid without any agreement upon the number of acres in the tract, for that is certain which can be made certain and the evidence satisfies that the parties did in fact agree upon the number of acres which the surveyor finally found. There was no error in the finding of the master and the court that Gaylord made a valid contract for the sale of this land, and then refused to perform it.

It is assigned as error that, while the decree charges the vendor with the rents and profits of the land from 1906 until the rendition of the decree, it fails to charge the vendee with interest on the purchase price from July 6, 1906, when the contract should have been performed, until the decree was rendered. But the proof is plenary that by means of the certified check which has been described and Clark's direction to Bernard and the Glasco Bank he deposited in that bank before July 6, 1906, and kept there from that time until the hearing the purchase price of this land payable to the vendor, or his successors in interest, on the single condition that he or they deliver to Bernard or the bank the deed to which he was entitled; that he and the bank which held the money notified Gaylord in June, 1906, that this money was on deposit in the bank for this purpose subject to his order; and that Clark never used this money for any other purpose or derived any benefit from it, but always kept it ready to pay for the land. The reason for and the purpose of the specific performance of a contract is to place the parties as near as may be in the same situation that they would have occupied if they had voluntarily performed it. The compulsory performance of it and the terms of the decree therefore rest in the sound judicial discretion of the chancellor which should be exercised to attain this object. All the rules which have been established for the molding of decrees have been framed and followed and all the exceptions to them have come into being to accomplish this purpose and are subordinate to its attainment.

[5] One of these rules is that from the time when the contract should be performed the land is in equity the property of the vendee held by the vendor in trust for him, and the purchase money is in equity the property of the vendor held by the vendee in trust for him, and that, when a decree for specific performance is rendered, the vendor is liable to account for the rents and profits of the land and the vendee for the interest on the purchase price. The application of this rule of accounting is generally just and equitable, because between the due date of performance and the decree the vendor usually receives the rents and profits and the vendee usually retains and has the use of the money requisite to pay the purchase price. But where, as in the case at bar, the purchaser does not retain or derive any benefit from the money required to pay the purchase price, but places and keeps it, to the knowledge of the vendor, subject to his order upon his



delivery of his deed, the application of this rule would be inequitable. It would reward the vendor for his own wrong. It would enable him by simply refusing to perform his contract to deprive the vendee of the possession and use of property which might yield no rents or profits and at the same time to mulct the vendee to the extent of interest on the amount of the purchase price which he does not receive. These considerations have brought forth the exception to the general rule. It is that where in an action for the specific performance of a contract to sell and convey land the vendor fails or refuses to convey and the vendee, to the knowledge of the vendor, sets apart and keeps the purchase price subject to the order of the vendor upon his delivery of the deed and derives no benefit from it, the vendor must account for the rents and profits of the land he retains, but the vendee is not liable to account for the interest on the purchase price. 36 Cyc. 754 (3d); *Bostwick v. Beach*, 103 N. Y. 414, 424, 9 N. E. 41; *Worrall v. Munn*, 38 N. Y. 137, 142, 146; *Hart v. Brand*, 1 A. K. Marsh. (Ky.) 159, 10 Am. Dec. 715; *Bass & Carter v. Gilliland's Heirs*, 5 Ala. 761, 766; *Fry on Specific Performance*, § 1383; *Hayes v. Elmsley*, 23 Can. Sup. Ct. 623, 627; *Kershaw v. Kershaw*, 21 L. T. R. N. S. 651, 652; *Regent's Canal Company v. Ware*, 23 Beavan, 575; *Howland v. Norris*, 1 Cox, 59, 60, 62; *Leggott v. Metropolitan Railway Company*, 5 L. R. Chan. App. 716, 719.

The decree below was right, and it is affirmed.

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GOLDEN CYCLE MINING CO. v. RAPSON COAL MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1911.)

No. 3,342.

1. CONTRACTS (§ 313\*)—RENUNCIATION—REMEDIES OF INJURED PARTY.

After the renunciation of a continuing contract by one party, the other may at his option consider himself absolved from any future performance of it, and may sue at once for any damages he has suffered from the breach of it, or he may wait until performance should have been completed, still holding it as prospectively binding for the exercise of this option.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1279; Dec. Dig. § 313.\*]

2. CONTRACTS (§ 10\*)—VALIDITY—MUTUALITY OF OBLIGATION—"MAY USE."

An agreement by one party to furnish and by the other party to purchase all the coal of a stated kind the second party "may use" in the operation of a mine and reduction works during a limited time is valid, and binds the purchaser to take from the seller all the coal that may be needed or required in the conduct of such business during the time specified.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7228-7237; vol. 8, p. 7825.]

3. CONTRACTS (§ 217\*)—CONSTRUCTION—OPTION TO TERMINATE.

Under a contract to furnish to a mining company all the coal it should require in its business during a stated time, which gave it the option, in

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the event it should acquire a substantial interest in a coal mine, as owner, lessee, or stockholder, whereby it secured the control of the operation of such mine, to terminate the contract by giving 90 days' written notice, to entitle it to exercise such option, it must at the time of giving such notice have acquired the interest stated in a coal mine and the giving of the notice without having previously acquired such interest was ineffective to terminate the contract, although such interest was afterward acquired.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1006-1009; Dec. Dig. § 217.\*]

4. EVIDENCE (§ 244\*)—ADMISSIONS.

In an action by corporations to recover damages for breach of a contract which defendant had the option to terminate by notice under certain conditions but not otherwise, and which it claimed had been so terminated, it was not error to exclude testimony as to a conversation between the president of plaintiffs and the agent who served the notice, tending to show that such president recognized the right of defendant to terminate the contract, especially where it was not shown that he had any knowledge at the time as to whether the facts existed which authorized such termination and which was essential to establish a waiver of the conditions or an acquiescence in the cancellation of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

In Error to the Circuit Court of the United States for the District of Colorado.

Action at law by the Rapson Coal Mining Company and the Curtis Coal Mining Company against the Golden Cycle Mining Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Tyson S. Dines, for plaintiff in error.

Henry McAllister, Jr. (Joel F. Vaile and William N. Vaile, on the brief), for defendants in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

PER CURIAM. On the 11th day of July, 1906, the Golden Cycle Mining Company, plaintiff in error, made and entered into a contract with the Rapson Coal Mining Company and the Curtis Coal Mining Company, defendants in error, which, so far as is material to the questions raised upon this record, was in the following language:

"This agreement, made and entered into this 11th day of July, 1906, by and between the Golden Cycle Mining Company, a West Virginia corporation doing business in the state of Colorado, and hereinafter called the Mining Company, party of the first part, and the Rapson Coal Mining Company and the Curtis Coal Mining Company, both Colorado corporations, hereinafter called the Coal Companies, parties of the second part, witnesseth:

"Whereas the mining company is now operating one or more metalliferous mines in the Cripple Creek mining district in Teller county, Colorado, and intends in the near future to begin the operation of its ore reduction works near Colorado City, El Paso county, Colorado, and desires to secure a continuous supply of coal for use in the operation of its said mines and reduction works, and any other mines or reduction plants it may hereafter acquire in the same vicinity, and

"Whereas, the Coal Companies are engaged in the business of mining lignite coal in and upon the coal mines which they control for such purposes

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

near Colorado Springs, Colorado, and mines of bituminous coal near Rugby in Las Animas county, Colorado, and are desirous of enlarging their market for the output of coal from said mines:

"Now Therefore, the parties hereto have agreed as follows:

"(1) During the period beginning with the date hereof and ending December 31, 1910, the Mining Company agrees to purchase from the Coal Companies all the lignite coal it may use in the operation of its said mines and reduction works, and also all the bituminous coal it may use so long as the Coal Companies are able to furnish a good quality of the same at as favorable prices and under as favorable conditions for delivery as other coal mine operators may be willing to furnish the same.

"(2) During said period of time the Coal Companies agree to supply to the Mining Company all of said coal that it may desire to purchase and use for the purposes aforesaid, and make such prompt delivery of the same as the necessities of the Mining Company may require. \* \* \*

"(11) It is agreed that in the event the Mining Company shall acquire a substantial interest in a coal mine as owner, lessee or stockholder whereby it secures the control of the operation of such mine, then the Mining Company may, at its option, declare this contract terminated upon giving the Coal Company ninety (90) days' written notice of its intention to do so."

Immediately upon the execution and delivery of the contract from which the above excerpts are taken, the Coal Companies commenced the performance of said contract and at all times thereafter until the 13th day of May, A. D. 1908, did fully perform all the obligations and agreements of said contract by them or either of them to be performed, and did sell and deliver to the Mining Company and said Mining Company did receive and purchase all the lignite coal required and used by it in the operation of its mines in the Cripple Creek Mining district, Teller county, Colo., and its reduction works near Colorado City, El Paso county, Colo., and said Mining Company did pay to the Coal Companies the contract price therefor.

On the 13th day of May, A. D. 1908, above mentioned, the Mining Company refused to purchase or receive from the Coal Companies any more lignite coal under the contract herein mentioned. July 1, 1908, the Coal Companies commenced this action against the Mining Company to recover damages for the alleged breach of the terms of the contract herein mentioned by the Mining Company in refusing to purchase or receive any more lignite coal under said contract after May 13, 1908. The Mining Company appeared in the action and after a trial in the court below a verdict was rendered in favor of the Coal Companies and against the Mining Company upon which final judgment was rendered in favor of the Coal Companies for the sum of \$21,250, besides costs and disbursements. The Mining Company has removed the case to this court by writ of error.

The damages claimed by the Coal Companies and for which they recovered judgment was for the fair and reasonable profits which would have accrued to them by the performance of the contract mentioned by the Mining Company from May 13, 1908, to December 31, 1910. On February 13, 1908, the Mining Company served the following notice on Charles H. Curtis, president and general manager of the Coal Companies:

"Colorado Springs, Colorado, February 13th, 1908.

"The Rapson Coal Mining Company and The Curtis Coal Mining Company, Both Colorado Corporations, Colorado Springs, Colorado—Gentlemen: You

are hereby notified that this company has acquired a substantial interest in a coal mine as stockholder, whereby it has secured control of the operation of such mine, and that this company hereby avails itself of the option contained in paragraph 11 of the contract now pending between your companies and this company for the sale and purchase of lignite coal, and hereby in accordance with a provision of said contract, contained in said paragraph 11 thereof, notifies you that said contract shall terminate at the expiration of 90 days from date of the receipt of this communication by you.

"Yours truly,

The Golden Cycle Mining Company,

"By Jno. T. Milliken, President."

On May 13, 1908, the Coal Companies served the following notice on the Mining Company:

"Colorado Springs, Colo., May 13, 1908.

"The Golden Cycle Mining Company, City—Gentlemen: You are hereby notified that we decline to release you from your obligations under the contract between us, dated July 11, 1906, and that we deny that said contract has been terminated by reason of any notice heretofore served on us by you. We insist that said contract is still binding and obligatory upon you, as well as upon us, and we are now ready, willing and able, and hereby offer to comply with each and every provision thereof, requiring the performance of any act or thing by us. We hereby offer to continue to deliver to you the coal mentioned in said contract at the time and place therein mentioned, which coal under said contract you are required to purchase from us, and we request you to notify us forthwith whether you will accept the delivery of said coal, according to the terms of said contract. You are further notified that we claim that you had not on February 13, 1908, at the time when you attempted to give us notice of the termination of said contract, placed yourself in such a position as to become vested with any right, under Paragraph 11 of said contract, to elect to terminate the same, or to give us notice of such election. In the event you persist in your determination to violate said contract, we will hold you liable for all damages which we may sustain by reason of such conduct on your part.

"Yours very truly,

The Rapson Coal Mining Company.

"By C. H. Curtis, President.

"The Curtis Coal Mining Company.

"By C. H. Curtis, President."

[1] The rule that a contract may be broken by the renunciation of liability under it in the course of performance, and that suit may be immediately instituted for the recovery of damages based as far as possible on the ascertainment of what the injured party would have suffered by the continued breach of the other party down to the time of the complete performance, less any abatement by reason of circumstances of which the injured party ought reasonably to have availed himself, is firmly established by the case of *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

After a careful review of all the cases, American and English, the Supreme Court in the case last cited declares that after the renunciation of a continuing agreement by one party the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it, but that an option should be allowed to the injured party either to sue immediately, or to wait until the time when the act was to be done still holding it as prospectively binding for the exercise of this option.

[2] In order to reverse the judgment below, counsel for plaintiff in error urges the proposition that the contract sued on is not en-

forceable, because the respective promises made by the parties constituting the only consideration supporting the same are not mutually binding, and that the contract is nudum pactum. We think the word "use" in the language of the contract is equivalent to the words "needed, required," or "consumed," and brings the agreement of the parties within the rule enunciated by this court in the case of Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 81, 52 C. C. A. 25, 57 L. R. A. 696. It is said in the case last cited that:

"An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer."

The court cited in support of said rule *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *Parker v. Pettit*, 43 N. J. Law, 512. This rule was also approved in the case of *A. Santaella & Co. v. Otto F. Lange Co. et al.*, 155 Fed. 719, 84 C. C. A. 145, also decided by this court. We therefore are of the opinion that the agreement above set forth constituted a valid contract on the part of the Mining Company to purchase and on the part of the Coal Companies to supply all the lignite coal needed or required by the Mining Company in the operation of its mines and reduction works during the time specified in the contract.

[3] It is also contended that under and by virtue of the terms of section 11 of the contract herein quoted the Mining Company terminated the contract on May 13, 1908, by giving the notice hereinbefore quoted to the Coal Companies, and which the Mining Company claims it had the right to give by reason of the existence of the requisite facts at the time the notice was given. This renders it necessary to examine somewhat carefully the provisions of said section. We think that the meaning of section 11 is plain, and that it appears therefrom that it was the intention and agreement of the parties to the contract that if the Mining Company should acquire a substantial interest in a coal mine as owner, lessee, or stockholder, whereby it should secure the control of the operation of such mine, then the Mining Company at its option could declare the contract terminated upon giving the Coal Companies 90 days' notice in writing of its intention to do so. In other words, the section means just what it says. By the insertion of this clause in the contract, the Mining Company was providing for the termination of the contract to buy coal from the Coal Companies in the event the Mining Company should acquire such a substantial interest in a coal mine as owner, lessee, or stockholder as would secure to it the control of the operation of such mine. It conclusively appears from the language used that two things should exist in order to give the Mining Company the right to terminate the contract: First, it was necessary that the Mining Company should acquire a substantial interest in a coal mine as owner, lessee, or stockholder whereby it should secure the control of the operation of such mine; second, if such fact existed then the Mining

Company, at its option, could declare the contract terminated by giving ninety days' written notice of its intention to do so. The acquiring of a substantial interest in a coal mine as owner, lessee, or stockholder whereby the Mining Company should secure the control of the operation of such mine, standing alone, was not enough; neither was the giving of 90 days' notice in writing, standing alone, enough to terminate the contract; but the acquirement of the substantial interest above mentioned and also the giving of the notice must coexist in order that the contract might be terminated by the Mining Company. The Mining Company might acquire the substantial interest above mentioned and not exercise its option to terminate the contract by giving the written notice, or, if it gave the written notice without having acquired such substantial interest, then there would be no right in the Mining Company to terminate the contract. It is admitted that the written notice of February 13, 1908, was given according to the terms of the contract. It is claimed, however, by counsel for the Coal Companies that at the time said notice was given the Mining Company had not acquired a substantial interest in a coal mine as required by the terms of the contract. Without detailing all the evidence in the record touching upon the question as to whether the Mining Company had so acquired a substantial interest in a coal mine within the requirements of section 11 of the contract, we may state that said evidence has been carefully read, and we agree with the trial court that the evidence wholly fails to show that at the time of the giving of the notice, February 13, 1908, the Mining Company had acquired a substantial interest in a coal mine as owner, lessee, or stockholder whereby it had secured the control of the operation of such mine, and we are further of the opinion that the trial court did not err in refusing to submit to the jury the question as to whether the Mining Company had so acquired a coal mine.

In view of what we have heretofore said, it follows that the mere giving of the notice without having a right so to do had no effect in terminating the contract.

It is further contended by counsel for the Mining Company that it appears from the record that it did on July 20, 1909, acquire a substantial interest in a coal mine as owner, lessee, or stockholder within the meaning of section 11. This contention is based upon a stipulation made between the parties at the trial of the case in the court below, paragraph 3 of which reads as follows:

"That the books of the Pikes Peak Fuel Company show that its capital stock is and since December 29th, 1906, has been 500,000 dollars, of which \$50,000 is preferred and \$450,000 is common stock, par value of shares being \$10.00 each. On July 20th, 1909, certificate No. 30 for 2,500 shares, or \$25,000, of the preferred stock of said company was issued to the Golden Cycle Mining Company, and upon the same date certificate No. 98 for 22,550 shares, or \$225,500 of the common stock was issued to the said the Golden Cycle Mining Company."

Counsel for the Coal Companies reserved the right of objection to the introduction of this stipulation in evidence as irrelevant and immaterial, and did insist at the trial that it was irrelevant and immaterial for the reason that said paragraph 3 does not show that the

Mining Company, on July 20, 1909, acquired such an interest as is specified in section 11 of the contract and which would authorize the Mining Company to give the written notice of the termination of the contract. We do not think that it is necessary to discuss the question as to whether the facts appearing from paragraph 3 of the stipulation show that the Mining Company did thereby acquire, on July 20, 1909, a substantial interest in a coal mine whereby it secured the control of the operation of the mine within the requirements of section 11, for the reason that we are clearly of the opinion that, even if the Mining Company by virtue of the transaction detailed in paragraph 3 of the stipulation did so acquire such substantial interest, it never exercised its option with reference thereto by giving 90 days' written notice of its intention to terminate the contract because it had so acquired such substantial interest. As we have heretofore explained, the acquiring of the substantial interest, standing alone, did not terminate the contract, nor did the giving of the notice on February 13, 1908, nearly one year and a half before it acquired the interest in the Pikes Peak Fuel Company, have any force or validity to terminate the contract because of the acquirement of the substantial interest on July 20, 1909. The Mining Company could not give the notice until the conditions existed which the contract required should exist before the right to give the notice should arise. We do not say that the notice must have been given at the exact time of the acquirement of the substantial interest—it might have been subsequent thereto, but not before, especially not such a long time before.

[4] Counsel for the Mining Company also insists that the trial court committed error in excluding the offer of its counsel to prove certain facts by the witness Vickroy. Vickroy was the auditor of the Mining Company and served or delivered to Curtis on February 13, 1908, the notice of intention to terminate the contract. It appears from the record that while Vickroy was upon the stand counsel for the Mining Company asked the following question:

"Q. Have any conversation with him (meaning Curtis) at the time you served it (notice of February 13, 1908)? A. Yes, sir.

"Q. What did you say to him? (Plaintiffs object to the question for the reason that it is incompetent and immaterial.)"

Whereupon, Mr. Cunningham, counsel for the Mining Company, made the following offer:

"We now offer to prove by the witness Vickroy now on the stand that at the time he (Vickroy) served the notice upon Curtis, Curtis said to Vickroy, in substance: 'That we (meaning plaintiff companies) regret to lose you (meaning defendant company), but we (meaning plaintiff companies) recognize your (defendant's) right to cancel the contract, and it (defendant's action) is all right. That said Curtis further said at said time in substance that he (Curtis) thought it (meaning defendant company) was making a mistake, would find that it was making a mistake (meaning in business policy), that it (defendant company) would so find; and would again give them (plaintiff companies) its (defendant's) coal purchases.'"

The offer was again objected to by counsel for the Coal Companies on the ground that it was incompetent and immaterial, and had no bearing upon the issues in the case. The offer was made for the pur

pose of showing that Curtis, as president and general manager of the Coal Companies, acquiesced in and recognized the right of the defendant company to cancel the contract, and for the further purpose of showing that the Coal Companies did not at that time regard their contract with the Mining Company as so valuable as they appeared to think it was at the time of the trial. The court below sustained the objection of counsel for the Coal Companies, and we think committed no error in so doing. It subsequently appeared in the testimony of Curtis that he had no such conversation, but, assuming as we must do for the purpose of determining the correctness of the ruling of the court below that the conversation took place as detailed in the offer, we do not see how the language claimed to have been used by Curtis could in any way determine the rights of the Coal Companies under the contract. It is not shown that Curtis had any knowledge of any facts which would entitle the Mining Company to terminate the contract under and by virtue of its terms, and the language detailed, if used, might have been entirely consistent with the assumption on the part of Curtis that such facts did exist as would authorize the termination of the contract by the Mining Company. Again, it does not appear that Vickroy at the time he served the notice had any authority from the Mining Company or stood in such relation to it as to be a person with whom Curtis could make any agreement in regard to waiving the Coal Companies' rights under the contract, and the question of waiving rights under the contract was not the business the parties were engaged in. In *Bennecke v. Insurance Co.*, 105 U. S. 359, 26 L. Ed. 990, the Supreme Court used the following language:

"A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding."

Numerous other errors are discussed in brief of counsel for plaintiff in error, but an examination of the record convinces us that they are wholly without merit, and, without further discussion, we are of the opinion that the judgment of the court below should be affirmed; and it is so ordered.



METZ et al. v. CITY AND COUNTY OF DENVER et al.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1911.)

No. 3,104.

*(Syllabus by the Court.)*

MUNICIPAL CORPORATIONS (§ 985\*)—PARK COMMISSION OF DENVER—PROCEEDS OF GENERAL TAXATION IN ANY DISTRICT.

The charter of the city and county of Denver empowers its park commission to expend the moneys collected by general taxation and appropriated by the charter to the maintenance and improvement of parks and parkways, wherever in the city and county in their judgment the needs of the respective park districts require its expenditure.

The commission is not required to expend such moneys in the respective park districts whence these moneys were derived by means of the taxation of the property therein.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 985.\*]

Appeal from the Circuit Court of the United States for the District of Colorado.

Bill by Louis Metz and others against the City and County of Denver and others. From a decree dismissing the bill, complainants appeal. Affirmed.

Albert L. Vogl and Carle Whitehead, for appellants.

F. W. Sanborn (H. A. Lindsley and Geo. Q. Richmond, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree which sustained a demurrer to and dismissed the bill of Louis Metz and other owners of real estate in the Highland Park district in the city and county of Denver, to enjoin the corporation, its mayor and the members of its park commission from using the moneys collected by general taxation of the property in that district for the maintenance and improvement of parks and parkways in other districts and to require them to take out of the moneys that shall be collected for the maintenance and improvement of parks and parkways by general taxation of the property in other districts, and to expend in the Highland Park district about \$89,000, an amount which they have heretofore taken out of the moneys collected from the latter district, and have expended for the maintenance and improvement of parks in other districts. The question presented is, Have the mayor and park commission of the city and county of Denver the power to expend for the purpose of maintaining and improving parks and parkways the moneys collected by the general taxation of the property of one park district in the other park districts of that municipal corporation? The answer must be found in the Constitution of Colorado and the charter of the city and county of Denver. The people of the state of Colorado by the twentieth article of their Constitution conferred upon the city

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and county of Denver the exclusive power to make, alter, revise or amend the charter of that municipal corporation (section 4) and bestowed upon the people of Denver every power possessed by the Legislature over that subject. *People v. Sours*, 31 Colo. 369, 387, 74 Pac. 167, 102 Am. St. Rep. 34; *People v. Johnson*, 34 Colo. 143, 159, 86 Pac. 233; *Denver v. Hallett*, 34 Colo. 393, 398, 83 Pac. 1066. In the exercise of the power thus vested in them the people of Denver on February 6, 1904, adopted their charter and these are the provisions of it that are material to the question here at issue:

Section 323: The city and county of Denver is divided into four park districts, one of which is the Highland Park district.

Section 97: The park commission and the mayor have complete and exclusive power to expend (1) all sums of money that may be raised by general taxation for park purposes; (2) all sums of money appropriated by the council from the general revenues for the same purposes; (3) all moneys realized by the commission from the sale of privileges in or near the parks of the city and county of Denver; (4) all money realized from the sale of the general bonds of the city and county and set apart for park purposes; and (5) all money realized from the sale of park district bonds.

Section 103: No moneys levied or appropriated by the council or the charter for park purposes remaining unexpended at the end of any fiscal year shall be converted into the general fund or be subject to appropriation for general purposes.

Section 105: (1) The proceeds of any bonded indebtedness of the city and county incurred for the purpose of acquiring lands for parks or parkways shall be used in acquiring lands in the several park districts in proportion to the assessed value of the real estate in each district; (2) the council shall annually assess and collect upon each dollar of taxable property within the city and county at least one and one-third mills, the proceeds of which shall be set apart and shall constitute an improvement and maintenance fund for park purposes; (3) "all moneys collected as taxes levied for the maintenance and improvement of parks and parkways shall be expended by the commission as in their judgment the needs of the several park districts require."

Section 324: In addition to the power of the commission to acquire lands for park purposes by the sale of general bonds of the city the commission may, with the approval of the mayor, acquire parks and parkways in each district to be paid for by special assessments upon all the other real estate in the district, except parks, parkways, and streets.

Section 325: The commission may acquire real estate for parks and parkways by the exercise of the power of eminent domain.

Section 326: Parks and parkways so established or such part thereof as may be determined by the mayor and the park commission shall be paid for by the general bonds of the city and county.

Section 327: Whenever the cost of any such park site can be definitely ascertained, bonds may be issued and sold therefor, the proceeds thereof may be used exclusively in the purchase or condemnation of park sites and parkways. The bonds so issued shall be paid by special assessments upon all the other real estate in the district and "shall be paid only out of the moneys collected from said assessments."

Sections 327 and 328 describe the method of making and collecting these special assessments.

Section 329: "No moneys received from any source for any park district shall be expended in or for any other park district."

The contention of counsel for the complainants below is that the section last cited prohibits the use by the commission and mayor of any of the moneys collected by means of the general taxation of the property in any park district for park purposes in any other district. In support of this position they call attention to the fact alleged in the bill that the Highland Park district is separated from the other districts of the city by the Platte river, by railroads and warehouses, and they argue that parks are improvements local to their respective districts; that the division of the city into park districts by the charter is conclusive evidence of this fact; that benefits to taxpayers must bear some reasonable relation to the taxes they are required to pay; that the property of owners cannot be taken from them by taxation and then be expended for the exclusive benefit of third persons; and that the provision of section 105 that the proceeds of the general bonds of the city and county shall be used for acquiring lands in the several park districts for parks and parkways in proportion to the assessed value of the real estate in each district, and the prohibition in section 103 of the use of moneys appropriated for park purposes for any other purpose, sustain their contention. These facts and arguments are not without persuasive power. But there are others as well worthy of consideration. While parks and parkways in cities are doubtless of more benefit to the residents and the property in their immediate neighborhoods respectively than to the more remote residents and property in the municipalities, yet they are by the consensus of the opinions and acts of the denizens of cities of material benefit to all the citizens and to all the property within the respective municipalities. Witness the universal practice of the owners of property in cities to tax themselves to acquire and maintain them. They are not improvements exclusively local; nor are they improvements exclusively general. They are both general and local improvements, improvements of such general benefit as to sustain general taxation of the property within a city to acquire and maintain them, and of such local benefit as to sustain special assessments upon the property in their respective neighborhoods for the same purpose. All the sections of the charter of the city and county of Denver must be read and construed together to ascertain the true meaning and purpose of the enactments therein upon this subject, and each provision of the charter must, if possible, be given full force and effect. Let us read the material provisions of the charter upon this subject in the light of these established canons of interpretation. Section 103 merely prohibits the use of moneys, already appropriated for park purposes, for any other purpose and it is neither determinative nor indicative of the proper decision of the question before us. The provision of section 105 that the proceeds of city bonds issued to acquire parks and parkways must be used in acquiring lands in the several park districts in proportion to the assessed value of the real

estate in each district might be persuasive if it stood alone and, if the charter contained nothing more on the subject, that provision and section 329 might be conclusive. But section 97 discloses the fact that there were five sources from which moneys might be derived for park purposes, (1) from general taxation, (2) from appropriations from the general revenue by the city council, (3) from the sale of privileges, (4) from the sale of general city bonds, (5) from the sale of park district bonds, and it empowers the mayor and the park commission to expend the moneys derived from each of these sources. Then comes section 105 which singles out the proceeds from the fourth source and requires that part of these proceeds derived from any indebtedness of the city for the acquisition of parks and parkways to be used to acquire them in the respective park districts in proportion to the valuation of real estate in each district, but leaves the commission free to use the moneys derived from the other four sources wherever their judgment dictates. Nor is this all. That identical section authorizes and requires the levy annually of a general tax upon all the property within the city and county, of at least one and one-third mills for "an improvement and maintenance fund for park purposes" and provides that all moneys "collected as taxes for the maintenance and improvement of parks and parkways shall be expended by the commission as in their judgment the needs of the several park districts require." Note that the proceeds of the city indebtedness for acquiring parks is to be used in the respective park districts in proportion to the assessed valuations of real estate therein, and that the proceeds of the general taxation of the property in the city and county for the maintenance and improvement of the parks and parkways is to be expended by the commission wherever in their judgment the needs of the several park districts require that expenditure. Now turn to section 329, on which counsel for the complainants chiefly rely. That section is found in another portion of the charter. It follows sections 324 to 328, which provide a method of acquiring parks and parkways by special assessments upon the property in the respective districts in which they are situated and by the issue and sale of park district city bonds. It declares that no moneys received from any source for any park district shall be expended for any other park district. What moneys are received from any source under this charter for any park district? The proceeds of special assessments for the acquisition of parks and parkways, the proceeds of park district bonds issued for that purpose and the proceeds of city bonds issued for that purpose appropriated by section 105 to the respective park districts in proportion to the assessed valuation of the real estate in each district. But all sums of money raised by general taxation for the maintenance and improvement of parks and parkways are received, not for any park district, but for the entire city and county of Denver, and by the express provision of section 105 the commission is empowered to expend these moneys in any park district in the city where in their judgment the needs of the several park districts require its expenditure. There was no error in the decree below and it is affirmed.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RY. CO. v.  
UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 18, 1911.)

No. 3,337.

(*Syllabus by the Court.*)

1. ANIMALS (§ 34\*)—CONTAGIOUS DISEASES—TRANSPORTATION—RESTRICTIONS.

The receipt outside a quarantine district and subsequent transportation by a railroad company of live stock that was received for transportation, and was transported by a previous carrier from a quarantined district in one state into another state, is not an offense under the act relating to quarantine districts of March 3, 1905 (chapter 1496, 33 Stat. 1264 [U. S. Comp. St. Supp. 1909, p. 1185]).

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 34.\*]

2. STATUTES (§§ 241, 263\*)—PENAL STATUTE NOT EXTENDED BY CONSTRUCTION TO PARTIES OR ACTS NOT DENOUNCED.

A penal statute plain in its terms which creates and denounces a new offense should be strictly construed.

It may not be extended by construction to those who are not within the class of parties denounced by it, nor to acts which are not by the expressed will of the legislative department clearly made offenses under it, although such parties or acts may in the opinion of a court be as vicious as those within its terms.

Ex post facto construction is as pernicious as ex post facto legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323, 344; Dec. Dig. §§ 241, 263.\*]

3. ANIMALS (§ 34\*)—REGULATIONS OF EXECUTIVE OFFICER INEFFECTIVE TO ADD OFFENSES TO LAW.

Regulations of the Secretary of Agriculture under section 3 of the quarantine act of March 3, 1905 (chapter 1496, 33 Stat. 1265 [U. S. Comp. St. Supp. 1909, p. 1186]), are ineffective to add to the class of railroad companies or to the acts denounced by that statute and railroad companies that in violation of such regulations receive and transport outside a quarantined district live stock which has been received for transportation, and has been transported by a previous carrier from the quarantined district in one state into another state, are not punishable therefor.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 34.\*]

4. CONSTITUTIONAL LAW (§ 66\*)—REGULATIONS OF EXECUTIVE OFFICER—DELEGATION OF POWERS.

A legislative body may delegate to an executive or administrative officer the power to find some fact or situation on which the operation of a law is conditioned, or to make and enforce regulations for the execution of a statute according to its terms.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 115, 117-122; Dec. Dig. § 66.\*]

5. CONSTITUTIONAL LAW (§ 60\*)—DELEGATION OF LEGISLATIVE POWER.

A legislative body cannot, however, delegate its lawmaking power, its power to exercise the indispensable discretion to make, to add to, to take from, or to modify a statute.

It cannot delegate its power to add parties or acts to those punishable under a statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 90, 93; Dec. Dig. § 60.\*]

In Error to the District Court of the United States for the Eastern District of Missouri.

The St. Louis Merchants' Bridge Terminal Railway Company was convicted of failing to placard the cars and to stamp the waybills of cattle in quarantined districts, and brings error. Reversed and remanded.

Tyson S. Dines (J. L. Howell, on the brief), for plaintiff in error.

Truman P. Young, Asst. U. S. Atty. (Charles A. Houts, U. S. Atty., on the brief), for the United States.

Before SANBORN and VAN DEVANTER, Circuit Judges, and REED, District Judge.

SANBORN, Circuit Judge. The St. Louis Merchants' Bridge Terminal Railway Company complains that it has been convicted and fined for failing to placard the cars and to stamp the waybills of certain cattle and sheep which had been received by previous carriers in quarantined districts in Texas without certificates of inspection and had been transported to St. Louis by previous carriers where they were delivered to it and whence they were carried by it to the national stockyards in Illinois. The ground of its complaint is that its receipt of the cattle and sheep and its failure to placard the cars and stamp the waybills constituted no violation of any law of the United States. Counsel for the government, on the other hand, contend that these acts are punishable under Act March 3, 1905, c. 1496, § 1, 33 Stat. 1264 (U. S. Comp. St. Supp. 1909, p. 1185). The question is whether or not that statute includes in the class subject to its penalties a carrier that neither receives the live stock for transportation in nor transports it out of the quarantined district. The provisions of that act which condition the answer to this question are these:

By section 1 the Secretary of Agriculture is authorized to quarantine any district when he finds that live stock therein are affected with any contagious or infectious disease and is directed to give notice of his action—

"to the proper officers of railroad, steamboat or other transportation companies doing business in or through any quarantined state or territory, or the District of Columbia, and to publish in such newspapers in the quarantined state or territory, or the District of Columbia, as the Secretary of Agriculture may select, notice of the establishment of quarantine."

Section 2 provides:

"That no railroad company \* \* \* shall receive for transportation or transport from any quarantined state \* \* \* or from the quarantined portion of any state \* \* \* into any other state \* \* \* any cattle or other live stock, except as hereinafter provided."

Section 3 empowers the Secretary of Agriculture to make regulations to—

"govern the inspection, disinfection, certification, treatment, handling and method and manner of delivery and shipment of cattle or other live stock from a quarantined state \* \* \* and from the quarantined portion of a state \* \* \* into any other state, \* \* \* and the Secretary of Agriculture shall give notice of such rules and regulations in the manner provided in section 2 (one) of this act for notice of establishment of quarantine."

Section 4 declares that live stock—

"may be moved from a quarantined state \* \* \* or from the quarantined portion of a state \* \* \* into any other state \* \* \* under and in compliance with the rules and regulations of the Secretary of Agriculture made and promulgated in pursuance of the provisions of section 3 of this act; but it shall be unlawful to move, or to allow to be moved, any cattle or other live stock from any quarantined state \* \* \* or from the quarantined portion of any state \* \* \* into any other state \* \* \* in manner or method or under conditions other than those prescribed by the Secretary of Agriculture."

The provisions of section 5 have no relevancy to the issue under consideration.

Section 6 provides that any person, company, or corporation "violating the provisions of sections 2 or 4" shall be punished by fine or imprisonment, or both.

The Secretary of Agriculture made regulations under section 3 to the effect that, when cattle or sheep of the character of those carried in the case at bar were shipped from a quarantined district, the transportation company should affix a descriptive placard to each side of each car carrying them, and should stamp the waybills with descriptive words such as "uninspected exposed cattle" and "exposed sheep for slaughter," and that:

"Whenever such shipments are transferred to another transportation company or into other cars or into other boats, or are rebilled or reconsigned to a point other than the original destination, the cars into which said cattle or sheep are transferred and the new waybills \* \* \* shall be marked as herein specified for cars first carrying said cattle or sheep and for the billing, etc., covering the same. If for any reason the placards required by the regulations are removed from the car, or are destroyed or rendered illegible, they shall be immediately replaced by the transportation company or its agents, the intention being that legible placards shall be maintained on the cars from the time of shipment until they arrive at destination and the disposition of the cars is indicated by an inspector of the Bureau of Animal Industry."

[2] A penal statute which creates and denounces a new offense, and the act under consideration is such a statute, should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified as punishable by such a law. The definition of offenses and the classification of offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous, the courts may not lawfully extend it to a class of persons who are excluded from its effect by its terms, nor by interpolation or construction after their commission make acts offenses which were not clearly such by the expressed will of the legislative department. The creation of an offense by ex post facto construction is as pernicious as its creation by an ex post facto law. *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37; *United States v. Ninety-Nine Diamonds*, 72 C. C. A. 9, 12, 13, 139 Fed. 961, 964, 965, 2 L. R. A. (N. S.) 185; *United States v. Clayton*, Fed. Cas. No. 14,814; *In re McDonough* (D. C.) 49 Fed. 360; *Maxwell v. State*, 40 Md. 293; *Alexander v. Worthington*, 5 Md. 472; *Smith v. State*, 66 Md. 215, 7 Atl. 49; *Tyman v. Walker*, 35 Cal. 634, 95 Am. Dec. 152;

Lake County v. Rollins, 130 U. S. 662, 670, 9 Sup. Ct. 651, 32 L. Ed. 1060; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13.

In *United States v. Wiltberger*, 5 Wheat. 96, 5 L. Ed. 37, Chief Justice Marshall said:

"The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case, which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

[1] There is no ambiguity in the terms of the act under which the plaintiff in error has been fined, there is no uncertainty in the class, or in the limits of the class of railroad companies punishable under this law. That class consists of railroad companies "doing business in or through any quarantined state or territory," to whom alone notice of the establishment of quarantine and of the rules and regulations of the secretary is required to be given by sections 1 and 3, that "shall receive for transportation or transport from any quarantined state or territory, or the District of Columbia, or from the quarantined portion of any state or territory, or the District of Columbia, into any other state or territory, or the District of Columbia, any cattle or live stock, except as hereinafter provided" (section 2), or that shall "move or allow to be moved any cattle or other live stock from any quarantined state or territory, or the District of Columbia, or from the quarantined portion of any state or territory, or the District of Columbia, into any other state or territory, or the District of Columbia, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture" (section 4).

The terminal company was not charged in the information filed against it or proved at the trial to have been a member of this class. It owned and operated railroads in the immediate vicinity of the city of St. Louis and performed only the usual functions of a terminal company. The quarantined districts were in the state of Texas. It was not "doing business in or through" any of those districts. It never "received for transportation or transported" any live stock or "moved" any live stock "from any quarantined state" or "the quarantined portion of any state" into any other state or territory in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. If any offense was ever committed under the act of March 3, 1905, in the receipt for transportation, carriage, or movement of the cattle or sheep that the defendant below hauled from St. Louis to Illinois, that offense had been committed and completed long before that company received them, by some earlier carrier that took them for transportation and carried them from the quarantined district in Texas into some other state. There is no provision or permissible construction of the statute under consideration that can add to or include in the class of railroads punishable thereunder transportation companies that receive and carry live stock that



has already been taken out of the quarantined district by other companies in violation of that law.

[3] Counsel say, however, that the Secretary was authorized to make rules and regulations for the inspection, handling, delivery, and shipment of the live stock under section 3 of the act, that he made such regulations for their handling by every railroad company that received them from the time they started out of the quarantined district until they reached their destination, whether those companies received them within and transported them out of the quarantined district or received them after they had been taken out of that district and subsequently transported them, and that the terminal company received this stock at St. Louis and carried them to Illinois on their way from the quarantined district to their destination in Illinois and thus violated the rules. But it is a principle of criminal law that an offense which may be the subject of criminal procedure must be an act committed or omitted, "in violation of a public law either forbidding or commanding it." 4 Blackstone's Comm. 5. The acts charged and proved against the terminal company were not violative of any such law. The Congress did not in fact delegate, and it could not delegate, to the Secretary of Agriculture, or to any other executive officer the power to add to the class of railroad companies or to the acts punishable under this statute such others as in his judgment ought to be punishable thereunder.

[4] A legislative body may delegate the power to find some fact or situation on which the operation of a law is conditioned, or to make and enforce regulations for the execution of a statute according to its terms. *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 27 Sup. Ct. 367, 51 L. Ed. 523; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 677, 693, 694, 12 Sup. Ct. 495, 36 L. Ed. 294; *Caha v. United States*, 152 U. S. 211, 218, 219, 14 Sup. Ct. 513, 38 L. Ed. 415; *St. Louis & I. M. Ry. v. Taylor*, 210 U. S. 281, 287, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Coopersville Co-operative Creamery Co. v. Lemon*, 163 Fed. 145, 147, 89 C. C. A. 595.

[5] But it cannot delegate its legislative power, its power to exercise the indispensable discretion to make, to add to, to take from, or to modify the law. "The true distinction," said Judge Ranney for the Supreme Court of Ohio in *Cincinnati, Wilmington & Zanesville R. R. Co. v. Commissioners*, 1 Ohio St. 77, 88, in a declaration which has been repeatedly approved by the Supreme Court, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." *Marshall Field & Co. v. Clark*, 143 U. S. 649, 693, 12 Sup. Ct. 495, 36 L. Ed. 294; *Union Bridge Co. v. United States*, 204 U. S. 364, 382, 27 Sup. Ct. 367, 51 L. Ed. 523; *Morrill v. Jones*, 106 U. S. 466, 467, 1 Sup. Ct. 423, 27 L. Ed. 267; *United States v. Eaton*, 144 U. S. 677, 687, 688, 12 Sup. Ct. 764, 36 L. Ed. 591; *United States v. Maid* (D. C.) 116 Fed. 650; *United States v. Blaslingame* (D. C.) 116 Fed. 654; *United States v. Hoover* (D. C.) 133 Fed.

950, 952; *United States v. Moody* (D. C.) 164 Fed. 269, 271; *Locke's Appeal*, 72 Pa. 491, 498, 13 Am. Rep. 716.

The attempt of the Secretary of Agriculture to add by his regulations to the class of railroad companies and to the acts punishable under the quarantine act of March 3, 1905, other railroad companies and other acts was unauthorized and ineffective. No offense was charged in the information or proved against the defendant below, the judgment is reversed, and the case is remanded to the court below, with directions to sustain the demurrer to the information and to discharge the terminal company.

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In re STURTEVANT et al.

RYDBERG v. SMITH.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1911.)

No. 1,755.

**BANKRUPTCY (§ 161\*)—PREFERENCE—DELAY IN RECORDING CHATTEL MORTGAGE.**

Under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), which provides that a transfer by a debtor, being insolvent, within four months prior to his bankruptcy, by which one creditor will obtain a greater percentage of his debt than others of the same class, shall constitute a preference, and that, where the preference consists in a transfer, the four-month period shall not expire until four months after the date of the recording of the transfer if by law such recording is required, a chattel mortgage given by a bankrupt when solvent, in good faith and for a present consideration, does not become a preference because not recorded until within four months prior to the bankruptcy, where, under the state law as construed by its Supreme Court, the failure to record does not affect the validity of the mortgage as between the parties nor as against general creditors of the mortgagor, and it takes effect as of the date of its execution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.\*]

Appeal from the District Court of the United States for the Western Division of the Northern District of Illinois.

In the matter of Alva G. Sturtevant and Esther Nygren, copartners as Nygren & Co., bankrupts. John Z. Rydberg, executor of the estate of John Blomberg, deceased, appeals from an order of the District Court. Reversed.

Appellant appeals from the order of the District Court disallowing all rights and benefits asserted under a certain chattel mortgage securing the claim of his testator against the bankrupts.

The facts are stipulated into the record as follows, viz.: That on April 30, 1907, the bankrupts duly executed and delivered to said testator, John Blomberg, in his lifetime, their promissory note for \$2,000 due on or before three years after date, together with their chattel mortgage securing payment thereof, covering certain chattel property consisting of a building situate in the city of Rockford, Ill.; that said note and mortgage were given for a then present and valid consideration of \$2,000, paid over to said bankrupts; that said mortgage was not recorded until October 5, 1909, 15 days prior to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the filing of the petition in bankruptcy; that Blomberg had been pressing the bankrupts for the payment of overdue interest, but had been able to collect only a small portion thereof; that practically all the liabilities scheduled by the bankrupt had accrued since April 30, 1907, and prior to the filing of the mortgage; that the creditors had no knowledge of the existence of the mortgage until it was filed for record; that no fraud is claimed other than the withholding of said mortgage from record; and that said bankrupts were not insolvent at the time of the execution and delivery of said note and mortgage. It was further stipulated that the trustee should sell said building for \$800, which sum should stand in lieu of the building and abide the court's adjudication of Blomberg's rights.

Subsequently to the entry of the order of the court disallowing the claim of said Blomberg to the security and benefit of said mortgage he, said Blomberg, departed this life testate, and his said executor was substituted herein. The referee held that the filing of the mortgage for record within the four months period created a preference, and disallowed the same, but allowed the note as a general claim against the bankrupts' estate. This order, on petition for review, the District Court approved and confirmed.

The only question presented is whether the recording of the chattel mortgage within the four-month period, under the circumstances of this case, created a preference within the meaning of section 60a of the bankruptcy act. Section 60a reads as follows, viz.: "A person shall be deemed to have given a preference, if, being insolvent, he has, within four months of the filing of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debts, than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." See, also, section 3b of the act.

The Illinois statute covering chattel mortgages (Hurd's Statutes 1908, c. 95, § 1) provides: "That no mortgage, trust deed or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee or the instrument shall provide for the possession of the property to remain with the grantor and the instrument is acknowledged and recorded as hereinafter directed. And every such instrument shall for the purpose of this act be deemed a chattel mortgage."

G. E. Johnson, for appellant.

Richard F. Locke, for appellees.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). Under the Illinois statute, a chattel mortgage is good as against the mortgagor and those representing him, even though unacknowledged (*McDowell v. Stewart*, 83 Ill. 538), or unrecorded (*Barchard v. Kohn*, 157 Ill. 579, 41 N. E. 902, 29 L. R. A. 803). As against creditors and third parties, an unrecorded mortgage prevails over all claimants not armed with an execution or writ of attachment or other process of the courts, subsequent incumbrancers, purchasers in possession, or other adverse possession based upon some lien. *Sumner v. McKey*, 89 Ill. 127; *Union Trust Co. v. Trumbull et al.*, 137 Ill. 146, 27 N. E. 24; *Hooven v. Burdette*, 153 Ill. 672, 39 N. E. 1107; *Grafe v. Schoenhofen Brewing Company*, 78 Ill. App. 570; *Allcock v. Loy*, 100 Ill. App. 574; *Hansen v. Bruckman*, 152 Ill. App. 18; *Hock v. Mager-*

stadt, 124 Ill. App. 140. *In re Antigo Screen Door Co.*, 123 Fed. 249, 59 C. C. A. 248.

There can be no doubt but that, under the Illinois statute, Blomberg perfected his lien as against the general creditors of the bankrupts by causing his mortgage to be recorded before any subsequent title attached. Assuming, then, as is here conceded, that the original execution and delivery of the note and chattel mortgage were made in good faith, that the makers were solvent at the date of the transaction, that there was no fraudulent withholding of the mortgage from record, and that the whole transaction was had in good faith, did the recording of the mortgage within the four-month period bring the subject-matter within the disabilities of section 60a? The referee held that it did, basing his opinion upon *First National Bank of Buchanan Co. v. John A. Connett, Trustee, etc.*, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, and *Loeser, Trustee, etc., v. Savings Deposit Bank & Trust Co.*, 148 Fed. 975, 78 C. C. A. 597. The case first named came to the Circuit Court of Appeals for the Eighth Circuit from the Western District of Missouri. The decision of the Court of Appeals is based upon the construction of the Missouri statute by the Missouri courts, given before the amendment of 1903 to section 60a. "If," says the court, "one (a mortgage) is given before (the four months period) but is recorded within that period, and, under the local law, the fiction of relation back to the date of execution is not indulged in, but, on the contrary, the instrument is deemed to have first come into existence as a mortgage, when recorded, the trustee may likewise defeat it if the condition of a voidable preference appear." The Illinois Supreme Court in *Dean v. Plane*, 195 Ill. 500, 63 N. E. 274, has held that a transfer takes place as of the date of the execution and delivery of the note and mortgage.

The facts in *Loeser v. Savings Deposit & Trust Co.*, *supra*, so far as material here, were conceded by the holder of the mortgage to be as follows, viz.:

"That at the time the chattel mortgage was executed by Cassie L. Chadwick, to wit, April 27, 1904, and delivered to J. C. Hill, its president, that said Cassie L. Chadwick was insolvent and that said J. C. Hill as president of said bank had reasonable cause to believe at that time that she was insolvent, and that such condition existed on the 22d day of November, 1904." (The date when possession was taken and the mortgage recorded.)

Manifestly, this case comes within the language and meaning of section 60a. Neither of the two, however, are here in point upon the facts. We do not concur in the construction given to section 60a by the referee and sustained by the District Court as applied to the present case. That section applies to cases "where a preference consists in a transfer." Here the transfer when made constituted no preference. If the word "required" of section 60a is to be construed as referring to a transaction which would be invalid for all purposes, then it does not apply to the case in hand, for the recording of the mortgage is not required in that sense under the Illinois statute. The recording laws are only for the purpose of notice. *Dean v. Plane*, 195 Ill. 495-500, 63 N. E. 274. This construction of section 60a does not strike at the object sought to be attained by the amendments of

1903. It would formerly have been an easy matter to make a preferential transfer prior to the beginning of the four-month period, and withhold the transfer instrument from record until after the period had begun to run, thus defeating the benefit contemplated by the creation of that period. Manifestly Congress must have construed the law as it then stood as making the transfer to date from the time it was actually made, without regard to the date of filing for record. Therefore a transfer, though fraudulent, could not have been attacked, even though the instrument evidencing the transfer were recorded within the four months. In order to cure this, the amendment was added, so that no fraudulent transfer constituting a preference could escape the four-month provision unless the recording was effected prior to that period.

In *Eppstein v. Wilson*, 149 Fed. 197, 79 C. C. A. 155, the Circuit Court of Appeals for the Fifth Circuit sustained the lien of an unregistered chattel mortgage given only six days before the petition in bankruptcy was filed to secure an existing debt, on the ground that:

"The referee does not find that the bankrupt was insolvent at the time the mortgage was executed, or that there was any fraud in the inception or execution of the mortgage."

This involved the Texas statute which is, so far as the question here involved, substantially like that of Illinois as interpreted by the Illinois courts.

In *Meyer Bros. Drug Co. v. Pitkin Drug Co.*, 136 Fed. 396, 69 C. C. A. 240, the same court held that under the Texas statute a chattel mortgage made and delivered more than six months before the filing of the petition in bankruptcy, but recorded only 22 days before such filing, was a valid lien, there being no proof of insolvency or fraud at the time the transfer was made. "We think," says the court, "it follows that the chattel mortgage in this case was valid between the bankrupt and the holders thereof, and as to all parties shown to be interested in the bankrupt's estate, whether the said mortgage was recorded or not. It cannot be said, therefore, that the mortgage was one required to be registered or recorded under section 3328 of the Revised Statutes of Texas of 1895, nor that the granting of said mortgage constituted a preference within the four months under section 60a of the bankrupt law."

To the same effect is *In re Doran*, 154 Fed. 467, 83 C. C. A. 265, decided by the Circuit Court of Appeals for the Sixth Circuit in 1907 construing the Kentucky law, which in substance is the same as that of Illinois.

In *re Beckhaus*, 177 Fed. 141, 100 C. C. A. 561, relied upon by the trustee herein, is not in point. In that case one Rasmussen sought to recover certain personal property from the trustee claiming the same under and by virtue of a certain unrecorded preferential agreement or conveyance made when the bankrupt was insolvent, which property was never reduced to possession by Rasmussen.

The effect of the amendment to section 60a upon the record within the four-month period and prior to the filing of the petition in bankruptcy of a transfer valid when made was not before or considered by

the court. It was there held that the trustee, under the facts of that case had sufficient title to refuse to recognize the transfer, following, in substance, the decision of this court in *Re Bement*, 172 Fed. 98, 96 C. C. A. 412.

While there may be found in the reports cases which seem to hold contrary to the foregoing, an examination of each case will disclose that the decisions in such cases are based upon construction of the several state statutes by the local or state courts.

The order of the District Court appealed from is reversed, with directions to proceed further in accordance herewith.

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PARLETT et al. v. BLAKE.

(Circuit Court of Appeals, Eighth Circuit. May 18, 1911.)

No. 3,400.

**BANKRUPTCY (§ 140\*)—ASSETS—BAILMENT AND SALE.**

Where certain agency contracts appointed the bankrupt agent for the sale of manufacturers' furniture and carpets for a period ending July 1, 1899, the contract providing that the bankrupt, on final termination of the agreement, agreed "to buy and pay for at the then current prices and on the regular terms, such goods as might be then on hand," the contract was not executory as to the goods remaining at the termination of the contract, but, as to such goods, constituted a sale, so that the title to the goods so remaining passed to the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. § 140.\*]

Appeal from the District Court of the United States for the Western District of Missouri.

In Bankruptcy. Petition by George F. Parlett and another to recover possession of certain furniture against Daniel F. Blake, trustee in bankruptcy of Hallack-Deamer Carpet Company. From an order dismissing the petition, affirmed by the District Court, petitioners appeal. Affirmed.

On June 19, 1908, the Hallack-Deamer Carpet Company, the bankrupt, made a written contract with the Coppes, Zook & Mutschler Company of Nappanee, Ind., as follows: "This agreement entered into this 19th day of June, 1908, between the Coppes, Zook & Mutschler Co., of Nappanee, Indiana, party of the first part, and the Hallack-Deamer Carpet Co., of Kansas City, Missouri, party of the second part, witnesseth: That for the period of one year, ending July 1, 1909, said party of the second part hereby agrees to act as the agent of the party of the first part in effecting sales of furniture manufactured by said first party \* \* \* to the furniture trade in the following territories, viz.: The state of Kansas and the western part of Missouri, after the following general manner, to wit: Said second party agrees to maintain a representative line of samples of the furniture manufactured by the said first party on the floor in their store in Kansas City for use in soliciting trade from visiting buyers, also solicit trade from the furniture dealers in the aforesaid territory by means of their traveling salesmen, catalogs, and other usual means of advertising. Said second party further agrees that all sales made under this agreement shall be made at the prices as directed by the party of the first part. \* \* \* Said party of the second part further agrees to make report daily to said first party of all sales effected on account of said first party,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

together with all terms and agreements relative to said sales. \* \* \* It is further agreed that the said first party shall, for themselves, determine upon the orders to be by them accepted and the amount of credit to be extended, and in the event that sales have been made and goods delivered by said second party before said first party has expressed their approval of said sale, then it shall be at the option of said first party to charge said sale to the account of the Hallack-Deamer Carpet Co., at the regular terms and so notify them promptly.

"To the end that business may be expedited and goods promptly delivered to the trade in Kansas City and nearby points, the said party of the first part agrees to keep on hand, on consignment with the Hallack-Deamer Carpet Co., such goods as may be necessary to supply the needs of the business resulting under this agreement, and to replenish such stock from time to time upon the order of the party of the second part, and further to make their best endeavor to ship promptly such goods as are ordered to be shipped direct to the trade, or in mixed cars from Nappanee, Indiana.

"The party of the second part agrees to furnish suitable warehouses in which to store the aforesaid goods and to keep them insured against loss or damage, by fire or water, to the amount of 90 per cent. of their value, for and on account of the Coppes, Zook & Mutschler Co. Also to do all necessary labor in handling, caring for, packing, transferring and shipping said goods, and at the final termination of this agreement to buy and pay for at the then current prices and the regular terms such goods as may be then on hand.

\* \* \*

"It is further agreed that the regular terms of sale shall be sixty days net or two per cent. discount for cash within thirty days, and that in the event that goods are to be shipped to Chicago or other nearby points for loading in mixed cars, that the freight charges to such points shall be prepaid by the party of the first part. \* \* \* In consideration of the aforesaid agreement and that the party of the second part shall at all times make their best endeavor to effect said sales, to reliable and responsible trade and to care for the delivery in a thoroughly satisfactory manner such goods as are carried by them on consignment under this agreement, the party of the first part agrees to pay, and the party of the second part agrees to receive in full payment for all services rendered, a commission fee of 10 per cent. of the gross amount of the sales accepted and shipped. Said commission to be due and payable on the 10th day of each month, upon all business transacted during the previous calendar month."

On July 3, 1908, the Carpet Company made a like contract with the Lincoln Upholstering Company of Lincoln, Nebraska, for a like period ending July 1, 1909. These contracts were not acknowledged or recorded. Under them the Zook Company and the Lincoln Company each shipped goods to the Carpet Company. Tags were attached to these goods indicating from whom they were shipped. Separate accounts were kept showing the sales made from them respectively. After May, 1909, the business of the Carpet Company became dull and remittances to the consignors became irregular but business went on as before and continued with no material change until August 3, 1909, when a representative of the Coppes, Zook Company went to Kansas City, examined into the condition of things and determined to remove the goods then on hand consigned by his company from the Carpet Company's store; was about to do so when Mr. Deamer, the president of the Carpet Company, suggested that it would hurt his business if a large amount of goods should be removed and asked if some arrangement could not be made by which the goods could be left in the store. It was finally determined that they should be turned over to Mr. George F. Parlett, who was then an employé of the Carpet Company, to be disposed of for account of the Coppes, Zook Company. A similar arrangement was made by the Lincoln Upholstering Company with respect to goods shipped by it to the Carpet Company then on hand.

Petition was filed on August 30, 1909, in the court below by the creditors of the Carpet Company seeking its adjudication in bankruptcy. The adjudication followed on October 7, 1909. Later Parlett (and his wife who seems to have become jointly interested with him in his project) filed an intervening petition claiming as against the trustee of the Carpet Company in bankruptcy

the ownership and possession of the goods turned over to them by the two consignor companies. Their claim was denied by the court below and the case is brought here by appeal.

Otto Basye (Chas. W. Webster, on the brief), for appellants.  
Albert R. Strother, for appellee.

Before SANBORN and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). In the view we take of this case it is unimportant to dwell upon the arrangement between George F. Parlett and his wife, Anna B. Parlett, interveners here, and the two consignor companies. Suffice it to say the evidence shows that the Carpet Company was at the time of the transfer insolvent, and that the Parletts paid no consideration to that company for the goods transferred to them. If, therefore, the goods belonged to the Carpet Company the transfer was without consideration and in fraud of the rights of its creditors. If they belonged to the consignors the transferees stand in their shoes and acquired their rights of property only.

The question then is whether the title to the goods on hand at the end of the contract period, July 1, 1909, passed to the Carpet Company or remained in the consignors. If the latter be the case, the trustee in bankruptcy had no concern with them. If the former, he is their owner, and the interveners were properly nonsuited.

The contracts in question were primarily contracts of agency for the sale of the consignors' goods for a period ending July 1, 1909. Goods were to be intrusted to the agent by them for sale and any that were actually sold prior to that time were the goods of the principals, and the proceeds less the commission reserved belonged to them and had to be accounted for. Whether this relation of agency ceased on July 1, 1909, depends upon the true interpretation of this clause of the contract:

"The party of the second part [the agent] agrees \* \* \* at the final termination of this agreement to buy and pay for at the then current prices and the regular terms such goods as may be then on hand."

In *Sturm v. Boker*, 150 U. S. 312, 329, 14 Sup. Ct. 99 (37 L. Ed. 1043), it is said:

"The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale."

In *Re Columbus Buggy Co.*, 74 C. C. A. 611, 143 Fed. 859, 861, this court said:

"The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment."

The contracts before us, disclosing no obligation or right in the agent to return the undisposed of goods to the consignors but the contrary and inconsistent obligation "to buy and pay for them," are,



therefore, in our opinion, not contracts of bailment. They stand on a different footing from the goods received and sold before the expiration of the contract period. These undoubtedly were bailments, and it is equally clear, we think, that the goods remaining undisposed of on July 1st, became by virtue of the provisions of the contracts, the property of the erstwhile bailees.

It is suggested that the clause of the contracts under consideration is executory, imposing an obligation to do something in the future rather than constituting a conclusive and final sale of such goods as might remain undisposed of at the end of the contract period.

If the clause had read:

"The party of the second part" (the agent) "agrees \* \* \* at the final termination of this agreement to pay for" (instead of "to buy and pay for") "\* \* \* such goods as may be then on hand"—

we think it could not be successfully claimed that the obligation to keep and pay for the goods was executory. A written obligation to "buy and pay for" goods in one's possession at a given fixed time does not seem essentially different from an obligation "to pay for" them at that time; and when we are striving to ascertain the intention of practical men in the language employed in a business contract, it is difficult to imagine that such minds would regard the two obligations thus expressed as at all different. Let us suppose the goods had been destroyed by fire while in the possession of the agent charged as it was with the obligation "to buy and pay for them"; can it be doubted that the consignors could have recovered from the agent the price which it had agreed to pay for them? We think not.

The contracts in their main and substantial aspect were, as already stated, agency contracts for a year's period. The object obviously was to dispose of as much merchandise as possible during that period. What would promote that object more than an obligation imposed upon the agent to keep and pay for such goods as it did not sell? It was, we think, in this natural and serviceable sense that the words of the contract in question creating the obligation "to buy and pay for" were employed. By requiring the agent to keep and pay for such goods as it did not sell to the trade during the year the business would naturally be promoted and the agency could be at once automatically and effectually wound up at the end of the year. This, in our opinion, was the clear intent and meaning of the parties in using the words "to buy and pay for," and under well-recognized rules of construction we should recognize and enforce it if possible. Moreover, there does not appear to have been any scope for the operation of an executory promise to buy.

Before the end of the year goods had been delivered to the Carpet Company for two purposes; some to be sold to the trade for account of the consignors, and the remainder to be paid for by the Carpet Company at current prices. Those that remained undisposed of at the end of the year were the subject of ready identification and thereby became the definite and certain subject of sale. The consignors had nothing to do but accept the purchase price. They had no option to take the goods or legal right to get them. The Carpet Company had

no legal right to return them. Its right as well as its obligation was to pay for them and that was all.

In view of these facts, we fail to discover any occasion or opportunity for further bargaining. The contracts as originally made operated *proprio vigore* upon a subject of sale which was to become and had become definite and certain.

It is said in *Mechem on Sales*, vol. 1, § 2:

"There may be an agreement whose legal effect is that the title shall not pass until a future time, either because, in the case of an ascertained chattel, something remains to happen or be performed which the parties have treated as precedent, or because the particular chattel whose title is to be so transferred has not yet been ascertained. This is an agreement to sell, called often, for purposes of further distinction, 'an executory sale.' It does not become a sale until the precedent event has happened or the condition has been performed. It then becomes a sale by force of the present agreement aided or completed by the happening of that event or the performance of that condition."

This is our view of the present case. The original contracts, on July 1, 1909, operated upon the undisposed of goods, and by force of their provisions transferred the title at once and unconditionally to the Carpet Company, on the terms specified. This, we think, expresses the intention of the contracting parties as manifested by the whole instruments, the objects to be accomplished and the conduct of the parties.

Counsel for intervenors invoke the doctrine of the following cases in support of their claim to the property in question: *In re Galt*, 56 C. C. A. 470, 120 Fed. 64, *John Deere Plow Co. v. McDavid*, 70 C. C. A. 422, 137 Fed. 802, *In re Columbus Buggy Company*, 74 C. C. A. 611, 143 Fed. 859, and *In re Pierce*, 85 C. C. A. 14, 157 Fed. 757, and other like cases, but we fail to see how that doctrine has any application to this case. Those cases decided that the contracts involved in them when properly construed were contracts of bailment or agency as distinguished from conditional sales, and as a result that the consignor's title to property which had been delivered to the bailee or agent was good as against the trustee in bankruptcy of the estate of the agent. This case on the contrary concerns property held by the Carpet Company with no option or right to return to the consignor and, therefore, not as a bailee or agent but with a duty and obligation to take and pay for it and, therefore, as the owner.

A patient investigation of authorities fails to disclose any adjudication upon the exact facts disclosed in this case. But we think the principles announced in the following cases dealing with very similar state of facts as those now before us lead unerringly to the conclusion we have reached. *Conable v. Lynch*, 45 Iowa, 84; *Norton v. Fisher*, 113 Iowa, 595;<sup>1</sup> *Fish v. Benedict*, 74 N. Y. 613; *Ætna Powder Co. v. Hildebrand*, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194; *Arbuckle v. Gates & Brown*, 95 Va. 802, 30 S. E. 496; *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 67 N. W. 174, 58 Am. St. Rep. 691; *O'Neal v. Stone*, 79 Mo. App. 279; *Potter v. Mt. Vernon Roller Mill Co.*, 101 Mo. App. 581, 73 S. W. 1005.

The court below rightly held that the interveners were not entitled to the relief sought, and its decree is affirmed.

<sup>1</sup> 85 N. W. 801.

## THE R. B. LITTLE.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 271.

**TOWAGE (§ 11\*)—INJURY TO TOW—LIABILITY OF TUG.**

A barge in tow alongside of a tug and drawing 12½ feet, while navigating the Harlem River at low water, struck some obstruction, which made a hole in her bottom and sunk her. The river was constantly navigated at the place with safety by boats of such draft, and no obstruction was known or found afterward; whatever caused the injury having apparently been forced into the mud by the vessel. *Held*, that the facts did not charge the tug with any negligence which rendered her liable for the injury.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17; Dec. Dig. § 11.\*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by John W. Livingston, owner of the barge *Serviss*, against the steam tug *R. B. Little*; John Rugge, Jr., and another, claimants. Decree for respondents, and libellant appeals. Affirmed.

The following is the opinion of Hough, District Judge, in the District Court:

It is not doubted that libellant's coal boat *Serviss*, while in tow of the *Little* and properly fastened to the tug's port side, took the bottom in the Harlem River near Spuyten Duyvil Bridge with such severity that she shortly after sank. On being raised, there was a hole in her bottom on her starboard side about 10 feet from her bow and a scratch or scar extending aft therefrom, gradually diminishing in depth toward the stern. At the time the *Serviss* was drawing about 12½ feet aft and 12 feet forward. The *Little* was drawing 12 feet or a little more aft, and about 11 feet forward.

Very little help in solving the question presented by the evidence is derived from the pleadings herein. The libel alleges that the coal boat was run upon an obstruction "well known to navigators"; "said obstruction being a very short distance from what is known as 'Johnson's Dock' in the Harlem River." These allegations are plainly not true, for the obstruction was carefully searched for and not found, and although there is much evidence as to lack of water at the place where the *Serviss* was injured, no one testifies to a well-known rocky obstruction, and, further, whatever it was that did the *Serviss* injury, it was not near Johnson's Dock. The answer alleges that the river at the place of accident was about 400 feet wide, and that the tug and tow "proceeded up the middle \* \* \* and when 500 or 600 feet past (Spuyten Duyvil Bridge), and *while navigating in the middle*" of the river the *Serviss* struck an unknown obstruction. These statements are not true, for by all accounts from the claimant the place of stranding is considerably further from Spuyten Duyvil Bridge than is alleged, and no witness from either side has asserted that the *Little* was navigating in the middle of the river at the time of disaster. This condition of the pleadings compels the court to make such findings from the evidence as it may; it being in my judgment impossible to test or judge the evidence submitted by the pleadings of either party.

Some fundamental propositions regarding the relations of tug and tow must peculiarly be borne in mind in a case of this sort. The tug is not an insurer. It is only bound to the exercise of ordinary care. The mere happening of an accident is not in and of itself proof of negligence (The

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Winnie, 147 Fed. 725, 79 C. C. A. 431), and those engaged in the towing business are entitled to rely upon maps and charts of accredited authority (The Nathan Hale, 99 Fed. 462, 39 C. C. A. 604). This last proposition is much relied upon by claimant, yet it must be noted that the charts submitted in this case are very unsatisfactory. They are two in number: The Coast Survey chart, of an ancient date and on a very small scale, and a War Department engineer's survey of 1905, with no date given for the soundings marked thereon, and obviously intended, not as an aid to navigators, but to show the (as yet wholly theoretical) pier and bulkhead lines approved by the Secretary of War in 1890. Any effort to rely upon these maps (or any other map) is rendered more difficult by the obvious unfamiliarity of every witness produced, with charts of all kinds. It was even plainer in this case than it usually is that most harbor boatmen have no acquaintance with the chart, never study a chart, and do not transact their business by any chart. They work by tradition and rule of thumb.

It is, I think, clearly established that the Serviss did strike some hard object when within 70 or 80 feet of the Manhattan shore and about the same distance to the westward of a bend in the Harlem River known as "Point of Woods." The ordinary bottom of the Harlem River in that region is mud, and it is, I think, a demonstration that the weight of the Serviss must have pressed that hard something which injured her into the mud as she passed over it; for otherwise I am wholly unable to understand how a serious break in the planking forward could have become a trifling scratch aft when the boat was loaded about 6 inches by the stern. The question presented by the evidence becomes, therefore, this: Was the person in charge of the navigation of the Little bound to know that navigation on a 12½ foot draught at low water was dangerous within about 100 feet of the Point of Woods? The distance of 100 feet is stated, because the Little herself is about 17 feet wide, and she was inside the Serviss (i. e., between the Serviss and the Manhattan shore) at the time of injury, and was herself uninjured. This shows that there was no general lack of water at the time and place.

On the question thus presented there is an absolute conflict of testimony. Men apparently of equal skill and equal opportunities of knowledge testify, some that they habitually take 12 feet of water within 15 or 20 feet of the Point of Woods, and others that they never navigate on that side of the channel at all, but keep nearer the Bronx shore, because they have always regarded the Point of Woods as dangerous. In this condition of the evidence recourse may be had to the charts, and without attempting to describe what any one may see at a glance on looking at the chart I am convinced that according to a survey, certainly not later than 1905 (and this accident happened in 1907), the water on the Manhattan side of the river off the Point of Woods is better than that near the Bronx side, and the whole river at this point is within the 15-foot contour lines, except a very narrow passage about 110 feet off the Point of Woods.

It is therefore to me entirely plain that the libellant has not sustained the burden of proof. He has shown an injury, but has not shown what caused the injury. He has not shown any permanent obstruction to navigation at the point where confessedly he was injured, and has not shown by a fair preponderance of evidence that the place where the injury occurred was known or even commonly believed to be dangerous.

For these reasons, the libel must be dismissed, with costs.

James J. Macklin (De Lagnel Berier, of counsel), for appellant.  
Carpenter & Park (Samuel Park, of counsel), for appellees.

Before LACOMBE, WARD and NOYES, Circuit Judges.

WARD, Circuit Judge. The barge Serviss, while in tow on the port side of the tug R. B. Little, bound from Fifty-Eighth street, North River, to Kingsbridge, Harlem River, was run upon a rock and sunk. This happened in broad daylight in waters constant-

ly used with safety by vessels drawing as much as the *Serviss*. The District Judge dismissed the libel.

The record is most unsatisfactory. The pleadings of both parties are concededly untrue as to the place of the accident and in other material allegations. The witnesses are inaccurate, entirely unacquainted with charts and in unusual disagreement. The master of the tug is especially blameworthy for failure to report the accident to the steamboat inspectors, as he was bound by law to do. Inspectors' Rule V (23).

The facts stated make out a *prima facie* case in favor of the barge and put the burden of explanation on the tug. *The Ellen McGovern* (D. C.) 27 Fed. 869; *The Resolute* (D. C.) 149 Fed. 1005, affirmed 160 Fed. 659, 88 C. C. A. 17. But the finding of the District Judge as to the facts amounts to an explanation which frees the tug of fault, and therefore the decree is affirmed, with costs.

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In re TORCHIA.

(Circuit Court of Appeals, Third Circuit. June 20, 1911.)

No. 49 (1,517).

**1. BANKRUPTCY (§ 267\*)—EXPENSES OF ADMINISTRATION—USE OF PROCEEDS OF PROPERTY SUBJECT TO LIENS—WAIVER OF OBJECTION.**

Holders of liens on realty of a bankrupt, who, with knowledge of proceedings by the trustee for the sale of the same free from liens, permit such proceedings to continue without objection and the proceeds of the property to be used in the payment of expenses of administration, by necessary implication assent to the same and cannot afterward object to such proper expenditures.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.\*]

**2. BANKRUPTCY (§ 205\*)—RIGHTS OF LIENHOLDERS—RENTS COLLECTED AFTER BANKRUPTCY.**

Under the law of Pennsylvania, rents collected by a trustee from property of a bankrupt which is subject to valid liens belongs to the lienholders and not to the general estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. § 205.\*]

**3. BANKRUPTCY (§ 205\*)—RIGHTS OF LIENHOLDERS—DAMAGES FOR INJURY TO PROPERTY.**

Judgment creditors of a bankrupt, whose judgments were liens upon real estate, are not entitled to a sum awarded as damages to such real estate resulting from a change of street grade, where their liens were obtained after such change, although the damages were not paid until after the bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. § 205.\*]

Petition for Review of Order of the District Court of the United States for the Western District of Pennsylvania.

In the matter of Frank Torchia, bankrupt. On petition by lienholders to revise an order of distribution. Reversed in part.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

James T. Buchanan, John E. McCalmont, Thomas H. Hasson, and Lyon & Hunter, for petitioner.

Charles A. Woods and James L. Wehn, for respondent.

Before BUFFINGTON and LANNING, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. The fund distributed by the District Court was too small to pay more than part of the judgment lien belonging to one of the petitioners, or to pay anything upon the four judgment liens immediately succeeding. These five lienholders assert that by reason of improper allowances and awards the fund that would otherwise have been available for their liens has been diverted, and they have therefore presented this petition to revise.

[1] The allowances complained of are for commissions to the trustee (the South Side Trust Company) and compensation to its counsel, for commissions to the referee, for compensation to the receiver and to its counsel, and for compensation to the counsel for the bankrupt. No objection is made to the amount of any of these charges—if, indeed, such objection could be made on this petition, a question that need not now be decided—but the single ground of attack is that *no* allowance on account of any of the foregoing items should have been made, because the fund is solely derived from real estate upon which the judgments of the petitioners were liens at the date of bankruptcy. The recent decision of this court in *Re Vulcan Foundry Co.*, 180 Fed. 671, 103 C. C. A. 637, is referred to in support of this position. There is, however, an essential difference between the present situation and the situation that was there passed upon. Not only did the petitioners now before the court have ample notice that the referee was being asked for an order to sell the bankrupt's real estate discharged of liens, but they made no objection thereto; and, after the order had been made, they not only took no steps to have it reviewed by the District Court, but they permitted the trustee to go on for months in the gradual execution of the order and in the distribution from time to time of the proceeds. To use a phrase of the *Vulcan Foundry Case*, they consented by "necessary implication" to all that was done, and their belated objections cannot now be regarded with favor. The objection to the commissions of the trustee and of the referee, and to the compensation of counsel for the trustee, the receiver, and the bankrupt, and the objection also to certain expenditures for the necessary care and preservation of the real estate, must be overruled.

[2] But we are compelled to disagree with the District Court on the subject of the rents. In our opinion this question has been decided by the Supreme Court of Pennsylvania in *Bausman's Appeal*, 90 Pa. 178, and in *Wolf's Appeal*, 106 Pa. 545, and we are disposed to follow these rulings. It was there determined that, after insolvency has taken the debtor's real estate out of his hands, its income or product belongs to the lien creditors, who have thus become its virtual owners, and we can see no sufficient reason why the same rule should not apply to real estate in a court of bankruptcy. It has already been so applied in this circuit (*Re Industrial Storage Co.* [D. C.] 163 Fed.

390), and the case may perhaps be referred to although it was decided by the writer of this opinion.

[3] Another subject of controversy is the money, \$6,300, that was paid by the city of Pittsburgh on account of the damage done to one of the bankrupt's houses by a change of grade in an abutting street. When the actual physical change of grade was begun, the bankrupt was still the owner and was still in possession. The petition in bankruptcy was not filed until several months afterwards, but although, by reason of delay in the settlement with the city, the money was paid into the hands of the trustee, the right to the damages was the bankrupt's right, and is to be so treated. It therefore passed to the trustee with the same restriction that qualified it in the bankrupt's own hands. He himself would not have been permitted to receive the money if the rights of his lien creditors would thereby have been injuriously affected. Woods Run Ave., 43 Pa. Super. Ct. 475. But the petitioners themselves had no lien at the time the damages accrued, and the difficulty about their position is that they must work out the equity they now assert through the rights of the creditors that did have liens at that time and might themselves have been able to assert a claim to these damages if they would have been injured by payment to the bankrupt. These creditors owned certain mortgages and mechanics' liens; but it appears clearly that they would have suffered no injury at all, even if the bankrupt himself had been paid the money, for the mortgagees had still an ample margin in the injured property and have since been paid in full out of the fund it produced; and the mechanics' lien creditors never had a claim on the damages, for their rights arose by reason of work done with full notice of the proposed change of grade, and upon the credit of the property in its injured condition. As neither the mortgagees nor the mechanics' lien creditors were in a position to establish any claim upon the damages, there seems to be no ground to apply the doctrine of marshaling assets in favor of these subsequent judgment creditors. And this we think is especially true, because, as already stated, the present petitioners had no lien upon the injured property until after the actual change of grade had been begun, and after the bankrupt's right to the damages had accrued.

We are satisfied with the ruling of the District Court on the subject referred to in the fifth assignment of error—attorneys' commissions stipulated for in certain securities—and do not find it necessary to discuss the sixth assignment on the subject of interest, because it is not referred to in the briefs of petitioners' counsel, and does not seem to be insisted upon.

In a word, we agree with the distribution made by the District Court, except the part that deals with the rents; but, as we disagree about that item, we are obliged to reverse the decree in order that a new distribution may be made in accordance with this opinion. It is therefore so ordered; but no costs in this court will be allowed to the petitioners.

## THE TRANSFER NO. 18.

(Circuit Court of Appeals, Second Circuit. May 24, 1911.)

No. 283.

## COLLISION (§ 95\*)—TUGS WITH TOWS—FAULT OF TUGS.

A transfer tug which moved out of her slip on the New Jersey side of North river with a car float on her side and a tug with a tow passing up the river both held in fault for a collision between their tows, the transfer for coming out without sounding the slip whistle required by article 18, rule 5, of the inland rules (30 Stat. 100 [U. S. Comp. St. 1901, p. 2882]), when she was ready to come out, and the other tug for failing to keep a proper lookout which might have avoided a collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 95.\*

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Lehigh Valley Transportation Company against the steam tug *Transfer No. 18*, the New York, New Haven & Hartford Railroad Company, claimant. Decree holding two tugs liable for collision between their tows, and libellant appeals. Affirmed.

Charles M. Sheafe, Jr. (J. T. Kilbreth, of counsel), for appellant.

Harrington, Bigham & Englar (Howard S. Harrington and D. R. Englar, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The collision happened at night in the North River near the Jersey shore off Communipaw ferry. We concur with the District Judge. Article 18, rule 5, of the inland rules provides that steam vessels, shall give the long blast "bend" or "slip" whistle signal "when (they) are moved from their docks or berths." Conceding that *Transfer No. 18* did give one long whistle, and there is a conflict of testimony as to that, she gave it, not when she moved from her dock, but some time before she moved. How long that time was it is difficult to determine. Certainly she waited till the tug *W. V. R. Smith* had moved out of her way, and, when she gave it, the *Superior* and her tow were still so far away that the master of *Transfer No. 18* could not make out what they were. We cannot find that, had she repeated her signal when the *Smith* had got out of the way and she herself was about to move from the dock, it would not have challenged the attention of the lookouts on the flotilla, and the collision would not have been avoided.

It is also manifest that, when the *Transfer* began to move from the dock, the *Superior* was still below her. Had she been merely past the dock at that time, she would have been safely beyond it before the *Transfer* could have backed out and made the turn she did before collision. Had the lookouts been attentive, they would have seen the *Transfer* backing out towards their own course, and it seems reasonable to con-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



clude that the master of the Superior thus warned of the Transfer's approach could have avoided the collision.

The decree is affirmed, with interest and costs.

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CONFECTIONERS' MACHINERY & MFG. CO. v. PANOUALIAS.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 248.

PATENTS (§ 328\*)—INFRINGEMENT—CANDY-COATING MACHINE.

A judgment based on the verdict of a jury finding infringement of the Panoualias patent, No. 685,790, for a candy-coating machine, affirmed.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Panayiotis Panoualias against the Confectioners' Machinery & Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William Quinby and Marcus B. May, for plaintiff in error.

Ferdinand E. M. Bullowa (Emilie M. Bullowa, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The plaintiff sues at law to recover damages for infringement of claims 27, 28, 37, and 38 of United States letters patent No. 685,790 issued to him November 5, 1901, for a candy-coating machine. The only issue involved is infringement. The jury rendered a verdict for \$1 in favor of the plaintiff. The defendant sues out a writ of error from the judgment entered thereon.

The art of coating candies is old, and is of two kinds, viz., dipping and flooding. By the first the candy cores to be coated are dipped into a tank of hot chocolate and then lifted out. By the second the chocolate is poured over the cores. In either case the surplus chocolate must be shaken off, and there are various devices for doing so. The machines of the plaintiff and of the defendant belong to the flooding class. The claims involved are as follows:

"27. In a machine for coating candies, a chocolate receptacle, a hopper provided with a transverse screen, means for conveying the chocolate from said receptacle into said hopper, an agitator frame mounted in front of and beneath said hopper, a basket or dipping frame adapted to receive candies to be coated, and also adapted to be placed over said agitator frame, and devices for conveying chocolate from said hopper, and distributing it over said basket or dipping frame, substantially as shown and described.

"28. In a machine for coating candies, a chocolate receptacle, a hopper mounted over said receptacle, means for conveying chocolate over said receptacle into said hopper, an agitator frame mounted in front of and beneath said hopper, and provided with a screen, a basket or dipping frame adapted to be placed on said agitator frame and adapted to hold candies to be coated, devices for conveying chocolate from said hopper and distributing the same over said basket or dipping frame and the candies held therein, and a chute

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

placed beneath the agitator frame and communicating with the chocolate receptacle, substantially as shown and described."

"37. In a machine for coating candies, a chocolate receptacle, an agitator frame mounted in front of and above said receptacle and provided with a screen, a basket or dipping frame adapted to receive candies and to be placed over said agitator frame, and devices for conveying the chocolate from the chocolate receptacle, and for distributing the same over the basket or dipping frame and over the candies therein, substantially as shown and described.

"38. In a machine for coating candies, a chocolate receptacle, an agitator frame mounted in front of and above said receptacle and provided with a screen, a basket or dipping frame adapted to receive candies and to be placed over said agitator frame, and devices for conveying the chocolate from the chocolate receptacle, and for distributing the same over the basket or dipping frame and over the candies therein, and a chute supported beneath the agitator frame and in communication with the chocolate receptacle, substantially as shown and described."

It will be noticed that the claims are for a combination and that the means for conveying the chocolate from a receptacle into the hopper and for conveying the chocolate from the hopper onto the cores is not specifically described. The plaintiff contends that the chief value of his invention consists in the element of the combination described as "an agitator frame mounted in front of and beneath said hopper (or alternatively in front of and above the chocolate receptacle) and provided with a screen, a basket or dipping frame adapted to be placed on said agitator and adapted to hold candies to be coated." He alleges that the defendant employs an equivalent of his agitator frame in its belt-tapping device.

Agitation was old in the art, but previous devices had agitated the cores only after the flooding. The plaintiff was the first person to construct a machine which shook the cores while the chocolate was passing over them, as well as afterwards. And there is testimony that this makes a much better coated candy. The plaintiff places the cores in a wire tray, which is agitated while the chocolate falls upon them from a hopper above and behind. The defendant, on the other hand, carries the cores on a wire-traveling belt to, through, and beyond a stream of chocolate, and agitates the belt by a device under it called a belt tapper.

The defendant's machine did not infringe claims 27 and 28, because both of them include as an element "devices for conveying the chocolate from [the] hopper and distributing it over [the] basket or dipping frame." There are no such devices in defendant's machine. The chocolate falls directly upon the traveling belt through holes in the hopper. Defendant, however, asked for no separate instruction as to these claims. His request was for an instruction "that the scope of the claims sued, *or any of them*, cannot be extended to embrace defendant's structure." Claims 37 and 38 do not include devices for conveying from the hopper, but only "devices for conveying the chocolate from the *chocolate receptacle* and for distributing the same over the basket." Such devices are present in defendant's machine. There was much testimony as to the practicability of the plaintiff's patent and as to the equivalency of the defendant's belt tapper with the plaintiff's agitator frame and whether the belt tapper was intended to do and did do what the agitator frame does. The verdict of the jury solved these questions in the plaintiff's favor.

The assignments of error are all to the effect that the court should, construing the claims with reference to the prior art and to the proceedings in the Patent Office, have held as matter of law that they did not cover the defendant's structure, and therefore have directed a verdict for defendant. We think he was right in refusing to do so. No exceptions were taken to his instructions to the jury, and, they having rendered a verdict in favor of the plaintiff, the judgment is affirmed.

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SHREDDED WHEAT CO. v. WILLIAMS BISCUIT CO. et al.

(Circuit Court, N. D. Illinois, E. D. March 8, 1911.)

No. 29,623.

1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING SHREDDED WHEAT.

The Perky & Ford patent, No. 502,378, for a machine for the preparation of cereals for food, the novel feature of which is the combination with a pair of compressing rolls, one or both of which are grooved, of a comb-like scraper, the teeth of which are arranged to fit said grooves and the spaces between the teeth to fit the cylindrical faces of the rolls between the grooves, discloses a true combination and invention. Claims 1 and 2 also held infringed.

2. PATENTS (§ 290\*)—SUIT FOR INFRINGEMENT—PARTIES.

Where one man conceived, built up, patented in part, and managed the business of a corporation, he may properly be joined with it in a suit for infringement of a patent in the conduct of such business.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 470-472; Dec. Dig. § 290.\*]

In Equity. Suit by the Shredded Wheat Company against the Williams Biscuit Company, Matthew R. D. Owings, Alonzo H. Benn, and William E. Williams. Decree for complainant.

Offield, Towle, Graves & Offield and Edward W. Anderson (Charles K. Offield and Frederick I. Allen, of counsel), for complainant.

W. E. Williams, for defendants.

KOHLSAAT, Circuit Judge. This cause is now before the court on final hearing upon bill filed to restrain infringement of claims 1 and 2 of patent No. 502,378, granted to complainant's assignors August 1, 1893, for a machine for the preparation of cereals for food. Defendants insist that the bill limits infringement to claim 1. While clause 6 of the bill makes special reference to claim 1, claim 2 is sufficiently covered by other clauses of the bill. This contention is not observed either in the answer or the evidence, and seems to be limited to the argument. It is not justified by the record.

[1] The claims read as follows, viz.:

"1. In a machine for the preparation of cereals for food, the combination with a pair of compressing rolls, one of which is provided with circumferential grooves, of a comb-like scraper the teeth of which are arranged to fit said

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

grooves, the spaces between said teeth being arranged to fit the cylindrical faces of the divisions separating said grooves, substantially as specified.

"2. In a machine for the preparation of cereals for food, the combination of a pair of circumferentially grooved rolls, the comb-like scraper therefor, the conveyer belt, and the spindle II hung in slotted bearings, over said belt, substantially as specified."

It will be seen that claim 2 differs from claim 1, in that (1) both compressing rolls are grooved; (2) the addition of means for delivering the product to and for shaping by the belt and spindle.

Defendants contest the validity of the patent on the prior art, the proceedings in the Patent Office, and on the ground that the devices of the claims are mere aggregations. The last named may be quickly disposed of, as it is plainly seen from the patent that all of the elements operate to produce in claim 1 the unshaped cereal food product, and in claim 2 the finished commercial article.

The proceedings in the Patent Office show that on December 31, 1892, the examiner rejected claim 1 of the amended claims filed December 29, 1892, upon patents to Carew Nos. 423,593, granted March 18, 1890, for machine for applying adhesive material to the surface of paper, etc., and 475,535, granted May 24, 1892, for a like purpose, and patent No. 176,176 for a granulating machine granted to A. R. Guilder, April 18, 1876, and allowed amended claims 2 (the present claim 1), 3, and 5, filed December 29, 1892. A comparison of said amended claims 1 and 2 discloses no substantial difference between the two, other than the statements in amended claim 2 that the spaces between the teeth of the scraper are arranged to fit the cylindrical faces of the divisions separating said groove, and the substitution in claim 2 (present claim one) of one grooved and one smooth compression roll for the two-grooved rolls of claim 1.

The specification, lines 24 and 25, p. 1, says:

"B and B' are two rolls, one or both of which are to be grooved circumferentially."

The two grooved compression rolls are included in claim 2 as allowed. It can hardly be that invention could be predicated upon the belt and spindle elements of claim 2 in combination without other novel features. That claim ends with the words, "substantially as specified." The specification, lines 34 to 37, p. 1, says:

"D is a scraper having teeth so formed as to fit in the grooves in roll B and between the teeth the said scraper is to fit the cylindrical faces of the divisions separating said grooves."

Did not the patentee acquiesce in the conclusion of the Patent Office to the effect that the feature which differentiated his invention from the prior art lay in the adaptation of the scraper to both the grooves and the division spaces between the grooves? This seems a fair conclusion.

Complainant's expert, Wilson, says:

"I think that a scraper would not fall within the language of the patent in suit and claim 1 to which your question refers, unless such scraper had teeth arranged to fit in the grooves of the roller, and the spaces between the teeth arranged to fit the cylindrical faces or lands, the same constituting the divisions separating such grooves."

The defendants set up a number of patents of which patent No. 210,927, granted to E. Durand, December 17, 1878, for a machine for cutting or chopping tobacco leaf for manufacturing "picadura" and cigarettes, and the like, also the two Carew patents above described for a device for applying adhesive material to the surface of paper, the above set out Guilder patent for a granulating machine, patent No. 485,483, granted to A. Abojador, November 1, 1892, for a machine for reducing and comminuting tobacco for cigarettes and the like, patent No. 146,304, granted to J. Baumgartner, January 13, 1874, for a machine for making noodles, and patent No. 378,516, granted to P. A. Oliver, February 28, 1888, for a device for pressing and graining gunpowder, fairly represent the state of the prior art. None of these can be said to anticipate the two claims in suit. The very objects set out in the several patents disclose substantial differences between them and the patent in suit. As applied to the shredded wheat art, claims 1 and 2 seem to be impressed with some little degree of novelty, and are entitled to be ranked as invention. This, together with the presumptions growing out of the grant of the patent, justify the court in holding them to be valid.

"Defendants' rolls are assembled in a machine, two rolls in a pair, with five pairs mounted one above the other (defendant's record, p. 22), the grain entering the first set as grain and passing down through the five sets is delivered as finished shreds from the bottom." It is then taken by a carrier belt which delivers it to the hopper of a cupping machine from which it is fed into revolving cups shown in fig. 17 of patent No. 949,013, granted to W. E. Williams on February 15, 1910, having a cone-shaped central projection in its bottom around and over which the shreds are placed in an interlacing manner. Over this cone-shaped projection a plunger having a cavity corresponding to the cone is forced down upon the shredded product, forming it into a cup or other desired shape.

In complainant's device the prepared cereal is delivered to the compression rolls by which it is reduced to "threads, lace, or ribbons, or sheets, etc. (the form of which depending on the contact or proximity of rolls *B* and *B'*)," and then removed by a scraper and received by a belt and carried to the spindle around which it is wound by the frictional action of the belt against the product. "If desired, the product may be conveyed without winding upon the spindle to any convenient receptacle."

Defendants' compressing rolls are provided of necessity with scrapers. Without these the rolls clog. According to defendant Williams' testimony, the defendants first used a scraper composed of a series of needles clamped into a box and held in such a manner that the needles entered the grooves. In August, 1907, they substituted (according to Williams) a flat piece of steel having V-shaped saw teeth which fitted into the groove registering with the bottom of the groove. These, the same witness (as well as complainant's witness Hutzen) claims, would become heated so that they were quickly abraded by contact with the grooves of the rolls to such an extent that they covered the spaces between the grooves, and become for all practical purposes the scraper of the patent in suit. Thereafter the witness says defendants used a

straight-bladed scraper, which, after 10 or 15 minutes' operation of the rolls, never fails to fit itself to the rolls sufficiently for commercial purposes. The witness insists that there is no advantage in scraping the faces of the division walls between the grooves, as removal of the dough from the grooves answers all purposes.

Complainant's witness Hutzen, who formerly worked for defendant corporation, denies that the straight-edge scraper blade scraped the shreds out of the rolls at the start. Complainant's expert Wilson corroborates Williams as to the wearing away of the straight edge by use so as to produce a scraper substantially like that of the patent in suit. In order to do this, the straight edge must be filed or otherwise produced to a beveled edge, so as to respond to the friction or grinding of the rolls. If the use of a scraper which fits the grooves of the rolls and at the same time acts upon and cleans the faces of the divisions between the grooves constitutes infringement of claim 1, then, manifestly, the use of any other scraper, which, by reason of its construction must, on frictional contact with the grooved roll, be reduced to an infringing device, would also be an infringement.

Complainant's expert, Wilson, says:

"Of course, if the bar upon which the teeth are formed was made thicker, the teeth would be more strongly supported at their bases, and such teeth would probably disengage the shreds from the grooves of the rolls, but such a scraping device would be dissimilar from defendant's exhibits to which you have called attention, because the spaces between the teeth would not engage the cylindrical faces of the rollers between the grooves."

It would probably be open to defendant to use these as well as the needle scraper first used by them.

It is evident that the question of infringement is a very close one, as is that of validity. However, considerable property interests have accrued to complainant based upon its operation under the patent in suit, and the court cannot say it has not been the result of the peculiar construction of its scraper. This feature of the patent is the basis of the patentable novelty of both claims in suit, so that both are infringed.

[2] With reference to defendants' motion to dismiss as to the individual defendant, it appears that the defendants' business, and particularly that which is complained of, has been conceived, built up, patented in part, and managed by the defendant Williams, who is also expert witness and counsel in this proceeding. He is properly made a defendant. As to the other individual defendants, the bill is dismissed. The injunction may go as to the use of the form of scraper as above intimated.

## ELLIOTT CO. V. CLYDE MACH. WORKS CO.

(Circuit Court, N. D. Illinois, E. D. March 8, 1911.)

No. 30,258.

## PATENTS (§ 328\*)—INFRINGEMENT—TUBE-CLEANER FOR BOILERS.

The Elliott patent, No. 641,092, for a tube-cleaner for water-tube boilers, *held* not so clearly infringed on the showing made as to warrant the granting of a preliminary injunction.

In Equity. Suit by the Elliott Company against the Clyde Machine Works Company. On motion for preliminary injunction. Motion denied.

Linthicum, Belt & Fuller and Bakewell & Byrnes, for complainant.  
Offield, Towle, Graves & Offield, for defendant.

\* KOHLSAAT, Circuit Judge. This cause is now before the court on motion for a preliminary injunction.

The bill alleges infringement of all the claims of patent No. 641,092, granted to W. S. Elliott on January 9, 1900, for a tube-cleaner for removing scales from the interior of the tubes of water-tube boilers. The claims read as follows, viz.:

"1. A rotatory tube-cleaner having freely-swinging arms, the planes of movement of the arms being longitudinal of the axis of the tool, and cutting-disks secured to the arms and lying in planes transverse to the axes of said arms; substantially as described.

"2. A rotatory tube-cleaner, having freely-swinging arms moving in planes longitudinal of the axis of the tool, each arm carrying a series of toothed disks lying in planes transverse to the axes of said arms; substantially as described.

"3. A rotatory tube-cleaner having a head provided with an uninterrupted cross-slot and freely-swinging arms having their ends mounted in the slot and closely adjacent to each other, said arms projecting beyond the head and provided at their free outer ends with cutters; substantially as described.

"4. A rotatory tube-cleaner having a head provided with a plurality of uninterrupted cross-slots arranged at opposing angles, and sets of arms having their pivotal ends mounted in the slots closely adjacent to each other, one set of such arms being in advance of the other; substantially as described.

"5. A rotatory tube-cleaner, having freely-swinging arms moving in planes longitudinal of the axis of the tool, said arms carrying cutting-disks lying in planes transverse to the axes of the arms, the cutters upon one arm being in advance of those upon the other; substantially as described.

"6. A rotatory tube-cleaner, having pivoted thereto freely-swinging arms with free outer ends, said arms moving in planes longitudinal of the axes of the tool, and cutting-disks rotatably mounted upon the arms near their outer ends and lying in planes transverse of said arms; substantially as described."

The specification (column 1, p. 1) states that the device "is particularly designed to be used in combination with a turbine-wheel motor or other similar fluid-actuated prime mover," and adds (column 2, p. 1, and column 1, p. 2), "any other operating mechanism may be substituted for the turbine wheel, and, if desired, the tool may be operated by hand through proper shaft connections."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bill alleges (page 3) that claims 1, 2, 5, and 6 were sustained by Judge Buffington in *Liberty Mfg. Co. v. American Brewing Co.* (C. C.) 155 Fed. 900, hereinafter termed the "Brewery Case." A reference to that authority would seem to indicate that all the claims were sustained, but only claims 1, 2, 5, and 6 held to be infringed. The issues mainly involved in that suit, as stated by the opinion, were: (1) Was Elliott the inventor, or was it the joint invention of Elliott and another; (2) certain prior uses. The court says, however:

"Much testimony has been taken. Narrowed down, it discloses no patent which so resembles Elliott's device as to warrant present discussion."

Both points as to joint invention and prior use were overruled. A large number of patents from the prior art were introduced in that record. But few seem to have been discussed. However, the suit seems to have been fairly litigated, and the adjudication of validity is deemed to be entitled to the consideration required by the courts for the purposes of injunctive relief in limine as to validity only.

It is apparent from an examination of the prior art that Elliott was by no means a pioneer in the art. The prior patents are so numerous and close that it requires a careful scrutiny thereof in order to ascertain just how broad a construction should be given to the patent in suit.

The Howlett tubular boiler cleaner of patent No. 598,249, granted February 1, 1898, discloses a circular, cone-shaped head 35 at the end of a lever, 32, projecting beyond the end of the block, 12, and having considerable play through the outwardly flaring opening, 29. By means of the steam-operated piston, 25, the lever and head are made to rapidly strike the inner walls of the boiler pipe. They are revolved by means of a hand-operated wheel, 48, thus striking the whole inner surface of the boiler pipe. The scale is removed by the exhaust steam. In this device centrifugal action is not employed.

The Rast patent, No. 386,848, dated July 31, 1888, covers a hand-operated device for cleaning boiler tubes. The carrying block is provided with slots which receive the arms that carry two serrated and one plain revolving cutters, having inclined teeth, and which extend beyond the block. These arms and the cutters are adjustable to different diameter pipes by means of a rod and disk. Apparently centrifugal force would throw these cutters out to a limited degree. Being operated by hand, it may be doubted whether sufficient velocity could be attained for that purpose. The idea of the patent is that they shall be held in contact with the walls to be cleaned by means of manual adjustment. Provision is made for the prevention of injury to the wall of the boiler pipe. The operation is that of grinding rather than hammering.

The device of the patent to Krueger, No. 597,421, is especially designed for use with the curved tubes of the Stirling boiler; this also being the particular advantage claimed by the patent in suit. The arms carrying the cutters are under spring tension. There seems to be no doubt but that these would, when subjected to rapid revolution, yield to centrifugal force, though they may not be termed the free swinging and hammering cutting disks of the patent in suit.



In patent No. 595,159, granted to W. D. Forsyth on December 7, 1897, and in the several Forsyth and Bell patents, is shown a means for burnishing the inside of pipes which operates by centrifugal force. The cutters are mounted upon pivoted arms which readily swing out against the walls of the boiler tube or other pipe. These cutters are free swinging and have a hammering effect upon the inside of the tube; but, being so arranged that they swing at practically right angles to the carrying head, their stroke is not so long, and consequently not so heavy or effective as that of the patent in suit. So far as this device goes, it suggests the means and object better covered by Elliott.

Bradley's patent, No. 608,418, granted August 21, 1898, shows a turbine-operated boiler tube cleaner having four freely swinging arms moving longitudinally of the head. The arms carry cutters or knives and are thrown out centrifugally against the walls of the boiler tubes. The specification says various forms of knives or cutters may be employed. It seems clear that these swinging arms must have a hammering or swiping impact upon the inner periphery of the tube. The court in the Brewery Case notes the difference between Bradley's cutters and Elliott's revoluble cutters.

The foregoing, all of which, except the Howlett patent, No. 598,249, seem to have been set up in the American Brewing Co. Case, supra, suffice to show fairly well the condition of the prior art. The record does not disclose just what the infringing device in that case consisted of. Nor does it appear whether complainant relied upon its original or a modified form of its cleaner, which latter it seems to rest upon here, while defendant's expert Gillson identifies the cleaner of the patent. There appears to be a considerable departure from the drawings in the construction of the modified form. The carrying arms of the latter are set in much larger slot guides than those disclosed in the drawings, so much so that the head may not be described as a skeleton head, as in the patent, and it can hardly be said of the cutter arms that they now have a hammering effect or act with a side-wise or swiping blow, as described in the Brewery Case, or a rapid succession of blows. It employs no slots cut clear through the head. The contrast between the action of Gillson, Exhibit B (the cleaner of the drawings), and that of the modified form in this respect, is very marked. The whole principle of the freely-swinging arms moving "longitudinal of the axis of the tool" seems to have been clearly outlined in the Bradley patent. As before stated, the court in the Brewery Case found the difference between the two to consist mainly in the formation of the cutting devices.

It is apparent that whatever of invention there is in the patent in suit must be narrow. In paper 10 of the file wrapper the examiner indicates that any claim allowed must be specific. The cutters work in different sections; that is, one pair in advance of the other. This is also true of the Forsyth patent. Rotably mounted cutting disks are also old in the art. These also appear in the Forsyth devices. The patentee disavows any intention of claiming the disclosures of the Schumandt, Rast, and Forsyth & Bell patents, and says none of these

show his invention. It is not evident how his statement in regard to these patents affects the construction to be placed on the claims in suit. To the eye defendant's cleaner and the modified form of the complainant's cleaner are almost identical, the only observable difference being in the length of the cutter-bearing arms, which in the alleged infringing device are shorter than those in suit. As a matter of fact, however, defendant's cutter-carrying arms are locked together by a series of interconnecting lugs, so that they move in unison, all four at once, making allowance for a small amount of play. Comparing the latter with the drawings of the patent in suit, the former seem to lack the free swinging features of the latter. The play of the arms is curtailed by the long slots, the four-in-hand harnessing thereof, and the difference in diameter of the carrying heads of the two. These features seem to set at naught the underlying idea of Elliott's invention, viz., the long, lightly guided, swinging, cutter-carrying arms, with their hammering and swiping blows. There is more grinding in the operation of defendant's cleaner than hammering or swiping. It seems to more closely resemble Forsyth & Bell than Elliott's, so far as this record discloses.

I am unable to say upon this record that defendant so clearly infringes as to warrant the issuance of an injunction in limine. The delay shown in commencing that suit would hardly justify the court in treating it as a waiver by complainant of its rights; but it may be considered in determining the question of emergency.

All things considered, a preliminary injunction should not be granted at this time, and the motion is denied.

## PROCTER &amp; GAMBLE CO. v. UNITED STATES et al

(Commerce Court. July 20, 1911.)

## No. 9.

**1. COMMERCE (§ 92\*)—UNITED STATES COMMERCE COURT—JURISDICTION—ORDER REFUSING RELIEF—"ORDER."**

Act Cong. June 18, 1910, c. 309, 36 Stat. 539, confers on the Commerce Court jurisdiction previously possessed by the Circuit Courts of the United States of cases brought to enjoin, set aside, annul, or suspend any "order" of the Interstate Commerce Commission, also authorizing the Commerce Court to exercise any and all powers of the Circuit Court of the United States so far as may be appropriate to the effective exercise of the jurisdiction conferred, and that nothing contained in the act shall be construed as enlarging the jurisdiction previously possessed by the courts thereby transferred to and vested in the Commerce Court; the jurisdiction so far as conferred, however, being exclusive, and so far as not conferred being reserved. *Held*, that since capacity to sue in the Commerce Court depends on the general equity practice in force in the Circuit Courts, and prior to the creation of the Commerce Court a shipper claiming to be injured by a ruling of the Interstate Commerce Commission refusing to annul a private car demurrage rule could have sued in the Circuit Court to set aside the commission's ruling, such ruling, though granting no affirmative relief, should be construed as an "order" of the commission which the Commerce Court had jurisdiction to review on petition of the person conceiving himself injured thereby.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 92.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5017-5023; vol. 8, p. 7739.]

**2. COMMERCE (§ 92\*)—UNITED STATES COMMERCE COURT—JURISDICTION.**

In determining whether the Commerce Court had jurisdiction of a petition to annul a ruling of the Interstate Commerce Commission sustaining a carrier's demurrage rule, it was not material that suits in that court to enjoin, set aside, annul, or suspend any order of the commission are required to be brought against the United States, nor that under the law as it previously stood the venue of suits in the Circuit Courts of the United States against the commission to vacate its orders was fixed in each case in the district where the carrier against which the order was made had its principal operating office.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 92.\*]

**3. COMMERCE (§ 92\*)—INTERSTATE COMMERCE—RULINGS OF COMMISSION.**

Though it was proper, if not necessary, for a shipper objecting to a carrier's demurrage rule to apply first to the Interstate Commerce Commission for relief, the fact that the commission merely dismissed the petition without granting any affirmative relief did not render its action conclusive, so as to deprive the shipper of the right thereafter to proceed to have the commission's ruling reviewed by the Commerce Court on the ground that the demurrage rule was confiscatory as to the shipper, and, if sustained, would deprive it of its property without due process of law.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 92.\*]

**4. CARRIERS (§ 26\*)—DEMURRAGE—PRIVATE TANK CARS.**

Since carriers engaged in interstate commerce are entitled to impose, as a condition to hauling private cars, such terms as have a reasonable relation to the transportation service in which they are employed, and may adopt such rules as will tend to provide a reasonably dependable supply of equipment and prevent the withdrawal of such cars at will, to serve the private purposes of the owners and as will keep them in active

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and steady use, a rule imposing a reasonable demurrage charge on such cars while standing on private tracks and while returned unloaded until the lading is removed and the cars released, is reasonable and not violative of the owner's rights.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 26.\*]

Petition by the Procter & Gamble Company against the United States and others to set aside an order of the Interstate Commerce Commission (19 Interst. Com. R. 556) refusing to annul a provision of the Uniform Demurrage Code, requiring privately owned cars while standing on private tracks to pay demurrage under certain circumstances. Petition dismissed.

George H. Warrington, for petitioner.

P. J. Farrell, for Interstate Commerce Commission.

Blackburn Esterline, for United States.

Edward Barton, for respondent railroads.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

ARCHBALD, Judge. The Procter & Gamble Company, the petitioner, is engaged in the manufacture of soap, and the refining of cotton seed and other oils, and owns large industrial establishments at Ivorydale, Ohio, Port Ivory, N. Y., and Kansas City, Kan. In all its plants it has and maintains private railroad tracks, for the purpose of receiving cars from the interchange tracks which connect it with the respondent railroads. At two of the places named it owns and employs its own locomotives and itself performs the entire switching of cars, and at the other the switching is performed by the railroads under contract, which is paid for separate and apart from the transportation charges. In every instance the tracks are owned by the company and are on its own land, and the railroads have no interest or control over them.

The Procter & Gamble Company is also the owner of 532 oil-tank cars, which it has purchased at a cost of about \$500,000. These cars are necessary for the transportation of the oils, grease, and other like commodities used by the company in its business, and were purchased by it in relief of the railroads, which were and are not prepared to furnish them. These tank cars, when loaded by the petitioner at its several establishments, are tendered to the connecting railroads for shipment, and are hauled to their various destinations at the regular published rates for the respective commodities with which they are loaded. The use of these cars is confined to the petitioner's business, and in consideration of the petitioner furnishing them an allowance is made by the railroads of three-quarters of a cent a mile per car for each mile that it is hauled; this allowance being in accordance with the published tariffs of the railroads with respect to the movement of all private tank cars.

Until the adoption of the rule set forth below, no demurrage was ever charged by any of the respondent railroads for delay in unload-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing private tank cars while standing on the private tracks of the owner. But beginning in February, 1910, and following that, the railroads have published, as part of their so-called "Uniform Demurrage Code," the following rule, which is the subject of this controversy:

"Private cars while in railroad service, whether on the carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"Empty private cars are in railroad service from the time they are placed by the carrier for loading, or tendered for loading on the orders of the shipper.

"Private cars under lading are in railroad service until the lading is removed and the cars are regularly released.

"Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed."

The demurrage rules, of which this is a part, were prepared by a committee of the National Association of Railway Commissioners, composed of a representative from each state having a railroad commission, and a member of the Interstate Commerce Commission; and were adopted by the association in convention and later approved, although not prescribed, by the Interstate Commerce Commission.

After the publication of the rule in controversy, but before it had gone into effect, the Procter & Gamble Company made complaint to the Interstate Commerce Commission, and sought to have the rule set aside, in so far as it permitted the railroads to make a demurrage charge against the private cars of the company after they had been delivered to it and were standing on its own private tracks. But after a due hearing the commission dismissed the complaint, and the respondent railroads are now exacting demurrage charges in accordance with the provisions of the rule.

[1] The proceedings in this court are brought to set aside the order of the commission dismissing the complaint and refusing relief; the allegation being made that the rule, in so far as it provides that privately owned cars under lading on private tracks are in railroad service, and so subject to a demurrage charge until the lading is removed, is unjust and unreasonable and deprives the company of the right to use its private cars on its private tracks for its own purposes unless demurrage is paid therefor, thereby permitting the respondent railroads to deprive the company of its property without due process of law, in violation of the fifth amendment to the Constitution and the acts regulating interstate commerce. The prayer of the petition is that the order of the commission dismissing the complaint may be annulled and the respondent railroads enjoined from collecting the demurrage charge, and that they may be further required to repay to the petitioner the sums which they have wrongfully collected from it under the rule.

The United States moves to dismiss the petition on the ground that this court has no jurisdiction in the premises; or that, if it has, no

cause of action is made out which entitles the petitioner to relief. And in this motion the Interstate Commerce Commission and the several railroads which have been summoned as respondents join.

The jurisdiction of this court is denied on the ground that the petitioner is a shipper, and the Interstate Commerce Commission having merely dismissed the complaint which was made to it, and granted no affirmative relief, that there is nothing in the order of dismissal which it entered that affords any basis for action here. Or, in other words, that it is only the carrier against which an order is made in favor of the shipper that can bring the case for review into this court; the shipper being concluded by the action of the commission, whatever it may chance to be. This is a serious question, which merits careful consideration and is not altogether easy to solve.

By the act by which the Commerce Court was created (Act June 18, 1910, c. 309, 36 Stat. 539), it was given "the jurisdiction now possessed by Circuit Courts of the United States and the judges thereof" of, *inter alia*, "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." It was also therein further provided that "in all cases within its jurisdiction the Commerce Court and each of the judges assigned thereto shall respectively have and may exercise any and all the powers of a Circuit Court of the United States, and of the judges of said court respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby conferred"; and, conversely, that nothing in the act should be construed as enlarging the jurisdiction at the time possessed by said Circuit Courts, or the judges thereof, thereby transferred to and vested in the Commerce Court; the jurisdiction, however, so far as conferred, to be exclusive, and so far as not conferred being reserved. The question, then, is whether upon any recognized ground of equity practice the present petitioner, under the law as it previously stood, would have had the right to apply by bill to a Circuit Court of the United States to set aside the action of the Interstate Commerce Commission dismissing its complaint, and to enjoin the enforcement by the railroads of the demurrage charge which in effect was thereby approved.

[2] It is of no significance in this connection, nor of any assistance in the solution of the question, that suits in this court to enjoin, set aside, annul, or suspend any order of the commission are required to be brought against the United States. It is just as consistent that the United States should be the respondent in cases brought for this purpose by the shipper as in cases brought by the carrier; the government in each case standing for the order of the commission which it is thus appointed to justify and defend.

Neither does it detract from the jurisdiction of this court that, under the law as it previously stood, the venue of suits brought in the Circuit Courts of the United States against the commission to set aside its orders was fixed in each case in the district where the carrier against which the order was made had its principal operating office; jurisdiction to hear and determine such suits being in terms vested in the courts of such district. Act June 29, 1906, c. 3591, §

16, 34 Stat. 592 (U. S. Comp. St. Supp. 1909, p. 1162). This was a favor to the carrier adversely affected by the order. And, according to the law at the time, the commission being the respondent, provision had to be made for jurisdiction over it by the courts of the various districts throughout the country where it was liable to be summoned. It was to meet this situation that jurisdiction was given in terms over suits of the character mentioned to the courts of the district where the carrier against which the order was made had its principal office. Nothing more was intended, and nothing more is to be made out of this provision of the law. Certainly nothing adverse to possible suits by others than the carrier is to be thereby implied.

The real argument against the right of suit, where the complaint of a shipper has been dismissed, is that the denial of relief by the commission is not an order of which the courts can lay hold. Such an order, it is urged, must be one specifically requiring that something shall or shall not be done before this is the case. In *Peavey v. Union Pacific Railroad* (C. C.) 176 Fed. 409, it is said:

"A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission, to those who were parties to the proceedings before it, upon which the order was based. The proceeding in court is not an appeal; it is a plenary suit in equity. \* \* \* The determination of the question what parties may maintain such suits is left by the \* \* \* act to the general rules and practice in equity, and under them any party whose rights or property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a federal court of equity for relief."

There was an order of the commission in that case, however, which prohibited the railroads from paying to complainants, and others who were owners of elevators located upon their lines, any compensation for the elevation of grain in transit, so that the law was unquestionably met so far as there being an order is concerned; and the case therefore decided nothing more than that the right to resort to the courts is not confined to the carrier, but extends to every one injuriously affected by the order of the commission, even though not a party to the proceedings before it in which the order was made. To that extent, but no further, it is pertinent here.

[3] Putting aside, however, for the moment, the provisions of the statute, and considering the case as though it had not been passed, it is clear that a shipper would have been entitled, in one form or another, to redress in court against an unjust and unlawful charge or practice imposed by a carrier, such as the one here is alleged to be. And it would have been permissible, therefore, for the Procter & Gamble Company, denying the right of the carrier to make this demurrage charge, to have refused to pay it and compel the carriers to bring suit therefor; or, in view of the complications to which this would give rise, to say nothing of the multiplicity of suits with different carriers which would be likely to ensue, and in order to settle the matter as to all parties once for all, it would have had the undoubted right to go into a court of equity by bill and have the legality of the practice tested, and, if found to be unjustified, enjoined. *Donovan v. Pennsyl-*

vania Co., 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192. Indeed, the only question would seem to be whether this was not the course which the company, even considering the provisions of the statute, was required to pursue; the legality of the demurrage charge being the only thing involved, and that being a matter for the courts and not for the commission to decide. *Hite v. Central Railroad of New Jersey*, 171 Fed. 370, 96 C. C. A. 326. See, also, *Danciger v. Wells Fargo & Co.* (C. C.) 154 Fed. 379, and *Langdon v. Pennsylvania R. R.* (C. C.) 186 Fed. 237. It was decided, however, in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, that redress by a carrier against an unjust and unreasonable rate must be sought in the first instance by proceedings before the commission, and that only after that could an action be maintained against the carrier for reparation based on the result. This conclusion was reached, and the common-law right of action otherwise existing held to be abrogated by implication, in view of the system established by the enactments with regard to rate regulation by the Interstate Commerce Commission, and as necessary to the efficiency of that system, which otherwise would be subverted and made nugatory. And this was repeated in *Baltimore & Ohio Railroad v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292, where it was held that, for the correction of an unequal distribution of cars, a shipper was similarly required to go to the commission, and could not in advance of its action seek to remedy by mandamus the discrimination alleged. And *Morrisdale Coal Co. v. Pennsylvania Railroad*, 183 Fed. 929, 106 C. C. A. 269, also, is to the same effect. But, if that be so, there can be no serious question as to the propriety, if not the necessity, for the present petitioner going first to the commission to have determined whether the demurrage charge in controversy was a just and reasonable requirement. And it cannot be that the implication by which this is brought about is to be carried so far as to make the action of the commission conclusive where relief is denied. There is no such compelling necessity in order to save the system; nor is the statute to be construed as requiring exclusive resort to a tribunal where the rights of the party can be only partially determined at the sacrifice of other rights which the courts of the land are appointed to consider and defend. This is not to deny that in questions of fact, or where judgment or expediency is involved, the action of the commission in denying relief, the same as in granting it, may not be final. But where, as here, it is not the amount that is in dispute—\$1 a day per car being recognized as reasonable if there is to be any charge—but the right of the carrier, under the circumstances, to make any charge at all, it is not to be implied, unless there is no escape from it, that the decision of the commission adverse to the shipper is to foreclose the question. And while the dismissal of a complaint by the commission in a case like the present one may not in strictness be an order, in that it does not require or prohibit that anything shall or shall not be done, it is so in substance and effect, in that, by refusing to interfere with the practice or the charge complained of, it virtually approves it and makes it operative. If it was required by the act to hold that a court



could not interfere with such an order however confiscatory to the shipper it might be, the shipper being thus without legal redress, the act might well be declared unconstitutional as wanting in due process of law.

The action of the commission, if to be given any force, having thus the effect of an adverse decision with respect to the question involved, must be regarded, even though negative in character, as an order within the meaning of the statute, which the courts may enjoin or set aside if legal or equitable grounds for doing so are found to exist. The petitioner therefore correctly came into this court, as it could previously have gone into a Circuit Court of the United States—the requisite amount being involved and the case being one arising under the federal law—to have the action of the commission dismissing its complaint set aside and the demurrage charge disallowed, if that should be the conclusion reached with regard to it, either by direct decree or by remanding the case to the commission with directions to sustain the complaint.

[4] But, while the jurisdiction of this court in the premises is thus sustained, we are forced to conclude, upon a consideration of the merits, that the demurrage charge in controversy was lawfully imposed, and that the petitioner therefore has no just ground for complaint. The argument against the charge proceeds upon a misconception. Baldly put, as an exaction for the use by the shipper of his own cars while standing on his own private tracks, the right to it might well be questioned. Neither is it to be sustained as compensation to the carrier for an additional service not covered by the transportation charge, that is to say, for the storage of the freight with which the cars are loaded, that storage being in the cars and on the tracks of the shipper and not in or on anything which the carrier has supplied. In *re* Demurrage on Private Tank Cars, 13 Interst. Com. R. 378, 381. It is difficult also to see how the imposition of demurrage on private cars for delay in unloading is necessary to prevent unjust discrimination; the shipper who is able to provide such cars having an advantage over those who cannot, which this regulation is supposed to correct. The ability to own private cars is a mere matter of capital which the undue withholding or the prompt unloading and releasing of them can hardly affect, and the difference in financial circumstances is an advantage, which the law cannot undertake in this way to overcome. *Peavey v. Union Pacific Railroad* (C. C.) 176 Fed. 409, 419. It may not be consistent also with the exaction of this charge that, provided only the cars are unloaded within the free time allowed, they may be reloaded and retained by the shipper indefinitely without any claim being made for demurrage. If this, which is the practical construction of the rule, is to be accepted as the correct one, it throws serious doubt on its validity, the real ground on which the charge is to be sustained being the right of the carrier to have the cars promptly returned into service, which this has the effect to undo. Nor is the condition of the cars, once they have been delivered to the shipper, whether loaded or unloaded, of any concern to the carrier, except as an end to getting them back into use again. And there is also an ap-

parent inconsistency in holding inbound cars liable to demurrage after they have been delivered and are on the tracks of the owner until they are unloaded, barring the free days, and yet in imposing it on outbound cars without regard to when they are loaded, only from the time they are placed on the interchange tracks. The justification of the rule is therefore to be sought in something outside of all this, upon a determination of the real principle involved.

It is not necessary to decide whether a railroad can refuse or be required to haul private cars. Whatever may be its duty in this regard, it is conceded that such terms may be imposed as a condition to hauling them as have a reasonable relation to the transportation service in which they are employed. And this concession necessarily sustains the present charge. In using these cars, whether as supplementary to or in place of their own, the railroads are entitled to require that there shall be a reasonably dependable supply, and that such cars shall not be withdrawn at will to serve the private purposes of the owners, but shall be kept in active and steady use, and to that end that they shall be put on a footing in this respect with other cars. The interest of the carrier that this should be the case is clear. For the time being these cars become a part of the rolling stock of the road, taking the place of those which the carrier would otherwise be called upon to supply. Cf. *State v. Cin. N. O. & T. P. R. R.*, 47 Ohio St. 130, 23 N. E. 928. It may be that there are some kinds of these cars, such as the tank cars here, which the railroads do not keep on hand, but rely on each shipper furnishing his own. But that does not change the principle involved. In one form or another, the carrier is bound to supply the necessary transportation facilities for handling every kind of freight. And this, not to one shipper only, but equally and without discrimination to all. And it is put at a disadvantage and an extra burden upon it imposed if it cannot be assured with regard to the supply of cars on which it can depend, but is liable to run short or be in excess, according as private cars are released or withheld. This the demurrage charge which is complained of is calculated to overcome, and therefore may justly be imposed. The purpose of demurrage is to force the cars back into use. Delay is made expensive, so that it may be an object to the shipper which he cannot afford to disregard. Its exaction from private cars, the same as others, is therefore neither arbitrary nor unjust.

Nor is it violative of the owner's rights. It is simply a condition to the acceptance of his cars, which, for the reasons given, the carriers have found it necessary to impose, and with which, therefore, he must expect to comply. Presumably the use of these cars operates to his advantage, or he would not be at the expense of supplying them. But he cannot expect that the advantage shall be all on one side. And it having been found by experience that demurrage on private, the same as on public, cars is a necessary transportation regulation, which is justified on principle, the carriers were within their rights in imposing it by the rule in question, and it must therefore be sustained.

The petition will be dismissed on the merits, with costs.

KNAPP, Presiding Judge (concurring). The conclusion reached in this case is undoubtedly correct, and I disagree with the foregoing opinion only so far as it questions the right to enforce the demurrage rule in controversy for the purpose or in aid of preventing undue preference and advantage to the owners of private cars. The commission based its decision in part on this ground and, in my judgment, was right in so doing.

NOTE ON CONSTITUTION OF COURT BY JUDGE ARCHBALD.

The United States Commerce Court was created by Act of Congress June 18, 1910, 36 Stat. 539; its principal jurisdiction being to review the orders of the Interstate Commerce Commission. It is composed of five Circuit Judges, four of whom are necessary to constitute a quorum. The President was authorized to appoint the first incumbents, who, by the provisions of the statute, were to serve for five, four, three, two, and one year, respectively; and in accordance with this President Taft, on December 12, 1910, appointed Hon. Martin A. Knapp, Chairman of the Interstate Commerce Commission, to be the Presiding Judge, to serve for the term of five years; Hon. R. W. Archbald, United States District Judge of the Middle District of Pennsylvania, to serve for four years; Hon. William H. Hunt, United States District Judge of Montana, to serve for three years; Hon. John E. Carland, United States District Judge of South Dakota, to serve for two years; and Hon. Julian W. Mack, of the Illinois Court of Appeals, to serve for one year. These appointments were afterwards confirmed by the Senate. With regard to the subsequent membership of the court, it is provided that, on the termination of the period for which any of the judges is designated to serve, the Chief Justice of the United States shall designate his successor from among the Circuit Judges in commission; the judges as designated above being competent to be redesignated, so far as their terms do not extend beyond the year 1914, after which at least a year is required to intervene before there can be a redesignation.

The judges above named met and organized the Commerce Court at Washington, D. C., on February 8, 1911, and fixed on February 15th as the time when it would be opened for business. The first regular term was held, and the first cases were heard and argued, on April 3d following, and the above is the first opinion rendered.

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ATCHISON, T. & S. F. RY. CO. et al. v. INTERSTATE COMMERCE COMMISSION et al.

(Commerce Court. July 20, 1911.)

1. CARRIERS (§ 84\*)—DELIVERY OF FREIGHT—WHAT CONSTITUTES.

The common-law rule that, in the absence of a special contract or usage to the contrary, common carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, has never been applied to railroads, which are exempt from the duty of personal delivery, and are bound only to carry the goods to the depot or station to which they are destined, and there hold or place them in a warehouse ready for delivery on demand of the consignee after notifying him of their readiness to deliver.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 290-298; Dec. Dig. § 84.\*]

2. COMMERCE (§ 95\*)—RATES—SWITCHING CHARGE—FINDINGS OF INTERSTATE COMMERCE COMMISSION—REVIEW.

A finding by the Interstate Commerce Commission that a carrier's charge for delivering and receiving car load freight to and from industry

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tracks when such freight was moving in interstate commerce was a mere incident to a system-line haul, and was in violation of the interstate commerce act (Act June 18, 1910, c. 309, 36 Stat. 539), was a conclusion of law and open to inquiry by the Commerce Court.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 95.\*]

**3. COMMERCE (§ 91\*)—INTERSTATE COMMERCE—COMMERCE COURT—RULINGS OF INTERSTATE COMMERCE COMMISSION—REVIEW.**

The Commerce Court, in examining the report of the Interstate Commerce Commission, to ascertain the particular provisions of the interstate commerce act (Act June 18, 1910, c. 309, 36 Stat. 539), relied on to sustain a particular order, is limited to the report of the majority of the Commission, the views of the minority not being open to consideration.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 91.\*]

**4. COMMERCE (§ 95\*)—INTERSTATE COMMERCE—RULINGS OF COMMISSION—REVIEW.**

Where a rule of the Interstate Commerce Commission that a carrier's charge for receiving and delivering car load freight to and from industry tracks was illegal and unjust was based on findings on admitted facts, that the industry track was a terminal facility of the railroad, and that the service was the same service as that which the carrier performed in delivering freight at its depot or team tracks, such ruling was not conclusive on the Commerce Court, which had power to form an independent judgment on the facts admitted.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 95.\*]

**5. CARRIERS (§ 26\*)—FREIGHT—RATES—SWITCHING CHARGE.**

Transportation of cars and freight intended for interstate commerce to and from industrial plants located from one-fifth of a mile to seven miles from the main track of the carrier is not the same service which the carrier performs when it delivers freight at its depot or team tracks, the carrier being bound to perform such industrial track service, in the absence of statute, only under an arrangement with the owner of the industrial plant, for which it may charge a reasonable compensation.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 26.\*]

**6. CARRIERS (§ 26\*)—INTERSTATE FREIGHT—TRAFFIC RATES—DELIVERY CHARGE.**

Under the facts in this case the general traffic rate for interstate freight does not include delivery to an industrial plant of the consignee or the transportation of the cars from the industrial plant of the shipper to the carrier's yard or main line over a distance varying from one-fifth of a mile to seven miles, but the carrier performing such service is entitled to exact a reasonable charge therefor.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 26.\*]

Mack, Judge, dissenting.

Bill by the Atchison, Topeka & Santa Fé Railway Company and others against the Interstate Commerce Commission and another. On motion for a temporary injunction against the enforcement of an order of the Interstate Commerce Commission, prohibiting a charge for switching service on cars delivered on industry tracks. Motion to dismiss bill denied, and temporary injunction granted.

Robert Dunlap, T. J. Norton, F. C. Dillard, H. A. Scandrett, and C. W. Durbrow (Gardner Lathrop and W. F. Herrin, of counsel), for petitioners.

J. A. Fowler, Asst. Atty. Gen., Blackburn Esterline, Sp. Asst. Atty. Gen., and P. J. Farrell, for respondent Interstate Commerce Commission.

Seth Mann, for interveners.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

CARLAND, Judge. This case has been submitted upon a motion for a temporary injunction made by the petitioners, and upon a motion to dismiss made by the United States and the Interstate Commerce Commission. The motion to dismiss is made by virtue of the provisions of section 1 of the act to create a Commerce Court (Act June 18, 1910, c. 309, 36 Stat. 539), which allows such a motion to be made where it is claimed the petition does not set forth a cause of action. As determinative of these motions, our view is necessarily limited to the facts which are well pleaded in the petition. These facts, as they appear in the petition, are substantially as follows:

"The petitioners are railroad corporations, organized under the laws of the states of Kansas, Kentucky, and Utah, respectively. At all times each of said petitioners, and their respective predecessors in interest have maintained and do now maintain public freight depot buildings theretofore, respectively, established by them in said city of Los Angeles upon or adjacent to their respective tracks connecting with their respective main tracks in said city, where freight in less than car load lots is and has been received for transportation for shippers in said city, destined to various points upon their respective lines of railroad or points upon connecting lines of railroad in the United States, and where such freight transported from various points to Los Angeles is delivered to the owners or consignees thereof.

Each of said petitioners and their respective predecessors in interest have also located and established and have maintained and do now maintain what are known as "team tracks" and freight sheds connected with their respective main tracks in said city of Los Angeles where cars are set for the accommodation of the public in general for the loading therein of car load freight for transportation to various points upon their respective lines of railroad in the United States, and where, also, is set and placed for the unloading thereof by consignees or owners in said city, who have not been favored with the private or special side-track facilities hereinafter mentioned, car load freight consigned and transported from various points on their respective lines of railroad or points on other lines of railroad in the United States or elsewhere to such owners or consignees in said city of Los Angeles; and said team tracks and freight sheds are so connected with the respective main line tracks of the petitioners in said city that cars loaded with car load freight may be readily transferred from said main line tracks to said team tracks and sheds, and where empty cars intended to be loaded with car load freight for transportation may be set and readily transferred when loaded from said places to the tracks upon which trains are made up; and the said team tracks and freight sheds constitute and have constituted the places where the respective petitioners receive and have heretofore received and have delivered and do now make deliveries of car load freight from and to the public in general in the said city of Los Angeles; and the same are and have been

in all respects sufficient and adequate for and fully accommodate those desiring such service.

Said main tracks, team tracks, sheds, and buildings above shown constitute the places established as depots or stations by each of the petitioners in said city of Los Angeles for the receipt, handling, and delivery of car load and less than car load freight intrastate and interstate. Said facilities so established and maintained for the receipt, handling, and delivery of less than car load freight are sufficient for the handling of double the amount of such freight that has been tendered, is tendered, or at any day can be tendered. The freight sheds and team tracks, established and maintained for the receipt, handling, and delivery of car load freight, are sufficient to handle all the car load freight coming into or shipped from said city, either for delivery on said team tracks or for delivery on any of the industrial tracks. Said sheds and team tracks so maintained and established are sufficient to handle more than double the number of car loads of freight coming into or going out of Los Angeles, whether originating on or destined to said team tracks, or originating at or destined to the industrial tracks hereinafter referred to; and on said team tracks and at said sheds without inconvenience to them more than double the amount of all car load freight can be received, handled, and delivered. In addition to this, each of petitioners has in connection with its said depots or stations a considerable amount of vacant land upon which it can and will as the requirements of the public may demand place other sheds and team tracks; so that there is no necessity in the proper conduct of petitioners' business or in the rendering of proper service to shippers in said city to have or maintain the industrial tracks hereinafter referred to. But for the accommodation of certain shippers and for their benefit in loading and unloading, shipping and receiving freight, and to save them the expense of cartage which they otherwise would have to pay, and which is paid by the public not favored with industrial tracks, industrial tracks have been built as hereinafter more fully set forth.

Each of the petitioners, as well as their respective predecessors in interest, have heretofore severally or individually entered into contracts or agreements with certain individual shippers in Los Angeles or with parties who had constructed or were contemplating the construction and operation of plants or industries in said city, for the construction of spur tracks from the respective plant or industry in said city to and connecting with the yard tracks of the respective petitioners in said city where trains of cars are made up or distributed, a part of the cost of such spur track being generally borne by the railway company and a part of such shipper. But such tracks were constructed especially to accommodate the plant or industry in question and to relieve the owner or operator thereof from the necessity of receiving at or delivering to the team tracks of the respective petitioners car load freight consigned to or shipped by the owner or operator of said plant, and therefrom and thereby the owner or operator of such plant or industry located upon such spur or side track was re-

lieved from the necessity of transferring car load freight to and from said team tracks and from or to such plant or industry by dray or wagon at a higher cost and greater risk; and that the shipper at such industry or plant by reason of such side-track facilities is given or accorded a decided advantage over other shippers in Los Angeles who were not favored with such spur tracks.

In such contracts it was generally stated that at the request of the shipper or owner of the proposed plant the railway company would construct and maintain for a limited number of years, usually less than five, a spur track to connect such plant or industry with the railroad of the railway company. But in such contracts it was generally provided that while the railway company might make use of the proposed track for its incidental purposes such use should not interfere with the movement or use thereon of cars switched to or from such plant or industry, but that the traffic to and from such plant or industry should be given a preferential right in the use of such tracks.

In the contracts made by the Southern Pacific Company covering the construction and maintenance of such industrial or spur tracks it was generally provided, among other things, as follows:

"(1) Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"(2) Said track shall be under full control of Southern Pacific Company and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"(3) All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"(4) In case said track shall not be used by undersigned for period of one year, said Southern Pacific Company may, at its option, remove said track.

"(5) All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

The contracts made for such purposes by the Atchison, Topeka & Santa Fé Railway Company contained among other things the following provisions:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

The contracts made by the San Pedro, Los Angeles & Salt Lake Railroad Company covering the cost and maintenance of such spur

or industrial tracks contained provisions similar to those of the Southern Pacific Company above set forth.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract, as aforesaid, by the Atchison, Topeka & Santa Fé Railway Company, or its predecessors in interest, in said city of Los Angeles, are distant from its main track in said city anywhere from one-fifth to one and a half miles, and in order to receive a car load of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of the said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a car load of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur to the industry or plant in question and to place the same conveniently thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in the said city of Los Angeles located upon the spur tracks heretofore constructed under contract as aforesaid by the Southern Pacific Company or its predecessor in interest in said city of Los Angeles are distant from its main track in said city anywhere from 200 feet to 7 miles, and in order to receive a car load of freight from such plant or industry it will be as it has been necessary to switch from the main track or yards of said petitioner any empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a car load of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over said spur to the industry or plant in question and to place the same conveniently thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

Industries or plants in said city of Los Angeles located upon spur tracks heretofore constructed under contract as aforesaid by the San Pedro, Los Angeles & Salt Lake Railroad Company in said city are distant from its main track in said city anywhere from one-fifth to four miles, and in order to receive a car load of freight from said plant or industry it will be as it has been necessary to switch from the main track or yards of said petitioner an empty car and set the same at such industry where the same can be conveniently loaded by the shipper, and such car when loaded must then be switched over such spur track and to the yard tracks to be placed in an appropriate train for transportation to destination; and where a car load of freight is consigned to the operator of such plant or industry it is and has been necessary to switch the same from the yards of said petitioner over



said spur track to the industry or plant in question, and to place the same convenient thereat for unloading, and in many instances the empty car is required to be switched or transferred in being returned from such plant to the general yards of petitioner.

In such contracts governing the construction and maintenance of such industrial tracks no specific sum was fixed or prescribed in case the railway company should perform the aforesaid special service of receiving or delivering freight at the plant or industry in question, but at the time of executing such contract the usual charge separately and specially set forth in the respective tariffs of petitioners for making such special deliveries or such special receipt of such car load freight, involving the switching service to and from such plant or industry from and to the yards of respective petitioners where trains are made or broken up, had been generally established by each petitioner at the sum or price of \$2.50 per car, and had for many years and since the installation of industry tracks in said city been paid by the shippers using such tracks, and at the time of making such special agreements shippers entering into the same understood and willingly consented that if the railway company performed such special service a charge therefor in addition to the freight rate from and to Los Angeles would be made, and such charge of \$2.50 per car has generally been made, maintained, and collected from said shippers in Los Angeles for said special service as aforesaid.

The aforesaid service heretofore rendered by the respective railway companies of receiving car load freight at said industries or delivering the same to such industries or plants instead of at the team tracks or sheds is of great value to the owners or operators of such industries or plants, and is worth much more than the sum of \$2.50 per car, inasmuch as a great saving is made by such industries by reason of being relieved of the necessity of paying drayage or other charges which would be involved in the receipt or delivery of car load freight at the team tracks or sheds, and risk of damage to such freight is materially lessened, and shippers who have been thus favored by the construction under special agreement of such spur tracks to and from their industries and by the receipt and delivery of freight thereat are greatly favored and are and have been accorded a decided advantage over other shippers in said city with whom such contracts have not been made or entered into. The general or prevailing charge for drayage in Los Angeles is 50 cents a ton, which makes the cost to the consignee \$7.50 on a car load of 15 tons, \$10 on a car load of 20 tons, \$15 on a car load of 30 tons, \$20 on a car load of 40 tons, \$25 on a car load of 50 tons, and so on, as against the charge of \$2.50 imposed by petitioners for delivering the consignment to or receiving the shipment at the door of the consignee's or shipper's warehouse.

In performing said special switching service involved in the receipt and delivery of car load freight at such industry or plant, petitioners are put to a much greater expense than if such freight was received or delivered on its team tracks or at its freight sheds.

Each of petitioners has made and established its rates of transportation to and from said city of Los Angeles from and to such points

on their respective lines, and in many instances joint rates from and to points on many other railroads in the United States; they have duly published and filed with the Interstate Commerce Commission and posted in their respective stations where freight is received their respective schedules or tariffs of rates governing or concerning interstate transportation of freight in which rates are prescribed for less than car load lots and for car load freight; and in respect to less than car load freight the rates have been established and made to cover the receipt or delivery of such freight at the freight station of the respective railway company in said city; and in respect to car load freight rates established for the public in general contemplate receipt or delivery thereof upon or at the team tracks or sheds of the respective railway company; and in said tariffs it has been and is distinctly and separately provided and stated that where car load freight is received at or delivered to private industries located upon such industry tracks in said city of Los Angeles an additional charge—that is, a charge in addition to the rate fixed to and from Los Angeles, amounting to \$2.50 per car—will be charged and collected for said special service of making delivery or receipt of car load freight to or at said plants or industries located in said city of Los Angeles upon such special industry tracks.

On account of water and other competition the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that petitioners do not receive for such transportation sums which they are justly entitled to and which they would otherwise be able to charge and collect.

On or about April 5, 1910, the Interstate Commerce Commission, having investigated the complaint of the Associated Jobbers of Los Angeles against petitioners wherein said charge of \$2.50 per car was claimed to be unjust and illegal, made the following order:

"This case being at issue on complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of \$2.50 per car exacted by the several defendants for delivering and receiving car load freight to and from industries located upon spurs and side tracks within their respective switching limits at Los Angeles, Cal., when such car load freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered that said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their present charge of \$2.50 per car for delivering and receiving car load freight to and from industries located upon spurs and side tracks within their respective switching limits in the said city of Los Angeles, Cal., when such car load freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered that said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving car load freight to or from industries located upon spurs or side tracks within their respective

switching limits in the said city of Los Angeles, Cal., when such car load freight is moving in interstate commerce incidentally to a system-line haul.'

Petitioners complain that said order deprives them of all compensation for the said special services so rendered by them respectively, and that said order is by reason thereof illegal and void. The petition prays that said order be annulled and that the Interstate Commerce Commission be perpetually enjoined from the enforcement thereof.

[1] Whether or not the facts stated in the petition constitute a cause of action depends upon the question whether the petitioners have the lawful right to make the charge of \$2.50 per car for the industrial track service mentioned. In the absence of special contract or usage to the contrary, under the common law carriers by land are bound to deliver or tender goods to the consignee at his residence or place of business, and until this is done they are not relieved from responsibility as carriers. This rule, however, never was applied to railroads. They are exempt from the duty of personal delivery, and bound only to carry the goods to the depot or station to which they are destined and there hold or place them in a warehouse ready for delivery whenever the consignee or owner calls for them, after notifying the consignee or owner of their readiness to deliver. *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709; *Witbeck v. Holland*, 45 N. Y. 13, 6 Am. Rep. 23; *Chalk v. Charlotte, etc., R. Co.*, 85 N. C. 423; *South, etc., Alabama R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749; *New Orleans, etc., R. Co. v. Tyson*, 46 Miss. 729; *State v. Republican Valley R. Co.*, 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424; *Francis v. Dubuque, etc., R. Co.*, 25 Iowa, 60, 95 Am. Dec. 769; *Evershed v. London, etc., R. Co.*, 2 Q. B. Div. 254.

The order of the Interstate Commerce Commission complained of makes the report of the commission a part thereof and as said order is set out in the petition the report also becomes a part of said petition.

[2] It is found in the order of the commission that the charge of \$2.50 per car exacted by the several petitioners for delivering and receiving car load freight to and from industries located upon spurs and side tracks within their respective switching limits at Los Angeles, Cal., when such car load freight is moving in interstate commerce incidentally to a system-line haul is in violation of the act to regulate commerce. This conclusion is a conclusion of law, and of course is open to inquiry in this court. It is not stated in the order itself what particular section of the act to regulate commerce the charge of \$2.50 per car for the services rendered by petitioners violates, but as the report of the commission is made a part of the order we are at liberty to examine said report with a view of ascertaining the views of the commission as to what particular provision of the act to regulate commerce the practice or charge of petitioners violates.

[3] In this examination we are limited to the report or opinion of the majority of the commission, the views of the minority not being open to consideration. *Interstate Commerce Commission v. Delaware, L. & W. R. R. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. —.

In the report of the commission we find the following language (18 Interst. Com. R. 310):

"The basic theory of the complainant's case is that these industry spurs are part of the receiving and delivering systems of the carriers, which theory is met by the defendants with the proposition that these spurs are essentially plant facilities constructed for the convenience of the shipper rather than that of the carrier. In a sense and within proper limitations both of these contentions are sound."

Again, it is said in the report as follows:

"We are fully convinced that the complainant's view of the nature of these tracks is correct, and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers."

It is also stated in said report:

"We do not find in the record sufficient data upon which to base a finding as to the reasonableness of the amount of this charge of \$2.50 for interline switching to these industrial tracks, and for the purpose of this present order will assume it to be reasonable."

Again, quoting from the report:

"The service here under consideration, however, is a delivery service and nothing more; the delivery being made at one of the carrier's tracks which is removed at a greater or less distance from its public yards. Spur track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle."

The commission condemned the charge of \$2.50 per car made by the petitioners for delivering and receiving interstate car load freight to and from industries located upon spurs or side tracks within their respective switching limits when such car load freight was moving incidentally to a system-line haul as illegal and unjust. As the commission did not find the charge of \$2.50 to be excessive in and of itself, we conclude that the commission found that the charge violated section 1 of the act to regulate commerce, the charge being unjust because on the theory of the report of the commission the carrier had already been paid for this service by payment of the regular tariff from point of origin to destination.

[4] It is claimed by counsel for the United States, under the decisions of the Supreme Court in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280, *Baltimore & Ohio R. R. Co. v. Pitcairn*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292, and *Interstate Commerce Commission v. Delaware, L. & W. Ry. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. —, that the findings thus made by the commission are conclusive upon this court, and that these findings forming a part of the petition, it

conclusively appears therefrom that no cause of action has been stated which would warrant this court, taking all the allegations of the petition as true, in granting the relief prayed for. We are not unmindful of the rulings of the Supreme Court in the cases mentioned in regard to the force and effect to be given to the findings of the commission and have no disposition in any way to avoid the binding force of such rulings. We think that it is fair to say that the conclusion of the commission that the charge of \$2.50 per car for the service named was illegal and unjust was based upon two findings: First, that the industrial track upon which the service was rendered is a terminal facility of the railroad and not a plant facility of the industry to which it leads; and, second, that the service for which the charge is made is the same service as that which is performed by the carrier in delivering freight at its depot or team tracks.

We do not think that whether the industrial track is a plant facility or a terminal facility of the railroad necessarily determines the legality of the charge. The commission, in one part of its report, found that the contentions of both parties within certain limits were sound. The real question presented is, "Is the carrier lawfully entitled to charge the sum of \$2.50 per car for the service performed upon the industrial tracks?" and we do not think that question can be determined alone by the consideration whether the industrial track is a plant facility or a terminal facility of the railroad, for the reason that it is the service which is performed upon the industrial track that is the question, regardless of the ownership of the track.

So far as the finding of the commission that the industrial track service is the same as the team track or depot service is concerned, we are constrained to hold that it is not a finding which precludes this court from coming to a different conclusion upon the present record. In cases where there is a substantial conflict in the evidence or testimony upon which a finding of the commission is based, we would feel bound by the finding unless clearly and palpably against the weight of the testimony; but we do not think that this court is concluded by a finding of the commission based upon admitted facts which in no wise tend to sustain the conclusion reached. In other words, as in this case, where all the facts are undisputed, we do not think that the commission can by an ultimate finding based upon the undisputed facts preclude this court from reaching a conclusion of its own upon such undisputed and admitted facts. Where the facts are undisputed there is no occasion for facts to be found, and the ultimate conclusion of the commission is a mixed question of law and fact which certainly ought not to be held to be conclusive upon this court.

[5] To say that the transportation of cars and freight to and from industrial plants located from one-fifth of a mile to seven miles from the main track of the carrier is the same service which the carrier performs and for which it is paid by the general tariff charge when it delivers freight at its depot in Los Angeles, or at the team tracks, is so contrary to the admitted physical facts as to be wholly untenable. It

seems clear to us that in the absence of statute the carriers in the present case are not bound to perform this industrial track service and if they voluntarily perform it under an arrangement with the owner of the industrial plant, we see no reason why they may not charge a reasonable price therefor, and the charge in question is conceded to be reasonable.

[6] We are not at liberty to view the case at this time except as it appears from the petition, and we are wholly unable to come to the conclusion from the facts therein stated, which are to be taken as admitted for the purpose of this motion, that the industrial or spur track service is the same service that the carrier performs by delivery to the team track or at the depot, and therefore are unable to say that the general tariff charge on freight shipped to Los Angeles from points of origin would include a delivery at the industrial plant. Nor are we able to see how it can be said that the general tariff charge includes a delivery at the industrial plant. When it is said that the general tariff charge for the transportation of freight to Los Angeles pays for the delivery of such freight at the industrial plant, upon what authority is this declaration made? Who is to say that it pays for delivery at the industrial plant? The carrier, in the first instance, is entitled to fix its tariff charges for the transportation of freight, and in this instance has fixed a certain tariff for the delivery of freight to Los Angeles. At the same time that it fixed this general tariff it fixed a tariff, which it filed with the Interstate Commerce Commission, for this industrial track service, so that the only party in the first instance that had anything to say about what the general tariff charge should be was the carrier, and it has said that the general tariff charge only carries the freight to the depot or the team tracks. There is no evidence whatever that the carrier ever waived in any way its right to charge for the special service on the industrial tracks. There may be conditions under which the carrier may waive its right to make a charge for terminal service, as was said in *Interstate Commerce Commission v. Stickney*, 215 U. S. 105, 30 Sup. Ct. 67 (54 L. Ed. 112):

"The carrier is under no obligation to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it."

The petition in the present case shows that before these tracks were constructed this charge was contained in the general tariffs of petitioners and that said charge for industrial track service was known to the different proprietors and owners of industrial plants, and that they consented to such charge. It is admitted of course that such consent or implied contract on the part of the industrial plant owners would be avoided if it was in conflict with any law of Congress regulating interstate commerce. If the carrier is not bound by law to deliver freight at the industrial plant, and it cannot be successfully contended that it is, then it follows as a necessary consequence that this industrial track service is a special service and is not a service which the carrier is bound to perform for the general tariff charge for the transportation of freight destined to Los Angeles.

The commission made no finding that the charge of \$2.50 in connection with the transportation of cars to and from industrial plants constituted an undue preference or advantage or was discriminatory in any way, and these questions if they exist at all will not be discussed.

From what has been stated in this opinion as the views of this court, it necessarily results that the motion to dismiss must be denied, and an order will be granted suspending the order of the Interstate Commerce Commission complained of until the further order of this court.

MACK, Judge, dissents. See 188 Fed. 929.

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**SOUTHERN PAC. CO. et al. v. INTERSTATE COMMERCE COMMISSION**  
et al.

(Commerce Court. July 20, 1911.)

No. 1.

Bill by the Southern Pacific Company and another against the Interstate Commerce Commission and another. Application for a temporary injunction. Application granted, and motion to dismiss denied.

Robert Dunlap, T. J. Norton, F. C. Dillard, H. A. Scandrett, and C. W. Durbrow (Gardiner Lathrop and W. F. Herrin, of counsel), for petitioners.

J. A. Fowler, Asst. Atty. Gen., Blackburn Esterline, Sp. Asst. Atty. Gen., and P. J. Farrell, for respondent Interstate Commerce Commission.

Seth Mann, for interveners.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

CARLAND, Judge. The bill in this case was filed for the same purpose as the bill in case No. 2, Atchison, Topeka & Santa Fé Railway Co. Southern Pacific Co., and San Pedro, Los Angeles & Salt Lake Railroad Co., v. Interstate Commerce Commission and United States, 188 Fed. 229, except that the switching service for which a charge is claimed is performed at the city of San Francisco, Cal.

For the reasons stated in the opinion filed in case No. 2, above mentioned, the motion for a temporary injunction made by the petitioners is granted, and the motion to dismiss made by the United States and the Interstate Commerce Commission is denied.

MACK, Judge, dissenting. See 188 Fed. 929.

## HOOKER et al. v. INTERSTATE COMMERCE COMMISSION et al.

(Commerce Court. July 20, 1911.)

## No. 5.

## 1. COMMERCE (§ 95\*)—INTERSTATE COMMERCE—RATES—JURISDICTION TO FIX.

Power to establish reasonable and just rates for the future transportation of interstate commerce by common carriers is vested in the Interstate Commerce Commission, and not in the Commerce Court.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 95.\*]

## 2. CONSTITUTIONAL LAW (§ 298\*)—INTERSTATE COMMERCE—RATES—CONSTITUTIONAL RATE.

It is no answer to a shipper's right to contest the validity of a freight rate imposed for the transportation of interstate commerce, on the ground that it is so high as to operate as a taking of his property without due process of law and without full compensation, that if he is not willing to pay the rate he is not obliged to ship.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 298.\*]

Regulations as to transportation of property as interference with interstate commerce, see note to *Rupert v. United States*, 104 C. C. A. 259.]

## 3. CARRIERS (§ 26\*)—INTERSTATE COMMERCE—REASONABLE RATES.

In determining the reasonableness of a freight rate between specified points, the Interstate Commerce Commission is not limited to the requirements of a particular carrier or to the question whether a lesser rate would be remunerative to a particular carrier, but should, in addition, consider the rates in the particular territory to be affected by a change of a rate or rates in question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 67-82; Dec. Dig. § 26.\*]

## 4. EVIDENCE (§ 20\*)—JUDICIAL NOTICE—INTERSTATE FREIGHT RATES.

The Commerce Court will take judicial notice that interstate rates prescribed for the transportation of freight by a common carrier must be more or less interdependent, or at least be so related with each other that the rate-making power will not, simply because it has the power, fix a rate on a single line of railroad which will necessarily disorganize reasonable rates on other railroads in the same territory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.\*]

## 5. EVIDENCE (§ 83\*)—INTERSTATE FREIGHT RATES—PRESUMPTION.

All interstate freight rates established in accordance with law are presumed to be just and reasonable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

## 6. COMMERCE (§ 91\*)—FREIGHT RATES—ESTABLISHMENT BY INTERSTATE COMMERCE COMMISSION—REVIEW.

Since the fixing of a schedule of interstate rates by the Interstate Commerce Commission is a legislative act, such schedule cannot be disturbed by the commerce court on complaint of a shipper as unconstitutional high unless it clearly appears that the rates so fixed are so high as to be violative of the shipper's constitutional rights, guaranteed by the fifth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 91.\*]



## 7. CONSTITUTIONAL LAW (§ 298\*)—INTERSTATE RATES—VALIDITY.

Interstate Commerce Commission order February 17, 1910, establishing a maximum first-class rate of 70 cents per hundredweight between Cincinnati and Chattanooga, and proportionate rates for other classes, *held* not so unreasonably high as to constitute a deprivation of shippers' property without compensation, etc., when considered in accordance with the earning power of all the carriers serving such territory.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.\*]

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations. see note to *Gamble Robinson Co. v. Chicago & N. W. Ry. Co.*, 94 C. C. A. 230.]

Archbald and Mack, Judges, dissenting.

Bill by James J. Hooker and others, officers of the Receivers' & Shippers' Association, against the Interstate Commerce Commission and others to compel the annulment of class rates fixed by the Interstate Commerce Commission between Cincinnati, Ohio, and Chattanooga, Tenn. Dismissed.

Francis B. James, for petitioner.

R. Walton Moore and Frank W. Gwathmey, for Cincinnati, N. O. & T. P. Ry. Co.

J. A. Fowler, Asst. Atty. Gen., and Blackburn Esterline, Sp. Asst. Atty. Gen., for United States.

P. J. Farrell, for Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

CARLAND, Judge. In this opinion, for the sake of brevity, the Cincinnati, New Orleans & Texas Pacific Railway Company will be abbreviated C., N. O. & T. P., the Interstate Commerce Commission will be abbreviated Commission, the Louisville & Nashville Railway Company will be abbreviated L. & N., and the Nashville, Chattanooga & St. Louis Railway Company will be abbreviated N., C. & St. L.

Petitioners are firms, partnerships, and corporations engaged in various kinds of mercantile, commercial, industrial, and manufacturing pursuits in Hamilton county, Ohio, and manufacture and produce goods, wares, and merchandise, and sell annually large quantities thereof of great value, alleged in the bill to be several hundred thousand dollars, to purchasers located at Chattanooga, Tenn., which said goods, wares, and merchandise are enumerated in the freight tariffs and classifications governing the same of the respondent C., N. O. & T. P. Said petitioners have invested in building up and maintaining their respective lines of business an amount exceeding the sum of \$25,000,000.

The C., N. O. & T. P. is a corporation duly organized under the laws of the state of Ohio, and is a common carrier engaged in the transportation of goods, wares, and merchandise by railroad from the city of Cincinnati, Ohio, to the city of Chattanooga, Tenn., the north-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ern terminus of said C., N. O. & T. P. being at Cincinnati and the southern at Chattanooga.

On the 14th day of July, 1910, petitioners filed their bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, Western Division, for the purpose of obtaining a judgment of that court setting aside and annulling an order of the Commission dated February 17, 1910, but in fact rendered May 24, 1910, and which order is in the following language:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present rates of defendant the Cincinnati, New Orleans & Texas Pacific Railway Company (lessee of the Cincinnati Southern Railway) for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., are, to the extent that said rates exceed the rates named in paragraph 3 hereof, unjust and unreasonable.

"(2) It is ordered, that said defendant be, and it is hereby, notified and required to cease and desist, on or before the 15th day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting its present rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn.

"(3) It is further ordered, that said defendant be, and it is hereby, notified and required to establish, on or before the 15th day of July, 1910, and maintain in force thereafter during a period of not less than two years, rates for the transportation of articles in the numbered classes of the Southern Classification from Cincinnati, Ohio, to Chattanooga, Tenn., which shall not exceed the following, in cents per 100 pounds, to wit:

Class .....	1	2	3	4	5	6
Rate .....	70	60	53	44	38	29"

The C., N. O. & T. P. and the Commission filed demurrers to the bill. Subsequently the case was transferred to this court under the provisions of section 6 of the act to create a Commerce Court and to amend the act entitled "An act to regulate commerce (Act June 18, 1910, c. 309, 36 Stat. 544)," and the cause has now been submitted for decision upon the bill and demurrers.

The bill of complaint is quite voluminous, consisting, exclusive of exhibits, of 66 printed pages. The material allegations, however, which in our judgment are necessary to be considered in order to dispose of the case, may be stated briefly as follows:

In 1894 the Commission decided the cases of Cincinnati Freight Bureau v. C., N. O. & T. P., and Chicago Freight Bureau v. L. & N. et al., 6 Interst. Com. R. 195. These proceedings had been instituted by the commercial interests of Cincinnati and Chicago for the purpose of correcting an alleged discrimination in rates upon the numbered classes from points of origin in the Central West as compared with rates from points of origin in the East, to southern territory. The complaint of the Chicago Freight Bureau alleged that the rates for the transportation of freight from western to southern points upon the numbered classes from Cincinnati and other Ohio river crossings to southern points of destination were excessive, and that

the rates from Chicago were even more excessive. Under this allegation the Commission held that it might inquire into the inherent reasonableness of these rates, and proceeded to dispose of the case upon that ground. The Commission held that the rates from Cincinnati were too high and should be materially reduced. The following are the rates then in effect from Cincinnati to Chattanooga and those ordered by the Commission, showing the reductions made:

Classes .....	1	2	3	4	5	6
Rates in effect.....	76	65	57	47	40	30
Reduced rates.....	60	54	40	30	24	22
Reductions .....	16	11	17	17	16	8

The order of the Commission, made in pursuance of this decision, was not complied with by the carriers, and the Commission thereupon instituted proceedings in the Circuit Court for the Southern District of Ohio to enforce obedience to its requirements. Such proceedings were had in that suit that the Supreme Court of the United States finally directed a dismissal of the bill of complaint upon the ground that the act to regulate commerce as it then stood conferred no authority upon the Commission to establish a rate for the future; that this order was in effect the fixing of a future rate, and therefore without warrant of law, and void. *I. C. C. v. C., N. O. & T. P.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243.

When the interstate commerce law was amended in 1906 by giving to the Commission power to fix and establish a rate for the future, the Receivers' & Shippers' Association of Cincinnati commenced proceedings before the Commission and against the C., N. O. & T. P. and the Southern Railway Co. for the purpose of obtaining the benefit of the holding of the Commission in the former case. As a result of a hearing had by the Commission in the proceedings last mentioned, the order complained of in this action was made.

It is claimed by the petitioners that the maximum rate fixed by said order is much too high and is extortionate, so much so that the Commission in making the order violated the fifth amendment to the Constitution of the United States, which prohibits the taking of private property without due process of law or without just compensation. While said order of the Commission was in full force and unsuspended in any way, the C., N. O. & T. P. put into effect a schedule of rates for the transportation of freight between Cincinnati, Ohio, and Chattanooga, Tenn., in accordance with the maximum fixed by the Commission, and said rates are still in force.

In the report of the Commission, which is made a part of said order, it is found as follows:

"If it is our duty to take this railroad by itself and to determine the reasonableness of these rates by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission."

This language of the report refers to the finding made by the Commission in 1894, and the reductions made then by the Commission appear in the table heretofore mentioned in this opinion.

The bill in this case also alleges that if the schedule of rates fixed by the Commission in 1894 had been in force or had been applied during the years 1903 to 1908, both inclusive, the yearly average net profit of the C., N. O. & T. P. would have been 40.66 per cent. It also appears from the bill of complaint that the city of Cincinnati owns the line of railroad between the city of Cincinnati, Ohio, and the city of Chattanooga, Tenn., which is commonly known as the Cincinnati Southern, and now and during the times mentioned in the bill operated by the C., N. O. & T. P. The road originally cost the city of Cincinnati \$18,000,000, and the city subsequently spent for terminal facilities \$2,500,000, making a total cost of the Cincinnati Southern to the city of Cincinnati of \$20,500,000. The C., N. O. & T. P. leased this property, and is still leasing it, and the basis of rental returned to the city of Cincinnati prior to 1906 was 6 per cent., and 5 per cent. subsequent to that date. The C., N. O. & T. P. owns its own equipment and never did have any interest in the Cincinnati Southern beyond the right to use the property under the terms of the leasehold. The capital stock of the C., N. O. & T. P. for the years 1903 to 1908, both inclusive, was \$5,000,000, divided into \$3,000,000 of common stock and \$2,000,000 of preferred stock, and about the year 1908 it increased its capital stock by adding \$500,000 of preferred stock, making its entire issued capital stock for 1908 \$5,500,000. The value of the property of the C., N. O. & T. P. between the years 1903 and 1908, both inclusive, was \$5,000,000, and after 1908 was \$5,500,000, and was all the property of the C., N. O. & T. P. devoted to and employed in the public service and use and for the public convenience.

The C., N. O. & T. P. is a single-track railroad from Cincinnati to Chattanooga, a distance of 336 miles, without branches, and has an average gross earning per mile of \$26,082.66. The L. & N. runs from Cincinnati to Louisville, and from Louisville to Nashville, the distance from Cincinnati to Louisville being 114 miles and the distance from Louisville to Nashville being 185.9 miles. The distance from Cincinnati to Nashville via the L. & N. is thus shown to be 299.9 miles. Nashville is connected with Chattanooga by the N., C. & St. L., the distance from Nashville to Chattanooga being 151 miles, making the distance from Cincinnati to Chattanooga, via the L. & N. from Cincinnati to Louisville and Louisville to Nashville, and from Nashville to Chattanooga over the N., C. & St. L., 450.9 miles. The direct haul from Cincinnati to Chattanooga via the C., N. O. & T. P. is thus 114.9 miles shorter than the indirect haul via the L. & N. and the N., C. & St. L. by way of Louisville and Nashville. The average gross earnings, per mile, between Cincinnati and Chattanooga via the L. & N. and the N., C. & St. L. is \$25,593.40.

[1] In view of the finding of the Commission heretofore mentioned, it necessarily follows that its order ought to have followed its findings, unless the reasons stated by the Commission for not doing so are valid. In this connection it must be remembered, however, that the power to establish reasonable and just rates for the future

for the transportation of freight by common carriers is vested by law in the Commission and no part thereof is vested in this court, and this court may not disturb the order complained of unless it can be clearly found that it conflicts with the provisions of the fifth amendment to the Constitution of the United States, providing the power conferred has been regularly exercised. The order of the Commission itself does not fix a schedule of rates to be put in effect by the C., N. O. & T. P., but simply fixes a maximum rate beyond which the railroad may not go. The railroad, however, upon the making of this order established the schedule of rates as high as the order would permit, and therefore it may be truly said that the schedule of rates put in effect by the railway company is the schedule of rates made by the Commission or at least authorized by it. All that this court could do if it found the maximum schedule fixed by the Commission violated the constitutional rights of shippers over the C., N. O. & T. P. would be to set aside the order; but as the rates prescribed thereby have already gone into effect, and as this court has no authority or power to establish rates or to order that any particular rate be put in effect, it necessarily results that the rates now in effect on the C., N. O. & T. P. would continue in effect unless changed by the carrier or the Commission. The carrier could change its rates if the order was set aside and even make them higher than they are now. The Commission could again investigate the matter and fix a new schedule of rates. So that it appears that all the shippers would gain in this litigation would be the vacation of the order, and if the court held that the rates permitted were so high as to be violative in a constitutional sense of the rights of the shippers then no doubt the Commission would not again establish such a high schedule of rates. But in any event if we should set aside the order on constitutional grounds the shippers would be obliged to go again to the Commission for relief. At first we were inclined to think that the result which would be obtained by a successful termination of this suit in behalf of the shippers would be so inconsequential as to render it unnecessary for this Court to take jurisdiction over the case, but upon further reflection it would seem that the shippers have the right to a judgment of this court as to whether or not the schedule of rates contained in the order complained of is so high as to be violative of the fifth amendment to the Constitution as to the difference between what the Commission found would be reasonable if they considered the C., N. O. & T. P. by itself and the maximum rates that were fixed. Then if the shippers again went before the Commission they would have the benefit of the judgment of this court upon that subject. And in that view we proceed to consider the question as to whether the reasons given by the Commission for not reducing the schedule of rates for the classes mentioned to the sums which the Commission found would be reasonable if the C., N. O. & T. P. should be considered by itself are valid.

It is claimed by the petitioners that the Commission, having found that the so-called 60-cent schedule would be reasonable for the C.,

N. O. & T. P. considered by itself, was bound to establish such schedule as the result of its finding, and that the Commission's establishing a higher schedule for the reasons mentioned in its report, while seemingly within its power to fix a reasonable rate, was really and in fact beyond its power, as the Commission had no right to take into consideration in fixing a higher schedule the matters which induced it to make the order which it did.

There are two questions which are presented to this court for decision: First. Are the reasons given by the Commission for the establishment of the schedule mentioned in the order valid, or are they so outside and beyond the power of the Commission to fix a reasonable rate as to come within the rule that prohibits the Commission from fixing a rate for reasons which the Commission is not authorized to consider? *Southern Pacific Co. v. I. C. C.*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. —. Second. Is it shown, beyond reasonable question, by the present record that the schedule of rates contained in the order of the Commission complained of clearly violates the fifth amendment to the Constitution of the United States by taking the property of petitioners without due process of law or without just compensation if the taking is for a public purpose?

[2] It seems to have been decided in the case of *Board of Railroad Commissioners of the State of Kansas v. Symms Grocery Co. et al.*, 53 Kan. 207, 35 Pac. 217, that the shipper cannot invoke these constitutional provisions for the reason that he is not obliged to ship; that he may utilize the rate prescribed or he may not. We are not impressed with the soundness of this decision. The logical result of such a holding as applied to the facts in the present case would be equivalent to saying to the shipper, "You may pay an unconstitutional rate or go out of business;" and we do not think that the protection of the Constitution is held on any such condition.

In stating the reasons which in the judgment of the Commission compelled it to take into account in fixing the schedule of rates which it did other considerations and other railroads than the C., N. O. & T. P., we can do no better than to quote from the report of the Commission, as follows:

"The defendants also contend that these rates should be fixed not only with reference to the financial results and the financial necessities of the Cincinnati, New Orleans & Texas Pacific Company, but also with reference to other companies whose rates are necessarily affected by these; otherwise stated, the Commission should establish rates which are just and reasonable for the section in which they prevail. If a particular company is so situated that it can make a handsome profit under such rates, that is the good fortune of that company, just as it would be the misfortune of some other company if it could not show as favorable earnings.

"The rate from Cincinnati and Louisville to Chattanooga has been the same for the last 28 years. The distance is substantially the same, and this relation in rates will undoubtedly be maintained in the future. Whatever reduction is made from Cincinnati will be met by corresponding reductions from other Ohio river crossings. Rates from Memphis to Chattanooga are lower by a fixed differential than from the Ohio River, and this relation would undoubtedly be preserved, and perhaps ought to be, since the distance is 300 miles as against 336 miles from Cincinnati.

"In the original case the Commission ordered reductions to many other points besides Chattanooga. While Chattanooga is the only southern point of destination referred to in these complaints, it is frankly stated that the purpose is to obtain a general reduction to this southeastern territory; and no reason is apparent why, if the Commission adheres to its former decision in case of Chattanooga, it ought not to do the same in case of other localities in this territory. It will be remembered that in 1905 certain reductions were made from the Ohio river to Atlanta without any corresponding reductions to Chattanooga. Originally, the same rate had been made to Atlanta from Louisville as was made from Baltimore. After the opening of the Cincinnati Southern this same rate was applied from Cincinnati to Atlanta, and the rate from Cincinnati to Chattanooga was constructed by using the same rate per mile, although the distance was shorter. At the present time the rate per mile is greater in case of Chattanooga than in case of Atlanta. The defendants say that the present rate is constructed upon the proper basis, and that the reductions made to Atlanta could not be applied to Chattanooga without undoing what was accomplished at that time, for the following reasons:

"The reductions of 1905 grew out of the claim upon the part of Atlanta that its rates from the north were too high in comparison with Birmingham and Montgomery. By that readjustment Atlanta was made the same as Montgomery, and the difference between Atlanta and Birmingham reduced.

"The distance from Memphis to Birmingham is 251 miles, from Memphis to Chattanooga 300 miles, from Cincinnati to Chattanooga 336 miles. The rate from Memphis to Chattanooga has always been somewhat less than that from Cincinnati, in recognition of the shorter distance, and the St. Louis & San Francisco Railway insists that the rate from Memphis to Birmingham shall not materially exceed the rate from Memphis to Chattanooga, which seems reasonable in view of the fact that the distance is 50 miles shorter. If, now, this rate from Cincinnati to Chattanooga is reduced, that will in all probability carry with it a reduction from Memphis to Chattanooga, which will involve a corresponding reduction from Memphis to Birmingham, and this will create the same discrimination out of which the reduction of 1905 came. This would mean a reopening of that contest.

"It must also be remembered that any reduction from the north to Atlanta and corresponding territory would undoubtedly be followed by similar reductions from the East as was the case in 1905.

"It is apparent, therefore, to make any considerable change in this rate from Cincinnati to Chattanooga will work a lowering in rates throughout this entire southern territory, or will produce a change in the relation of those rates which now seem to be adjusted upon a basis fairly satisfactory to that territory. How far are we at liberty to consider all this in fixing a reasonable rate over the Cincinnati, New Orleans & Texas Pacific? It should be noted that Chattanooga is not complaining of unfair treatment as compared with other southern points.

"Some indignation was expressed by several witnesses upon the part of the city of Cincinnati because after that community had expended this enormous amount of money in the construction of the Cincinnati Southern Railroad that property was not more devoted to the interests of the city of Cincinnati. If that city, under proper legislative authority, had seen fit to operate its railroad, it might have established to Chattanooga whatever rates it saw fit, and if the results of municipal operation had been as favorable as the present, it could have materially reduced those rates and still obtained a fair return upon its investment. Such a reduction would have cheapened the cost of this freight to the dealer and probably in a degree to the consumer, and so might have benefited the ultimate consuming public. It is doubtful if it would have benefited the interests of Cincinnati, since the rates established by it would have been met by carriers serving rival communities, and the relation of rates would have continued the same. However this may be, the city has parted with its right to operate this property, and the matter stands exactly as though this road had been built by private capital.

"In the Matter of Proposed Advances in Freight Rates, 9 Interst. Com. R.

382, the Commission, having under consideration the rates on grain from Chicago to the Atlantic seaboard, announced that the interests of all competing lines must be considered in determining the reasonableness of those rates; and not merely that line which could handle the business the cheapest. In the Spokane Case, 15 Interst. Com. R. 376, the same subject was considered and the same conclusion reached. The last affirmation of this doctrine is found in *Kindel v. N. Y., N. H. & H. R. R. Co.*, 15 Interst. Com. R. 555, in which the rule is stated by Clark, Commissioner, as follows:

"In the Spokane Case (15 Interst. Com. R. 376) we held that the reasonableness of a rate between two points, served by two or more carriers, could not be determined by consideration alone of that line which is shortest and most favorably situated as to operation, earnings, etc., but that the entire situation must be considered. \* \* \*

"As before suggested, we cannot, in determining competitive rates, select that railroad which is the shortest or most advantageously situated, and limit the rate to what would allow that property fair earnings. We must consider the entire situation, and determine a reasonable rate not merely with reference to the Union Pacific, but with reference to all lines serving these Colorado points by reasonably direct lines."

"We have no doubt as to the correctness of this principle and believe it must be applied here within proper limits.

"The Cincinnati Southern Railroad is a single trunk line without branches, running from Cincinnati to Chattanooga. The main line of the Louisville & Nashville extends from Cincinnati to Louisville, and from Louisville to Nashville. Traffic from Louisville to Chattanooga passes through Nashville, and over the Nashville, Chattanooga & St. Louis to Chattanooga. For the year 1907 the gross earnings per mile of the Cincinnati Southern were, as already stated, over \$26,000 per mile, those of the Louisville & Nashville about \$11,000 per mile, and of the Nashville, Chattanooga & St. Louis less than \$10,000 per mile. The same year the earnings of that portion of the line of the Louisville & Nashville between Cincinnati and Louisville were \$25,000 per mile; between Louisville and Nashville \$30,000 per mile; those of the Nashville, Chattanooga & St. Louis between Hickman and Chattanooga, a distance of 320 miles, over \$20,000 per mile. Now, in adjusting the rates of the Louisville & Nashville, or the Nashville, Chattanooga & St. Louis, shall the Commission consider each section of the road by itself, or shall it establish a common rate for the whole?

"Commission rates are usually the same for all lines, both main line and branches. It is fair that the main line should in a degree contribute to the support of the branch line, for the branch-line business when it reaches the main line is surplus traffic, from which a larger profit is made. It is in the public interest that rates shall be so adjusted that population and industries may freely diffuse themselves. It hardly seems proper to fix the rates upon the Cincinnati Southern, which is really a main line, without any reference to the branch lines which contribute to it.

"This should be further borne in mind. Of the entire traffic handled by the Cincinnati, New Orleans & Texas Pacific in the year 1907 over two-thirds of the tonnage was delivered to it by its connections and most of it hauled as a through transaction from Cincinnati to Chattanooga or the reverse. Comparatively little traffic originates upon this railroad between these two termini. The present large earnings may be due to the fact that the Southern Railway is able to turn onto this road large amounts of traffic which it would exchange with some other railroad but for its interest in the Cincinnati Southern. If the city of Cincinnati were operating this property itself, it is by no means certain that the apparently undue profits of to-day might not be a deficit.

"The complainants urge that the Cincinnati Southern is really a part of the Southern Railway system. If it were so considered, the gross earnings per mile of the entire system would be less than those of either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis.

"If these rates are to be established with reference to other rates in the vicinity, it becomes pertinent to inquire how the present rates compare with



other rates for similar distances in the South. Extensive tables have been furnished by the defendants instituting such comparisons, and these tables have been to some extent criticised and replied to by the complainants.

"It fairly appears that the rates now in effect from Cincinnati to Chattanooga upon the numbered classes are lower than similar rates prescribed by the Railroad Commissions of most states in the South. They are as low and usually lower than the interstate rates made by southern roads for similar distances.

"The complainants call our attention to rates from Cincinnati to Nashville. The distance is 300 miles, and the rates are materially lower than those from Cincinnati to Chattanooga, being, first class, 53 cents as against 76 cents, and, sixth class, 23 cents as against 30 cents. But this Commission has found (*Chamber of Commerce of Chattanooga v. Southern Ry. Co.*, 10 Interst. Com. R. 111), and the federal courts have found (*East Tenn., Va. & Ga. Ry. Co. v. I. C. C.*, 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719), that water competition influences these rates to Nashville. The rate from Cincinnati to an intermediate point where there is no water competition is higher in proportion to distance than those to Chattanooga. Thus the first-class rate from Cincinnati to Gallatin, 20 miles north of Nashville, is 78 cents.

"The complainant also refers to rates from Virginia cities to Atlanta which are less per ton mile than those in question. But it is well understood that these rates are materially affected by water competition, and ordinarily the long-distance rate would be less per ton mile than the rate for the shorter distance. If rates from Virginia cities south for distances of from 300 to 350 miles are examined, it will be found that they usually equal or exceed the Chattanooga rates.

"The complainants urge that the volume of traffic in this territory has increased and is increasing, all of which should make for lower rates—and this is certainly true; but it must also be borne in mind that the cost of operation is advancing. In the past, railways have been able to introduce various economies in the handling of their business, which have tended to offset the added cost of labor and supplies, so that the net result has been that the increase in the cost of transporting a ton of freight one mile has but slightly, if at all, increased. It is doubtful if in future similar economies can keep pace with advancing prices.

"We hesitate at this time to make widespread and far-reaching reductions in rates where there is no special occasion for it and where the rates themselves are not clearly excessive."

[3] It appears from the findings of the Commission that it has always refused in the consideration of the reasonableness of a rate or rates to consider only the particular carrier making the same by itself, but on the contrary has always considered the rates in a particular territory or the rates of other carriers to be affected by the change of the particular rate or rates in question; and we think it fair to say that, so far as the Commission is concerned, there has been a uniform policy, public policy if you please, because the Commission represents the United States in so far as it acts within the scope of its delegated authority in the establishment of reasonable and just rates, to the effect that it will not fix rates or determine their reasonableness solely upon a consideration of the particular carrier whose rates are directly involved.

[4] We think this court may take judicial knowledge of the fact that the interstate rates prescribed for the transportation of freight by common carrier must necessarily be more or less interdependent, or at least be so related to each other that the rate-making power will not, simply because it has the power, fix a rate upon a single line of rail-

roads which will necessarily disorganize established and reasonable rates on other railroads in the same territory.

[5] All rates established in accordance with law are presumed to be just and reasonable. It is for this reason that the rates for the transportation of freight of other carriers in the same territory may be looked into as evidence of what should be a just and reasonable rate, providing conditions are similar. We cannot as a court not vested with the power to fix rates say, beyond question, that the elements which the Commission took into consideration in fixing the schedule complained of were improper for the Commission to consider, and therefore cannot conclude that the Commission based a schedule of rates upon improper grounds.

It was said by the Supreme Court in *Texas & Pacific Railway v. I. C. C.*, 162 U. S. 233, 16 Sup. Ct. 680, 40 L. Ed. 940:

"That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations; that, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers. \* \* \*"

[6] Under the second proposition we cannot disturb the order of the Commission on the theory that it fixed rates so high as to be violative of the fifth amendment to the Constitution, unless it shall clearly appear to us that the constitutional rights of the shippers were invaded thereby. The fixing of the schedule of rates complained of was a legislative act. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Peil v. Chicago N. W. Ry. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; *C., M., etc., Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *St. L. & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *C., N. O. & T. P. Ry. Co. v. I. C. C.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *T. & P. Ry. v. I. C. C.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; *I. C. C. v. Cincinnati Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Smyth v. Ames*, 169 U. S. 515, 18 Sup. Ct. 418, 42 L. Ed. 819; *McChord v. L. & N. R. R. Co.*, 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; *Alpers v. City of San Francisco (C. C.)* 32 Fed. 503; *So. Pac. Co. v. R. R. Commissioners (C. C.)* 78 Fed. 236; *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *Atlantic Coast Line v. North Carolina Corporation Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933.

[7] And while we are of the opinion that our power to review the order of the Commission fixing a schedule of rates is coextensive with the limits of the protecting shield of the Constitution, still it must clearly appear that such protection in some degree has been taken

away. The Commission found that the rates complained of were not clearly excessive. Much less are we able to find that the rates authorized by the Commission in the order complained of and which were a reduction of the former rates are clearly excessive. In making this statement we are fully aware of the allegation of the bill as to the net earnings of the C., N. O. & T. P., and the whole case as to the excessive feature of the rates fixed by the Commission is almost entirely based upon the earnings of the C., N. O. & T. P. While earnings may be considered in the fixing of a reasonable rate to be charged by a carrier for the transportation of freight, rates necessarily cannot be based upon earnings alone. This is made clearly to appear when we consider that a just and reasonable rate is one which is just to the carrier and to the shipper. It is a rate which yields to the carrier a fair return upon the value of the property employed in the public service, and it is a rate which is fair to the shipper for the service rendered; and when this rate is established, if it results in large profits to the carrier, the carrier is fortunate in its business, and if it results in a loss of earning power so that the business of the carrier is unprofitable the carrier is unfortunate. But the rate may not be lowered or raised merely upon the ground that the carrier is either making or losing money, providing always the rate is a reasonable and just rate. Indeed, it has been held that the earning power of the rate is one of the least considerations in fixing a just and reasonable rate. *Canada Northern R. R. Co. v. International Bridge Co.*, L. R. 8 App. Cases, 723; *Board of Railroad Comm. v. I. C. R. R. Co.*, 20 Interst. Com. R. 181.

Being satisfied that the Commission did not err in taking into consideration the grounds they did in fixing their schedule of rates, and not being clearly satisfied that the rates themselves are so high as to violate the constitutional rights of the shippers, we are of the opinion that the bill must be dismissed.

And it is so ordered.

ARCHBALD, Judge (dissenting). There can be no serious question as to the conclusion which would have been reached by the Commission had they confined themselves to the determination of what was a just and reasonable rate from Cincinnati to Chattanooga by the Cincinnati Southern, without regard to the effect upon other roads. This was gone into at length in 1894, and the 60-cent schedule, which is now contended for, sustained. *Freight Bureau v. Cin., N. O. & T. P. R. R.*, 6 Interst. Com. R. 195. But as the law then stood there was no authority in the Commission to fix future rates, and its action was therefore held of no effect. *Inter. Com. v. Cin., N. O. & T. P. R. R.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. But even with the lapse of time and the change of conditions, the issue as is recognized by the Commission is the same, and the same conclusion would confessedly have been reached except as they were influenced by a regard for the necessities of other roads. "If it is our duty," says Commissioner Prouty in the report, "to take this railroad

by itself, and to determine the reasonableness of these rates, by reference to cost of construction, cost of maintenance, and profit upon the investment, we think the complainants have established their case, and that these rates ought fairly to be reduced by as great an amount as was formerly found reasonable by this Commission." Unfortunately, however, for the complainants, this view did not prevail. It was contended by the railroad company that the rates should be fixed not only with reference to the final results to itself and its own financial necessities, but also with reference to other companies whose rates were necessarily affected thereby; or, in other words, that the Commission should establish rates which would be just and reasonable for the whole section of territory in issue, and that if a particular carrier was so situated that it could make a handsome profit it was to be recognized as a piece of good fortune with which the Commission was not to interfere. Adopting this view, which had also been followed in other cases (*In re Proposed Advance in Freight Rates*, 9 Interst. Com. R. 382; *Spokane v. North Pac. R. R.*, 15 Interst. Com. R. 376; *Kindel v. New York, New Haven & Hartford R. R.*, 15 Interst. Com. R. 555), it was accordingly held that the reasonableness of the rate between points served by two or more lines could not be determined by reference to that line alone which was shortest and most favorably situated with respect to operation and earnings, and the rate limited thereby; but that the entire situation was to be considered, and a rate fixed which would be reasonable with respect to all the lines directly serving the points involved. That rates for similar distances on other lines similarly conditioned may be referred to, to assist in determining what is fair and reasonable in any case, is clear. And it is no doubt proper, also, to take into account the effect on rates upon freight moving to and from other points beyond those immediately in view. But that, in my judgment, is as far as it is permissible to go. There is no right, as I look at it, to consider the effect of the rate or rates to be established on those of other roads, between the same points, or to maintain such rates at a figure which is necessary to meet the needs of those roads. And so far as the order of the Commission was induced by any such idea, it cannot be sustained.

If the Cincinnati Southern was the only line from Cincinnati to Chattanooga the rate, of course, so far as it was not a joint rate, would be fixed with reference to that road alone. And if it was a line that was costly to build, or that could not be economically run, this would operate to increase the rates, and the shipper would have to pay, to correspond. But, on the other hand, if the reverse of this was true, and the road was neither an expensive one to construct, maintain, or run, the shipper would clearly be entitled to the benefit of these conditions and to the lower rates necessarily to ensue. So, also, if this favored road was the first in the field, and other roads had come in after it was built, it certainly would not be contended that with the introduction of new and additional facilities the lower rates prevailing on the more favored line could be raised to meet the necessities of others not so well placed. It is not to be thought of that the construction of a second or third road should be made the basis for higher

rates. The standard would be that of the original and most favored line. But what difference does it make whether the road which can afford the best rate is the first or the last to be built? It is the condition at the time the rate is fixed that controls. The shipper is entitled to the benefit of any advance in transportation facilities that may be made, and is not to be tied down to the unprogressive and outdistanced past. The supposed advantage in competing lines between the same points becomes a detriment if rates are to be kept up to help the weakest road.

The Cincinnati Southern extends in a short and direct route due south from Cincinnati to Chattanooga without branches 336 miles. It was expensive to build, and the cost of operation and maintenance is high. But its net earnings are nevertheless large, amounting to some 44 per cent. on the capital stock. The route between the same points by way of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis roads is a third longer, or 450 miles, and both of these roads have more or less unremunerative branch lines. And yet the Commission have not only put the two routes on an equality, but have even considered the influence of unprofitable branches, which have to be taken care of, fixing a rate which shall be fair for the whole system, and not simply for the immediate section of road which is involved. This, in my judgment, they had no right to do. The shipper is entitled to a just and reasonable rate, having regard to the service which is to be rendered by the carrier that is to perform. And this service is largely to be measured by the facilities for economically rendering it, which are possessed by that particular road. It is not to be augmented or kept up, beyond what is fair and just, by the consideration of what some other road, not so favorably situated, may need.

The order of the Commission, being based upon mistaken and erroneous grounds, is therefore invalid and should be so declared. *Southern Railway v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004; *Inter. Com. Com. v. Stickney*, 215 U. S. 98, 30 Sup. Ct. 66, 54 L. Ed. 112; *Southern Pacific Railway v. Inter. Com. Com.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. —. And the case should be remanded in consequence to the Commission in order that a rate may be fixed which shall be just and reasonable as respects the respondent carrier, by whom the services are to be performed. This does not take from the Commission the right to say what that rate shall be. Much less does it involve the determination of the rate by the court. It merely disposes of the rate which has been mistakenly made, as preliminary to a new consideration of it by the Commission upon correct and proper grounds. *Cin., N. O. & T. P. R. R. v. Inter. Com. Com.*, 162 U. S. 184, 238, 239, 16 Sup. Ct. 700, 40 L. Ed. 935; *Southern Railway v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004.

I therefore dissent from the judgment of the court sustaining the demurrer and dismissing the bill.

MACK, Judge, concurs in the above dissent.

**EAGLE WHITE LEAD CO. et al. v. INTERSTATE COMMERCE COMMISSION et al.**

(Commerce Court. July 20, 1911.)

No. 6.

Bill by the Eagle White Lead Company and others against the Interstate Commerce Commission and others. Dismissed.

Francis B. James, for petitioner.

R. Walton Moore and Frank W. Gwathmey, for Cincinnati, N. O. & T. P. Ry. Co.

J. A. Fowler, Asst. Atty. Gen., and Blackburn Esterline, Sp. Asst. Atty. Gen., for United States.

P. J. Farrell, for Interstate Commerce Commission.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Associate Judges.

CARLAND, Judge. The bill in this case is, for all practical purposes, the same as the bill in case No. 5, Receivers' & Shippers' Association of Cincinnati v. Interstate Commerce Commission and the Cincinnati, New Orleans & Texas Pacific Railway Co., 188 Fed. 242, and was filed for the same purpose. The cases were submitted together upon bill and demurrer.

For the reasons stated in the opinion filed in case No. 5, the demurrer in this case must be sustained and the bill dismissed.

ARCHBALD and MACK, Judges, dissenting.

**UNITED STATES v. NORTON (seven cases).**

(District Court, E. D. Oklahoma. June 5, 1911.)

Nos. 515-521.

**1. BANKS AND BANKING (§ 256\*)—INDICTMENT AND INFORMATION (§ 125\*)—NATIONAL BANKS—OFFENSES BY OFFICERS.**

Under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), which makes it a criminal offense for any officer or agent of a national bank to make any false entry in any book, report, or statement of the association, with intent "to injure or defraud the association, \* \* \* or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association," the making of a false entry, accompanied by an intent either to "injure or defraud" or to "deceive," as defined by the section, constitutes an offense; and a count of an indictment which charges that such a false entry was made with intent to injure or defraud, and also with intent to deceive, charges two offenses, and is bad for duplicity.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958-964; Dec. Dig. § 256; \* Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

**2. BANKS AND BANKING (§ 257\*)—NATIONAL BANKS—OFFENSES BY OFFICERS—MISAPPLICATION OF FUNDS.**

An indictment under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), which charges that defendant, while an officer of a national bank, with intent to injure or defraud the bank, unlawfully and willfully misapplied and converted to his own use funds of the bank, by withdrawing money therefrom upon a charge ticket, pursuant to which the amount was charged to his account, is insufficient to charge an offense, in the absence of averments showing that the bank was in fact defrauded, or a probab-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ity that it would be defrauded, thereby, as that defendant was insolvent, and that the overdraft was not paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 973; Dec. Dig. § 257.\*]

**3. BANKS AND BANKING (§ 257\*)—NATIONAL BANKS—OFFENSES BY OFFICERS—MISAPPLICATION OF FUNDS.**

An indictment under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), which charges that defendant, while president of a national bank, with intent to injure and defraud the bank, unlawfully and willfully misapplied and converted to his own use, by paying to himself the amount of a draft drawn by a customer on a third party to whom the bank was not indebted, does not charge an offense; there being no averment that the drawee was not solvent, or of other facts showing that the draft which defendant caused the bank to cash was not collectible.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 973; Dec. Dig. § 257.\*]

**4. BANKS AND BANKING (§ 256\*)—NATIONAL BANKS—OFFENSES BY OFFICERS—MISAPPLICATION OF FUNDS.**

The fact alone that an officer of a national bank causes it to pay overdrafts, drawn by himself or other customers of the bank, or makes a loan without security, does not constitute an offense, under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497); nor does an indictment averring such facts charge an offense, because it further avers an intent to injure and defraud the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 958-964; Dec. Dig. § 256.\*]

Criminal prosecutions by the United States against William L. Norton. On motions to quash indictments. Motions sustained in part, and overruled in part.

William J. Gregg, U. S. Atty., and Frank Lee, Asst. U. S. Atty. Veasey & Rowland and Haff, Meservey, German & Michaels, for defendant.

CAMPBELL, District Judge. In each of the 7 above-numbered cases an indictment has been returned against the defendant, William L. Norton, the several indictments aggregating 42 counts, all relating to offenses under section 5209 of the Revised Statutes (U. S. Comp. St. 1901, p. 3497), covering offenses by officers and agents of national banks. Each count relates either to an alleged false entry, or misapplication or abstraction of the moneys, funds, and credits of the association. The indictments and counts which allege false entries are No. 515, all 3 counts; No. 516, the first 2 counts; No. 517, all 6 counts; No. 518, 7 counts; No. 519, first 2 counts; No. 521, first 2 counts. And those indictments and counts which allege misapplication are No. 516, the third count; No. 518, eighth and ninth counts; No. 520, all 10 counts; No. 521, the third count. Those which alleged abstraction are No. 521, fourth and fifth counts. Motions to quash have been filed in each case, attacking on various grounds each count of the respective indictments.

[1] We will first consider the motions as they relate to the false entry charges. The ground of the motions in this respect most strenuously urged by counsel for the defendant appears in the fourth para-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 188 F.—17

graph of the motion filed in No. 515, and may be taken as typical of similar contentions set up in the other motions, and is as follows:

"That said indictment, and each and every count thereof, is defective and bad for duplicity, in that it purports to charge two or more offenses in each count; that is to say, said indictment alleges in each count that a false entry was made in a certain report to the Comptroller of the Currency by the defendant, with the intent on his part to injure and defraud the American National Bank of Bartlesville, and also that a false entry was made by the defendant in such report with the intent to deceive the board of directors and other officers of said banking association and any agent appointed and designated by the Comptroller of the Currency to examine into the affairs of said banking association, and also that a false entry was made by the defendant in such report with the intent to injure and defraud and deceive the officers of said banking association and any agent appointed and designated by the Comptroller of the Currency to examine into the affairs of said banking association, whereby the defendant is not advised of the offense with which he is sought to be charged."

In each of the false entry counts, it is charged that the false entry involved was made—

"with the intent to injure and defraud the said banking association, and with the intent to deceive the board of directors and other officers of said banking association, and with the intent to deceive any agent appointed and designated or thereafter to be appointed and designated by the Comptroller of the Currency to examine into the affairs of said banking association."

Section 5209 provides as follows:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The persons coming within the purview of the statute are the officers and agents of national banks. Any one of those who either embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the bank, with intent to injure or defraud the association, or any other company, corporation, or individual, or with intent to deceive any of the officers of the bank, or any agent appointed to examine the affairs of the bank, offends against the statute. The embezzlement, abstraction, and misapplication condemned are each separate and distinct acts, which, when committed with either the intent to injure or defraud, or with the intent to deceive, mentioned in the statute, become separate and distinct offenses under its terms. The fourth act, which may become an offense under the statute, when coupled with either one of the intents mentioned, is that of issuing or putting in circulation any of the notes of the association without



authority from the directors. The fifth is the issuing or putting forth, without such authority, any certificate of deposit; sixth, the drawing of any order or bill of exchange without such authority; seventh, the making of any acceptance without such authority; eighth, signing any note, bond, etc., without such authority; ninth, the making of any false entry in any book, report, or statement of the association, with either of the intents mentioned.

It is therefore seen that there are nine distinct acts, each of which, when coupled with the intent to injure or defraud, or with the intent to deceive, mentioned in the statute, becomes a separate and distinct offense. The making of the false entry is not in itself what the statute condemns; but it is the making of it with any one of the several intents mentioned therein. The gravamen of the offense is not the mere making of the false entry; but coupled with the act there must be one of the intents condemned by the statute. A false entry made by mistake, or one knowingly made, but with no intent to injure, defraud, or deceive in any of the respects condemned by the statute, would not be an offense against the statute. "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act, because the common law does not." Bishop on Stat. Crimes, § 132. As, therefore, it is not every false entry, even when knowingly made, but only such as is concurrent with some particular intent named in the statute, which is condemned, it may, I think, be properly said that the criminal intent is the gravamen of each offense contemplated by section 5209. *Evans v. United States*, 153 U. S., loc. cit. 594, 14 Sup. Ct. 934, 38 L. Ed. 830.

It is an elementary rule of pleading that an indictment or information must not in the same count charge the defendant with two or more distinct and substantive offenses, and in case it does so it is bad for duplicity if the offenses are inherently repugnant, or are not different stages in one transaction, or involve different punishments. 22 Cyc. 376, and cases cited. It follows that an indictment which in one and the same count charges an officer or agent of the bank with embezzling *and* abstracting its funds, or with abstracting *and* misapplying its funds, or with embezzling its funds *and* making a false entry in a book or report of the association, or combining in the same count the charge of the doing of any two or more of the nine distinct acts mentioned, would clearly be duplicitous, and on a proper and timely objection would have to be quashed. But in the counts now under consideration there is but the single act of false entry charged. This act, however, as we have seen, is not condemned by the statute, except it be coupled with the concurrent intent either to injure or defraud *or* to deceive in the respects mentioned. The pleader, therefore, must charge, not only the act, but the intent. In this case he charges that the act was done both with intent to injure and defraud *and* to deceive, either one of which intents, coupled concurrently with the act, makes the act an offense. It is insisted by the defendant that this amounts to the joining of two distinct, substantive offenses in the same count, and, therefore, is duplicitous.

In the case of *Billingsley v. United States* (8th Circuit) 178 Fed., loc. cit. 659, 101 C. C. A. 471, it is said:

"There are apparently two separate intents contemplated by this section, either of which, when accompanying a forbidden act, constitutes an offense. One of them is the intent to 'injure or defraud,' and the other the intent to 'deceive.' The contention that there can be no offense in making a false entry with the intent to deceive an agent appointed to examine the affairs of the association, unless there be also the coexisting intent to injure or defraud the association, etc., seems to ignore the grammatical structure of the statute and the natural meaning of the language employed. Either the intent to injure or defraud, or the intent to deceive when accompanying the doing of the substantive act to which they appropriately pertain seem, according to the language employed, to constitute an offense. Any other construction would, in our opinion, give practical immunity to the making of a false entry with the intent to deceive, etc. [Citing *U. S. v. Corbett*, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173.] If it constitutes no offense to make a false entry with intent to deceive an examiner, unless an intent actually exists to injure or defraud somebody, it would seem that much of the corrective purpose of the law can be thwarted."

Without reciting the authorities further, it is sufficient to say that the *Billingsley* Case, just cited, determines for this district that one and the same false entry may constitute two distinct and separate offenses; one when made with intent to injure and defraud, mentioned in the statute, and the other when made with intent to deceive, mentioned therein. And it will be noted that it is the intent, rather than the act, which the court considers the gravamen of the offense, for it says:

"There are apparently two separate *intents* contemplated by this section, *either* of which, when accompanying a forbidden act, constitutes an offense."

In other words, the intent, when accompanied by the act, constitutes an offense. This is clear when it is remembered that the offense in no way depends upon whether the act (the false entry) actually effects the injury, fraud, or deception intended.

It follows that one and the same false entry may give rise to two distinct offenses, according as it may accompany either of the two concurrent intents mentioned, and when in one count of the indictment a false entry is charged as having been done with the intent to injure or defraud *and* with the intent to deceive, condemned by the statute, does it not clearly combine two distinct and separate offenses? That they might properly be pleaded in separate counts, each count reciting the same false entry as accompanying a different one of the intents, cannot be doubted. No case is cited by counsel where this question had been directly raised by demurrer on motion before trial, and as it has been held by the Circuit Court of Appeals for this circuit that it is too late to raise the question in arrest of judgment, after verdict (*Morgan v. United States*, 148 Fed. 189, 78 C. C. A. 323), expressions of the courts on the question in passing upon such motions cannot be said to be directly in point.

Counsel for the government says:

"It would be a new departure in criminal jurisprudence if the several intents with which an act was committed could each be subdivided and penal-

ized, especially when, as stated by Judge Sanborn in the above opinion, such several intents are all presumed upon the commission of an act."

But we have seen in the Billingsley Case, above cited, that, whether or not it be a "departure," it is the established construction of this section, so far as this circuit is concerned, so that the contention that the existence of the several intents constitutes but one offense, where there is but the one act, is not sound. Counsel for the government in his brief declares that he makes no contention that two distinct, independent offenses can be preferred in one count of an indictment, but admits that they cannot be so charged. In view of the construction of this statute, just noted, it would seem that this admission would, in effect, concede the defendant's contention.

It is contended for the government, however, that the pleading attacked has been approved and sustained by a long line of decisions. The case of *United States v. Corbett*, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173, is relied upon, for the reason that it appears from the opinion that it was charged that the false entry involved was made with the double intent to injure and defraud and to deceive. It is not clearly stated whether this double intent was pleaded in one and the same count, or separately stated in different counts; but it is clear that, however that may have been, the question of duplicity now under consideration was neither raised by the motion nor the demurrer filed in that case, and it will not do to say, because the court may have passed without comment a feature of the pleading to which no objection was raised, that it therefore approved it, especially when, as said in the *Morgan Case*, *supra*, such question can only be raised before trial. And in this *Corbett Case* Justice White announces the doctrine that the construction of a statute in regard to which no question was raised will not prevent the determination, as an original question, as to how the statute should be construed in that particular when controverted in a subsequent case.

The recent case of *United States v. Morse* (C. C. A.) 174 Fed. 539, is cited. In the false entry counts in this case, as in the case at bar, the double intent to injure and defraud and to deceive was charged; but there is nothing in the case to indicate that this pleading was ever questioned prior to the trial, by motion or demurrer, and it is passed by the court without comment. So that, like the *Corbett Case*, *supra*, it cannot be taken as authority directly sustaining the pleading. It is further noted in this *Morse Case* that the court treated the act of misapplication charged in some of the counts, when accompanying the intent to injure and defraud the bank, as a separate and distinct offense from one wherein the same act of misapplication might accompany an intent to deceive the officers of the bank, etc. The court says:

"The allegation is plainly one charging the defendants with misapplication with intent to injure and defraud the bank, and the proof tended to establish the truth of the allegation, and not the intent 'to deceive any officer of the association or any agent appointed to examine the affairs of any such association.'"

The court, in its charge to the jury, told them it was necessary, in order to complete the crime of willful misapplication, that it should have been made with an intent on the part of the defendants to injure or defraud the bank, or any other person, *or to deceive any officer of the bank, etc.* This instruction was challenged by the defendant, because, as stated, it was neither charged nor proven that the misapplication was made with intent to deceive. The court then point out the fact that this instruction was given to the jury when the court was explaining generally the meaning of the statute, and that the language quoted was a correct statement of its provisions, and that later, when dealing with the specific charges of misapplication, the court charged that the intent must be to injure or defraud the bank. But while the court was for this reason inclined to the belief that the instructions, taken altogether, had not misled the jury, it expresses a lingering doubt upon the subject, for it says:

"Per contra, we cannot wholly divest ourselves of the apprehension that the jury may have obtained a mistaken notion of the essentials of the offense, and may possibly have convicted the defendant upon the theory that the funds of the bank were misapplied with intent to deceive an officer of the bank or an agent of the government, and not with intent to injure and defraud, as alleged in the indictment. In a civil cause a theory resting upon a foundation so insubstantial could not be maintained; but where the liberty of a citizen is at stake the court should be clearly convinced that he has not been convicted under a mistaken interpretation of the law. If the language above quoted were the only portion of the charge upon which the defendant's argument is based, it would not be difficult to disregard it; but later on, when the court was explaining the misapplication counts relating to the ice transactions, he charged, after stating that, if the jury believed that the ice stock was purchased at grossly excessive prices, they might find that the amount paid in excess of the real values of said stock was a willful misapplication thereof, providing they also found 'that such misapplication was with the intent denounced by the statute.' It would have been more accurate had he said, 'with the intent charged in the indictment.' The intent denounced in the statute, as previously explained by the court, was (1) either to injure or defraud the bank, or (2) to deceive any officer of the bank or any agent appointed to examine its affairs. Is it not possible that the jury may have convicted the defendant, upon the counts in question, of an intent not charged against him in the indictment?"

The court then passes to a consideration of the false entry counts, and, finding them sufficient to sustain the conviction, regardless of the misapplication counts, the possible error of the court as to the latter counts is not regarded as having worked any substantial injustice to the defendant. But it is evident from the opinion that, had the error in the charge of the court as to the intents connected with the misapplication counts not been rendered negligible by the fact that the conviction was properly sustained on the false entry counts, the judgment would probably have been reversed.

United States v. Harper (C. C.) 33 Fed. 473, being the charge of Judge Jackson to the jury, is cited by the government as indicating that in this case the double intent to injure and defraud and to deceive is charged in each count. But an examination of a certified copy of the indictment, now before me, develops that the pleader in each false entry count only charged there the intent to defraud or

the intent to deceive, outlined in the statute, in no instance charging both in the same count.

Greenleaf on Evidence (13th Ed.) 18, is cited to the effect that:

"If several intents are comprised in one allegation in the indictment, any one of which, being consummated by the principal fact, would constitute the crime, the allegation is divisible; and proof of either of the intents, together with the act done, is sufficient."

It may be conceded that, had this question not been raised before trial, the jury would have been warranted in returning a verdict on any false entry count as to which the evidence showed the defendant knowingly made a false entry with any one of the several intents charged. It would not be necessary to prove all the intents charged. *McKnight v. United States*, 97 Fed. 216, 38 C. C. A. 115. But here the question is raised by a timely objection, a situation, so far as the court is informed, not heretofore presented by any reported case. The fact, as has been said, that in a number of cases where no timely objection was made the courts have passed such pleading without comment, cannot be relied upon as establishing its correctness, now that it is challenged. In a number of others, it appears the several intents were stated in separate counts. What, then, is the situation? The intent to injure and defraud and the intent to deceive are separate and distinct intents, either of which, when accompanying a forbidden act, constitutes an offense. The same act may accompany each intent, and thus the same act may give rise to several distinct offenses. It is conceded that two or more offenses should not be joined in one count. That is sought to be done here, and the motion to quash raises the question.

The case of *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, is cited as authority for this pleading. This case involved that section of the Revised Statutes prohibiting the false making, altering, forging, or counterfeiting, or causing to be made, etc., any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or enabling another to obtain from the United States any sum of money. By the statute it is also prohibited to any person to knowingly transmit to or present at, or cause or procure to be transmitted or presented to any office or any officer of the government any of the writings mentioned in support of or in relation to any account or claim against the government, with intent to defraud it. The second count of the indictment charged, not only that the defendant did the things, and each of them, the doing of which, or either of which, the statute prohibited, but also that he caused the doing of such things and each of them. The question was raised in motion in arrest of judgment, and the court says:

"Was the count thus drawn so defective as to require the judgment upon it to be arrested?"

After discussing the question, the court say:

"We are of opinion that the objection to the second count upon the ground of duplicity was properly overruled. The evil that Congress intended to reach was the obtaining of money from the United States by means of fraud-

ulent deeds, powers of attorney, orders, certificates, receipts, or other writings. The statute was directed against certain defined modes for accomplishing a general object, and declared that the doing of either one of several specified things, each having reference to that object, should be punished by imprisonment at hard labor for a period of not less than five years nor more than ten years, or by imprisonment for not more than five years and a fine of not more than \$1,000. We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it."

Aside from the fact that the question was raised after trial, when objections for duplicity are too late, it is established by a long line of authorities that a charge of the doing of a thing and causing it to be done may properly be combined in one count. As said by the court:

"The evil that Congress intended to reach was the obtaining of money from the United States by means of fraudulent or forged writings and the statute was directed against certain defined modes of accomplishing this, either one of which, having the unlawful object in view, constituted a substantive crime under the statute."

Now the making or causing to be made of a forged or prohibited writing, and its utterance or publication as true, and its transmission or presentation to an officer of the government, may all be successive phases in one transaction by one person, as they were, in fact, in the Crain Case. In such case it is well established that the various successive acts may be charged in one count. But in the case at bar it cannot be said that the intent to injure or defraud the bank is in any way related to the intent to deceive. They may both exist in the mind of the accused when the false entry is made, but they are not successive phases or stages of one transaction. A false entry may be made to deceive any agent appointed to examine the affairs of the bank, without any intention to injure or defraud the bank, and in fact may be made under such circumstances as not to be in any way calculated to do so. The same entry may be made with the intent to injure and defraud the bank, and with no intent to deceive any officer appointed to examine the affairs of the bank, and under such circumstances as not to be in any way calculated to do so.

State v. Goodwin, 33 Kan. 538, 6 Pac. 899, involves the following statute:

"Every person who shall take away any female under the age of eighteen years from her father, mother, guardian or other person having legal charge of her person, without their consent, either for the purpose of prostitution or concubinage, shall upon conviction thereof, be punished by confinement and hard labor for the term of not exceeding five years."

The court said:

"The information charges that the female, Nannie Lawson, was taken away for prostitution and concubinage. In the information there is a joinder of two distinct felonies in one count. If the appellant took away the female

for the purpose of prostitution, under the circumstances alleged in the information, he would be guilty of one offense; but if he took her away for the purpose of concubinage, but not for prostitution, he would be guilty of another offense. If the appellant took the female away for the purpose of prostitution, he did so for the purpose of devoting her to infamous purposes; that is, of offering her body to indiscriminate intercourse with men. If he took her away for concubinage only, then his purpose was to cohabit with her in sexual commerce, without the authority of law or a legal marriage. Now, two or more offenses may, under proper circumstances, be joined in one information; but it must be in separate counts. Each count, as a general thing, should embrace one complete statement of a cause of action, and one count should not include distinct offenses—at least, distinct felonies. There are many prominent exceptions to this rule, but, as this case is not within the exceptions, they need not be noted. Wharton's Cr. Pl. and Pr. pp. 244-254; 1 Bishop on Cr. Pro. pp. 433-440."

To the same effect is *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *Slocum v. People*, 90 Ill. 274; *Henderson v. People*, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391.

Section 1024 of the Revised Statutes of the United States provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts." U. S. Comp. St. 1901, p. 720.

Here are two charges against the defendant for the same act, the false entry; each distinct intent charged constituting a separate offense. *Billingsley Case*, supra. Such charges may be joined under the statute in one indictment, *but in separate counts*.

Because no reported case is brought to the attention of the court, where, as to section 5209, this question has been raised before trial, as is done in the case at bar, it is considered at greater length than otherwise it would have been. It is concluded that the charges in the indictments under consideration are duplicitous, in that they each plead two separate and distinct offenses, and that the motion to quash as to such counts is therefore well taken.

The suggestion made by counsel for the government that to so hold is imposing an impossible standard of pleading upon the government is not sound, nor is it requiring such detail of pleading as is impracticable of proof. It is just as easy to plead the intent to injure or defraud in one count and the intent to deceive in another, both relating to the same act, and is a practice, in fact, commended by the authorities. In *State v. Bailey*, 50 Ohio St. 636, 36 N. E. 233, it is said:

"The authorities are quite uniform in maintaining the right of the prosecutor, where a single offense has been committed, to include a number of counts in one indictment, variously framed to meet possible contingencies that may arise in the introduction of evidence. Upon this subject, the following pertinent language is used by Wharton: 'Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence, and this the law permits.' *Beasley v. People*, 89 Ill. 571; *Com. v. Andrews*, 132 Mass. 263; *State v. Smith*, 24 W. Va. 814; *State v. Flye*, 26 Me. 312. The law permits this multiplication of the counts in an indictment, where each states, though with variations of detail, the same offense, to prevent that failure of justice which might follow if the

prosecution should be confined to a single count, and the proof should vary from the allegations of that count in some essential particular. Upon the same principle, it would seem that where two similar and closely allied offenses arise from the same transaction, and each must be established, if at all, by substantially the same evidence, each should be permitted to be set forth, in separate counts, in the same indictment. *People v. Sandman*, 12 Hun (N. Y.) 167; *State v. Hogan*, R. M. Charl. (Ga.) 474; *State v. Fisher*, 37 Kan. 404, 15 Pac. 606; *Com. v. Ismahl*, 134 Mass. 201; *State v. Scott*, 15 S. C. 434; *Ker v. People*, 110 Ill. 627 [51 Am. Rep. 706]; *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50; *Armstrong v. People*, 70 N. Y. 38."

The following excerpts from reported cases controlling this court will aid in the determination of the questions here presented as to the misapplication and abstraction counts:

In *United States v. Britton*, 107 U. S. 668, 2 Sup. Ct. 523, 27 L. Ed. 520, it is said:

"It is true that it is possible for an officer of a banking association, with intent to defraud it, to misappropriate its funds in the purchase for its use of its own stock; but the count which avers such an act should also make other averments to show that the application was not merely the use of the money for the benefit of the association, forbidden by law, but a criminal misapplication by which it was possible that the association could be defrauded."

In the same case it is also said:

"The words 'willfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzle,' as used in the statute, or the words 'steal, take, and carry away,' as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'willfully misapplied' the funds of the association. That is well settled by the authorities we have already cited. There must be an averment to show how the application was made, and that it was an unlawful one."

In the case of *Evans v. United States*, 153 U. S., loc. cit. 587, 14 Sup. Ct. 936 (38 L. Ed. 830) it was said:

"Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that upon a plea of former acquittal or conviction the record may show with accuracy the exact offense to which the plea relates."

The Circuit Court of Appeals for this circuit, in *Dow v. United States*, 82 Fed. 904, 27 C. C. A. 140, criticising an instruction given by the trial court, said:

"From this broad statement upon the subject, given without restrictions or qualifications, the jury might well understand that in all cases the drawing of a check, when at the time the drawer had no funds to meet it, would be a fraud on part of the drawer, and the recognition of the check by the bank officials, by crediting it to the account of the holder, would constitute a criminal misapplication of the funds of the bank, yet it is apparent that in many cases such acts would not be justly open to the charge of fraud, and in no case could they constitute a criminal misapplication of the funds of the bank, unless the funds of the bank had been lessened thereby. In nearly all cases wherein overdrafts occur, checks are drawn on the bank when in fact the drawer at the time has no funds on deposit to meet the check; and yet



not all overdrafts are frauds, nor do the officers of the bank necessarily become participants in a fraud simply because they give recognition to checks drawn by their customers which are in fact overdrafts, because drawn upon the bank when the drawer had not funds therein to meet the checks. Of course, frauds and criminal misapplications of bank funds by the officials thereof may be committed by the recognition or payment of checks drawn on the bank when there are not funds to meet the same; but the criminal wrong, *including the intent*, must appear from all the facts surrounding the transaction, and cannot be inferred, as a matter of law, from the mere fact that when the check was drawn there were not funds on deposit to meet the check; and the charge given the jury in this case on this subject must be held misleading and erroneous, because it is so broadly stated as to justify the jury in believing that the mere drawing of a check creating an overdraft is a fraud on the part of the drawer, and the payment thereof by the bank officers of necessity constitutes a fraudulent misapplication of the funds of the bank."

In the same case, discussing section 5209, the Circuit Court of Appeals said:

"The statute thus referred to, being section 5209 of the Revised Statutes, was before the Supreme Court for construction in the cases of *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512 [27 L. Ed. 520], and *U. S. v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580 [30 L. Ed. 664], and it was therein held 'to be of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant, or some person other than the association, with intent to injure and defraud the association, or some other body corporate or natural person.' In the several counts in the indictments charging a misapplication of the funds of the Commercial National Bank it is averred that the misapplication was made with the intent to injure and defraud the association, meaning the national bank, and it is clear, under the ruling of the Supreme Court in the cases just cited, that the charges of misapplication contained in these indictments could not be made out unless it appeared that the funds of the bank had been depleted, withdrawn, or diminished in some form by reason of the action of Dow, aided and abetted by McClurken and Miller. The jury were instructed that the fact that Miller received credit in his account on the books of the bank for checks drawn on that bank or on other banks constituted a flagrant misapplication of the funds of the Commercial Bank, within the meaning of section 5209; yet it is apparent that merely giving credit to Miller on the books of the bank for the amount of the checks did not lessen the funds held by the bank, nor in fact defraud the association, in any form. To complete a misapplication of the funds of the bank, it was necessary that some portion thereof should be withdrawn from the possession or control of the bank, or a conversion in some form should be made thereof, so that the bank would be deprived of the benefit thereof. It is not necessary in all cases that the money should be actually withdrawn from the bank. Thus if, by connivance between a bank official and a customer of the bank, the latter is allowed to draw checks on the bank, when the drawer has not the funds to meet the checks, and the same are given by the drawer to third parties, instead of getting the cash on the checks, have them credited up to their accounts in the bank, this completes the misapplication of the funds of the bank, because the bank has become bound for the payment of the sums thus credited to the third parties; and the result is just the same as though the holders of the checks had obtained the money thereon, and had subsequently deposited it to their credit. In such cases the funds of the bank would be lessened, and thereby the criminal misapplication might be completed. If, however, the customer presents the checks himself, and has the same credited on his account, the crime of misapplication is not completed thereby, because the bank is not under legal obligation to pay out any of the amounts wrongfully credited to the customer, and may refuse to pay checks drawn against the inflated account, and may at any time charge back against the customer the amounts of the checks

upon which nothing was in fact realized by the bank. To complete the criminal misapplication of the bank funds in the supposed case, some sum must be paid by the bank to the customer, or to third parties on his order, or must be credited to third parties under such circumstances that the bank becomes bound for the payment thereof."

Now, taking up the misapplication counts: Without prolonging this opinion by reciting in detail the several particulars in which it is charged the third count in indictment No. 516 is bad, on a careful examination of it, in the light of the objections raised, I conclude that it substantially states a misapplication under section 5209.

[2] As to indictment No. 518: The eighth count of this indictment charges that on February 9, 1908, the defendant, as president of the association, with the intent to injure and defraud the association, and without the knowledge and consent of the board of directors, unlawfully, willfully, etc., misapplied and converted to his own use moneys, funds, and credits of the association in the sum of \$8,000, by means of a charge ticket, which is set forth in full, from which it appears the defendant was charged upon the books of the association with \$8,000 cash; that the payment to him was unlawful, in that the association was not indebted to him, and had no account with him, on which such payment was entitled to be made; that the repayment thereof was not secured, and that defendant had no right, title, or authority to the same, all of which he well knew. The effect of the transaction charged in this indictment is the same as if the defendant had permitted himself, or some other person, to whom the association was not indebted, to draw out of the funds, moneys, and credits of the association the sum of \$8,000, in the shape of an overdraft, and charge the person so drawing it out therewith on the books of the bank. Presumably, in the absence of a charge to the contrary, the defendant is solvent and able to repay the \$8,000 for which he stands indebted on the books of the bank. So far as the indictment shows, this amount may have been repaid to the association upon demand. How, then, can it be said that it appears from the facts alleged that it was likely, or even probable, that the bank would be injured or defrauded by the transaction? In the absence of such averments, the mere statement that the defendant intended to injure or defraud the bank is not sufficient.

It might be further suggested, also, that if the averment of this count were sufficient to bring the transaction within the condemnation of the statute, it probably would be more in the nature of an abstraction than a misapplication.

In the ninth count of indictment No. 518 it is charged that the defendant, without the consent of the board of directors, and with intent to injure and defraud the association, willfully misapplied \$8,000 of the moneys, funds, and credits of the association by means of a charge ticket, from which it appears that he procured from the association three drafts, each to the order of a different oil company, aggregating the above amount, which was charged to his "escrow" account. Like the preceding count, no averment is made from which it appears how it is possible or probable that the bank will lose, nor

does it appear that the drafts were ever paid. *Dow Case*, supra; *United States v. Martindale* (D. C.) 146 Fed., loc. cit. 282.

[3] Taking up indictment No. 520, the first count of this indictment is unintelligible, as the mere reading of it shows, because of the confusion of the name of the defendant with that of the American National Bank of Bartlesville, and this confusion, occurring as it does at the beginning of the count, is carried through the entire count, by reference from time to time relating back to this defective beginning. For this reason, if no other, this count is subject to the motion to quash.

The second count charges that the defendant was president of the association, and that on October 13, 1908, while acting as such president, with intent to injure and defraud the association, and without its knowledge or consent, or that of its board of directors, he unlawfully, fraudulently, knowingly, willfully, and feloniously converted and appropriated to his own use, and to the use of the Oklahoma Investment Company, the moneys, funds, and credits of the association, in the sum of \$500, by means of a certain customer's draft set out in the indictment. It is dated October 7, 1908, drawn by one R. M. Conway, to the order of the Farmers' State Bank, and is drawn upon the Oklahoma Investment Company. It is charged that upon this paper the defendant paid to himself, out of the moneys, funds, and credits of the association, the said sum, and that said payment was unlawful, in that the association was not then indebted to the investment company, had no account with it upon which such payment was due and payable, and that the repayment of the said sum was in no way secured; that the defendant had no right, title, or authority in and to such moneys, funds, and credits, all of which he then and there well knew. Now, while it does not appear how the defendant came in possession of the draft, it may reasonably be inferred from the indictment that he presented it to the association, and received it for the association, in exchange for the moneys, funds, and credits he is charged with having misapplied. The draft was originally payable to the order of the Farmers' State Bank. It is not charged that the defendant was wrongfully in possession of the paper, so that it must be assumed that he was entitled to present it to the Oklahoma Investment Company, upon whom it was drawn, and collect \$500. But, instead of that, he passes it through the association, whether by indorsement, or for collection, or how, does not appear. It does appear that he received for it \$500 of the moneys, funds, and credits of the association. Now, it is charged that this was unlawful, in that the association was not indebted to the Oklahoma Investment Company, and the repayment of said moneys, funds, and credits was not secured, and that the defendant was not entitled to the said moneys, funds, and credits. But as the bank holds the paper, which is in itself a credit against the Oklahoma Investment Company, and as it does not appear that the Oklahoma Investment Company was insolvent, and as no other reason appears why the paper is uncollectible, it must be assumed that upon presentation by the association to the Oklahoma Investment Company it will be paid. If, so, then it does not

appear that the bank loses anything by the transaction. It is not materially different from the defendant's having received for the bank and discounted the note of the Oklahoma Investment Company, and taken the proceeds himself. In such case, unless it appeared that the investment company was insolvent, or that for some other reason the paper was uncollectible, the mere charge that it was done by the defendant to injure and defraud the bank would not be sufficient to make criminal a state of facts which fails to show on its face that injury or fraud would probably result. *United States v. Britton*, *supra*.

[4] In the third count the defendant is charged with having misapplied \$250 of the moneys, funds, and credits of the association, by means of a draft drawn by the Oklahoma Investment Company, by its treasurer, upon the associations payable to the order of J. W. Jenkins, agent. It is charged the Oklahoma Investment Company has no account with the association upon which the draft may be drawn, but no charge of insolvency is made against it. It amounts to no more than the permitting of an overdraft by the Oklahoma Investment Company. It is not charged that the Oklahoma Investment Company had no account with the association, but that it had no account upon which the amount was due and payable. There being no allegation from which it can be inferred that the association cannot or did not collect this overdraft from the Oklahoma Investment Company, which, so far as appears, was a solvent concern, no offense of misappropriation is stated.

The fourth count is very similar to the third, and is subject to the same criticisms.

The fifth count charges a misapplication by the defendant of \$9,204.90 with intent to injure and defraud the association, and without the knowledge and consent of the board of directors, by means of a draft dated January 28, 1909, drawn by the defendant to the order of Columbia Bank & Trust Company upon the Oklahoma Investment Company, charged to have been unlawful, in that the investment company had no account with the association upon which said amount was due, and that the association did not owe said sum to the investment company. It is not alleged that the investment company was insolvent, nor that the draft was for any reason uncollectible. This count is therefore defective, for the reasons stated as to the second count of this indictment.

The sixth count sets forth a transaction involving a customer's draft, drawn by the Columbia Bank & Trust Company upon the Oklahoma Investment Company, to the order of the Southwestern Mortgage Company, for \$3,087.50. It does not appear that the Oklahoma Investment Company is insolvent, or that the draft upon it was for any reason uncollectible.

The seventh count charges that on January 15, 1909, the defendant, as president of the association, with intent to injure and defraud it, and without the knowledge and consent of the board of directors, unlawfully, etc., misapplied and converted to the use and benefit of himself, one Davis, and the Columbia Bank & Trust Company moneys,

etc., of the association in the sum of \$2,500, by means of certain checks, drafts, and charge tickets, a more particular description of which the grand jury is unable to give, and by further means and methods to the grand jury unknown; that this payment was unlawful, in that the association was not indebted to defendant, nor to the said Davis, nor the Columbia Bank & Trust Company, in any sum entitling them to such payment, and the repayment of said moneys, funds, and credits was in no way secured, all of which was known to the defendants. For the reasons set forth as to the foregoing counts, it will be seen the facts averred as constituting the means by which the alleged misapplication was effected do not amount to an unlawful misapplication under the statute. Nor do they apprise the defendant of the particular charge against him with such definiteness of detail as enables him to make a defense, or plead it in bar of another prosecution, in case of acquittal or conviction.

The eighth, ninth, and tenth counts of this indictment are substantially the same as the seventh in the manner in which the alleged misapplication is pleaded.

Taking up the charges in the fourth, and fifth counts of indictment No. 521: The fourth count charges that the defendant, as president of the association, on the 15th day of December, 1908, with intent to injure and defraud the association, and without the knowledge and consent of the board of directors, unlawfully, willfully, etc., abstracted and converted to his own use and to the use of the Bartlesville State Bank moneys, funds, and credits of the association in the sum of \$4,000, by means of a certain charge ticket set forth in the indictment; that said sum was not lawfully paid, in that the association was not indebted to the Bartlesville Bank, and it had no funds on deposit with the association, and no valid subsisting account upon which the payment was due, or entitled to be paid; and it is then charged that the repayment of "said customer's draft" was not in any way secured, and that the defendant and the said bank had no right, title, or authority in and to said moneys, funds, and credits, all of which the defendant well knew. The reference to "said customer's draft" must be an error in drafting the indictment, for in no other place in this count is any customer's draft mentioned. It appears from this count that the defendant, without knowledge and consent of the board of directors, paid out of the moneys, funds, and credits of the association the sum of \$4,000 to the Bartlesville Bank, which amount was charged to that bank, as shown by the charge ticket, and that no security was given for the repayment of this money, other than the credit of the Bartlesville Bank; but in place of such moneys, funds, and credits the association has a charge against the Bartlesville Bank for the same amount. If the latter bank was solvent, as must be presumed in the absence of an allegation to the contrary, then the association can lose nothing by reason of the transaction; for it must be presumed that a solvent bank will repay this amount when called upon, whether it be treated as a loan or an overdraft. As it is neither charged that the Bartlesville Bank is insolvent nor that this indebtedness to the association was not re-

paid upon demand, all the facts charged in the indictment might be admitted or proven, and still there would be nothing from which the jury could infer the unlawful intent charged.

In the fifth count it is charged that on December 9, 1908, the defendant, as president of the association, with the intent to injure and defraud it, and without the consent and knowledge of the board of directors, willfully and unlawfully abstracted and converted to the use of himself and the Bartlesville State Bank moneys, funds, and credits of the association, in the sum of \$9,000, by means of a customer's draft, drawn by the cashier of the latter bank, payable on demand to the order of the association, said moneys, funds, and credits having been paid to the latter bank by the association upon said draft; that the payment was unlawful, in that the association was not indebted to the said bank; that it had no funds on deposit with the association, and no valid subsisting account with the association upon which said payment was due, and the repayment thereof was not secured. From this it appears that for the said moneys, funds, and credits the association held the demand draft of the Bartlesville Bank for the same amount. No insolvency of the latter bank is charged, so it was presumably solvent. Nor is it charged that upon demand the draft was not paid. So that, presumably, it was; it not appearing that the amount was lost to the bank. For reasons stated as to other counts, this count fails to state a case of unlawful abstraction, as contemplated by the statute.

As to all the false entry counts in the several indictments, the motions to quash will be sustained, because said counts are duplicitous; each combining in one count two distinct offenses.

The several motions to quash, so far as they relate to counts in the respective indictments charging misappropriation, will be sustained, for the reasons heretofore stated, except as to the third count of indictment No. 516, as to which count the motion will be overruled. So far as they relate to the counts charging abstraction, the said motions will be sustained.

So ordered.

## CONTINENTAL &amp; COMMERCIAL TRUST &amp; SAVINGS BANK v. McCARTY.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1911.)

No. 1,943.

## WATERS AND WATER COURSES (§ 252\*)—STOCKHOLDERS—SUPPLY OF WATER—CONSTRUCTION OF CONTRACT.

Defendant, who had purchased land within an irrigation system being constructed under a contract with the state, bought stock in the corporation organized to maintain and operate such system which entitled him to water for irrigation of his land, entering into a contract by which he made an initial payment and agreed to pay the remainder in annual installments. The contract provided that he should pay the first installment, with interest on all, November 1st following, but further, in accordance with the requirement of the contract with the state for construction of the system, that interest should be payable from April 1st if water was available for irrigation of the land during the irrigation season, but, if not, to commence when such water was available; that "no payment other than the initial payment, and no interest shall be required to be paid under this contract until the water is available \* \* \* and such water must be available at the beginning of the irrigation season in order to make such payments become due, and all payments and interest \* \* \* shall be advanced in time according to the delay in the delivery of the said water." The contract was secured by a lien on the land and with other like contracts, and, as provided therein, was assigned to a trustee to secure bonds of the corporation. The irrigation season extended from April 1st to November 1st, and water was not available for defendant's land until May 14th. *Held* that, under such contract, no payment of interest or principal became due or collectible by the assignee until one year from the 1st of the ensuing November, and that interest commenced to run from the 1st of April of the next season.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 252.\*]

Appeal from the Circuit Court of the United States for the District of Idaho.

Suit in equity by the Continental & Commercial Trust & Savings Bank against Charles W. McCarty. Decree for defendant, and complainant appeals. Affirmed.

The appellant, as trustee under a deed of trust, brought a suit for the foreclosure of a lien created by a contract assigned to it as security for an issue of bonds. The lien was executed by the appellee, and it covers certain lands situate in the state of Idaho, together with a certificate of stock representing water rights for the irrigation of land. The court below sustained a demurrer to the bill, and dismissed the same. The facts set forth in the bill are in substance the following: That on May 1, 1908, the Kings Hill Irrigation & Power Company, a corporation, entered into a contract with the state of Idaho for the construction of an irrigation system for the reclamation and irrigation of several thousand acres of land which had been segregated from the public domain under the act of Congress known as the "Carey Act" (Act Aug. 18, 1894, c. 301, 28 Stat. 372). The contract provided that, before the land should be thrown open for entry, a corporation to be known as the Glenn's Ferry Canal Company should be organized for the purpose of maintaining and operating the irrigation system; that it should have a capital stock of 25,000 shares, each share to represent an undivided interest in the system based upon the number of shares finally sold; that each share should represent sufficient water for the irrigation of one acre of land; that the entire capital stock should be issued to the Kings Hill Irrigation & Power Company in full payment for the irrigation system; and that said stock

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 188 F.—18

should be sold to persons who desired to enter the land, and to owners of other lands susceptible of irrigation from the system. Payments for said stock were to be made as follows: \$6.50 per share at the time of purchase, and the remainder in nine equal annual deferred payments with interest at 6 per cent. per annum. The Irrigation & Power Company having constructed the irrigation works, the appellee desired to enter certain parts of said land, and, with that end in view, purchased 42.97 shares of the capital stock of the Glenn's Ferry Canal Company, sufficient to irrigate 42.97 acres of land which the appellee filed upon under the Carey act. In purchasing his stock the appellee entered into a contract with the Irrigation & Power Company whereby the latter was given a first lien on the land on which the appellee filed for the amount due it in nine deferred annual payments of \$279.31 each. The appellee under his contract agreed to pay the irrigation company his first deferred payment on November 1, 1909, and agreed to pay interest on all deferred payments on said date, the interest to be computed from April 1, 1909, at 6 per cent. per annum. The contract contained, however, the following qualifying clause: "Interest from April 1, 1909, at six per cent. per annum may be charged if water is available from said irrigation system for use during the irrigation season of 1909, and, if not available for said season, interest shall commence when such water is available. But it is further understood and agreed that no payment other than the initial payment, and no interest shall be required to be paid under this contract until the water is available for distribution from said irrigation system at a point within one-half mile of each legal subdivision of one hundred sixty acres, and such water must be available at the beginning of the irrigation season in order to make such payments become due, and all payments and interest provided in this contract shall be advanced in time according to the delay in the delivery of the said water as aforesaid." The following provision was also contained in the contract: "This contract is made pursuant to and subject to the contract between the company and the state of Idaho, and the existing laws of said state, and is to be construed in conjunction with said contract and said laws." The contract between the state and the irrigation company contained the following provision: "It is further agreed that no payment other than the initial payment, and no interest shall be required under any contract, either for Carey act lands or state or private lands, until the water for the said land is available from said canal for distribution at a point within a half mile of each legal subdivision of one hundred sixty (160) acres of the said land, and such water must be available at the beginning of the irrigation season in order to make such payments become due, and all payments and interest provided in said contract shall be advanced in time according to the delay in the delivery of said water as aforesaid." In the Revised Codes of Idaho, section 3306 provides that owners or persons in control of any ditch, canal, or conduit used for irrigation purposes shall maintain the same in good order and repair ready to deliver water by the 1st of April in each year. In the bill it was alleged upon information and belief that the irrigation system described in the contract between the appellee and the appellant was so far completed on May 14, 1909, that water on said date became available, and ever since has been available, for the irrigation of the lands described in the contract.

Richards & Haga, for appellant.

B. S. Crow, for appellee.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The single question presented by the demurrer is whether a cause of suit has arisen in favor of the appellant. The contract provides that the appellee shall pay on November 1, 1909, the first deferred payment and interest on all deferred payments from April 1, 1909, but it proceeds



in the next paragraph to provide that the interest may be charged if water is available from the irrigation system for use during the irrigation season of 1909, and that, if not available for said season, the interest shall commence when such water is available, and that no payment, other than the initial payment, and no interest shall be required to be paid under the contract until the water is available, and that such water must be available at the beginning of the irrigation season in order to make such payments become due, and that all payments and interest provided in the contract shall be advanced in time "according to the delay in the delivery of the water as aforesaid." The appellant contends that the paragraph is ambiguous, the ambiguity arising from the phrase, "and, if not available for said season, interest shall commence when such water is available." But that sentence is controlled by the provision which follows: "And such water must be available at the beginning of the irrigation season in order to make such payments become due." The contract was made upon a printed form presented to the appellee for his signature, and, if there is ambiguity in it, doubtful terms are to be construed favorably to the appellee. But we find no substantial difficulty in the way of construing the contract as a whole.

It is not disputed that the irrigation season in the locality of the appellee's lands is the period between April 1st and November 1st. The contract, when all its terms are considered, makes it clear that, if water for irrigation is not available at the beginning of the first irrigation season, no payment either of principal or interest is to be made until the end of the next ensuing season at the beginning of which the water shall be available for use. Counsel for the appellant argue that such a construction is unreasonable and unjust; that the water might be available on the 2d of April, 1909, and the appellee might have all the benefit thereof for the season, and yet, under the construction so adopted, no compensation could be collected for the use thereof. But that argument does not meet the case presented by the bill. It is not therein alleged that the water was available for substantially the whole of the irrigation season of 1909. It is alleged that it was available on May 14th. The use of the water from May 14th to the end of the season may or may not have been of considerable value to the appellee. Of that we need not inquire. The parties saw fit to contract for the use of the water for the irrigation season as a whole. They made clear their intention that if the use of the water was delayed until after the beginning of the first irrigation season, so that the appellee could not receive substantially what he contracted for for that season, all payments of principal and interest should be advanced one year. The construction contended for by the appellant that interest began to run from May 14th, the day when the water was in fact available, would involve the unjust and unreasonable conclusion that if the water had been furnished on the 1st of October, which was practically at the end of the irrigation season, interest would have run from that date.

The contention is made that the delay in furnishing the water for the irrigation season of 1909 cannot affect the right of the appellant

to sue upon the bonds for the reason that it is the assignee thereof, that by the contract the appellee agreed to make the payments to the assignee and to look to the irrigation company for the performance of its covenants, and that the stipulation that the contract might be assigned is a waiver of the right of set-off or recoupment. But the appellee does not base his defense upon any claim of equities as against the irrigation company. He asserts no equities or set-off, and seeks no recoupment. His defense rests solely upon the nonperformance of the conditions of the contract, and the single question is presented whether the contract has been performed according to its terms so that a right of action has accrued to the appellant. That question is in no way affected by the assignment or by the stipulation that an assignment might be made.

The decree is affirmed.

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**NORFOLK & PORTSMOUTH TRACTION CO. v. REPHAN.**

(Circuit Court of Appeals, Fourth Circuit. May 2, 1911.)

No. 990.

**1. COURTS (§ 347\*)—FEDERAL COURTS—RULINGS ON PLEADINGS—WHAT LAW GOVERNS.**

Under the conformity act, federal courts in determining a demurrer to a declaration in an action at law will be governed by the decisions of the highest court of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.\*]

Conformity of practice in common-law actions to that of state court, see notes to 5 C. C. A. 594, 27 C. C. A. 392.]

**2. STREET RAILROADS (§ 110\*)—INJURIES TO TRAVELERS—PLEADING—DECLARATION.**

Where, in an action for injuries to a pedestrian at a street railway crossing, plaintiff's whole case was based on the alleged negligence of the motorman in operating the car by which she was struck, and her declaration was divided into three counts, the first charging that the injury was the result of the motorman's negligence in operating the car at the point where she was hurt, the second, that it was due to his negligence in failing to keep a proper lookout, and the third, to a negligent failure to warn, the first count was not demurrable under the Virginia practice as indefinite and uncertain for failure to allege in what particular the operation of the car was negligent.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 110.\*]

**3. TRIAL (§ 330\*)—VERDICT—RESPONSIVENESS TO PLEADING.**

Where neither of the three counts of a declaration were demurrable, a general verdict for plaintiff was not objectionable as not sustained thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 777-781½; Dec. Dig. § 330.\*]

**4. PLEADING (§ 53\*)—DECLARATION—COUNTS—INSTRUCTIONS.**

Where plaintiff's whole demand is founded on a single transaction, and her relative rights and those of the defendant are well established, the issues consisting of negligence and contributory negligence, the entire declaration, though divided into counts under the Virginia practice, may be considered in passing on the question whether one of the counts is

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sufficiently definite to inform defendant as to the nature of the cause of action pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 114-117; Dec. Dig. § 53.\*]

**5. TRIAL (§ 169\*)—DIRECTION OF VERDICT—DUTY OF COURT.**

It is the duty of a trial judge to direct a verdict for defendant in a civil action, when plaintiff's testimony, assuming it to be true, and giving it that weight and effect which necessarily follows or may be reasonably inferred from it, fails to establish a cause of action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-389; Dec. Dig. § 169.\*]

**6. STREET RAILROADS (§ 117\*)—INJURIES TO PEDESTRIAN—CROSSING ACCIDENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.**

In an action for injuries to plaintiff by being struck by a street car at a street crossing as she was attempting to cross the street in a rainstorm, evidence *held* to require submission to the jury of the questions of negligence and contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**7. NEGLIGENCE (§ 136\*)—QUESTION OF LAW OR FACT.**

Negligence only becomes a question of law to be determined by the court when the facts are such that fair-minded men can only draw from them the inference that there was no negligence, and if such might honestly differ on the question it must be submitted to a jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**8. TRIAL (§ 260\*)—INSTRUCTIONS—REQUEST TO CHARGE—REFUSAL.**

Where the court's charge covered the entire case, and was all that was necessary to give the jury an intelligent understanding of the law applicable to the facts they might find from the testimony, it was not error to refuse requests to charge.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 260.\*]

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Action by Mamie Rephan by Harry Rephan, her next friend, against the Norfolk & Portsmouth Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Venable and Henry W. Anderson (J. R. Tucker, on the brief) for plaintiff in error.

S. M. Brandt, for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and ROSE, District Judges.

BOYD, District Judge. The defendant in error, Mamie Rephan, who for convenience will hereafter be called the plaintiff, is a citizen and resident of the city of Charleston, S. C., and is under 21 years of age. The plaintiff in error here, which was the defendant below, and will hereafter be called the defendant, is a corporation under the laws of the state of Virginia, and owns and operates a street railway in the city of Norfolk, and a part of its line is along Granby street, which in its course intersects with another street called College place. On the 14th of November, 1908, between 7 and 8 o'clock in the evening,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

during a rainstorm, the plaintiff undertook to cross Granby street at College place, when she was run over by a car operated upon the line of the defendant, and so injured that it resulted in the amputation of her left leg above the knee. She brought this suit by her next friend, Harry Rephan, against the defendant to recover damages, alleging that the injury to her was caused by the servant of the defendant in the negligent operation of the car. The case was tried in the circuit court at Norfolk, the jury returning a verdict for \$15,000 in favor of the plaintiff, which, by consent of her counsel, was reduced to \$10,000 by the presiding judge, and judgment for that amount rendered against the defendant. The case is here by writ of error sued out by the defendant, and is presented to us upon three propositions: First, exception to the action of the court in overruling a demurrer to the declaration; second, for error assigned on the refusal of the court to direct a verdict for the defendant; and, third, assignments of error for instructions requested by defendant and refused by the court, and exceptions to and error assigned upon instructions as given by the court to the jury.

[2] With this general statement of the case, we will proceed to consider the several points which arise, and will in the course of our discussion revert to such facts in the record as may be necessary to elucidate the questions presented. The first question to be passed upon is the demurrer. The declaration consists of three several counts. In order to dispose of the legal propositions raised by the demurrer we do not deem it necessary to reproduce the entire declaration, but only the substantial parts of the first count, in which, after alleging that the plaintiff is an infant under the age of 21 years, and a citizen and resident of the city of Charleston, S. C., and that she sues by her next friend, Harry Rephan, and that the defendant is a corporation under the laws of the state of Virginia, operating an electric street railway in the city of Norfolk, in said last-named state, the declaration goes on to allege:

"That on the 14th of November, 1908, the defendant, by and through its then servant and agent, was operating, running, and propelling one of its said cars upon, along, and over its said track, which was then laid upon Granby street as aforesaid, from a point at or near the intersection of a certain other street in the city of Norfolk, to wit, College place, en route to the intersection of Main and Granby streets, in the city of Norfolk, Va., and which said car was then operated, run, and propelled, by and through the said servant and agent of the said defendant, upon and along said Granby street; that on the day and year aforesaid the said plaintiff was walking along, upon, and across said Granby street, from the east side thereof to the west side thereof, as was her right; and thereupon it became, and was the duty of said defendant, by and through its then servant and agent, who was then running and operating said car, by means of electricity, to use due and reasonable care to prevent injury to persons using said Granby street, and particularly to use due and reasonable care to prevent running down and against the said plaintiff; and to so run, operate, govern, and control its said car, which was then being run and operated by and through its then servant as aforesaid to prevent injury to persons using said Granby street, and particularly to prevent running upon, against, and down the plaintiff. Yet the said defendant, wholly disregarding its duty in this behalf, when it, the said defendant, by its then servant and agent, who was in charge of and operating said car, knew or by the use of reasonable care, could have known, that danger of collision with the said plaintiff was imminent, so negligently, care-

lessly, and improperly ran and operated its said car; that by reason of the negligence, carelessness, and improper conduct of the said defendant in the running, management, operation, government, and control of said car, by and through its then servant and agent, the motorman of said car, when it, the said defendant, knew, or by the use of reasonable care could have known that danger of collision with persons at, upon or near its tracks, and particularly collision with the plaintiff was probable, ran down, upon and against the said plaintiff and the said plaintiff was knocked down, run down and was dragged, wounded, lacerated and maimed, and so greatly injured and wounded, that by reason whereof, it became necessary to amputate the left leg of the said plaintiff above the knee, and that by reason of the negligence, carelessness, and improper conduct of the said defendant, the said plaintiff was so greatly injured and wounded, that she was confined to her bed for a long period, to wit, ten weeks, and was, and is, maimed, disfigured, and disabled for, and during the term of her natural life, and suffered great physical pain and mental anguish, and doth still suffer great physical pain and mental anguish, and always will suffer great physical pain and mental anguish, and hath been obliged to pay and expend great sums of money, in and about the endeavor to get healed and cured of her injuries as aforesaid, to wit, one thousand dollars, and will be compelled to pay and expend further sums of money, in and about the endeavor to get healed and cured of her injuries as aforesaid, by reason of the negligence, carelessness and improper conduct of the said defendant, by and through its then servant and agent to the damage of the said plaintiff thirty thousand dollars. And therefore she brings her suit," etc.

The second count is in substantially the same language except it charges specifically that the negligence consisted in the failure of the motorman to keep the proper lookout at, upon, or near the tracks of the defendant, and the third count charges the negligence to consist in the failure of the motorman to give warning as he approached this crossing with the car that he was operating. The defendant's counsel has not argued the demurrer at length, either orally or in the brief, but relies upon some decisions of the Virginia Court of Appeals to sustain the view that the declaration is insufficient. The sole objection to the declaration as a whole is set out in the demurrer as follows:

"This declaration, and each count thereof, discloses on its face such contributory negligence on the part of the plaintiff as would bar her recovery."

The counsel, however, have not seen proper to discuss this general objection, but have confined the argument, both oral and in the brief, to the demurrer to the first count, which is as follows:

"The first count of the said declaration is so vague, uncertain, and indefinite, in that it does not set out what the alleged negligence of the defendant consisted of, and the defendant cannot properly concert its defense thereof."

[1] We concede the proposition that the practice, pleading, forms, and mode of proceeding in civil causes other than equity and admiralty causes in the federal Circuit and District Courts are required to conform as near as may be to the practice, pleading, forms, and modes of proceeding existing at the time in like causes in courts of record of the state in which such Circuit and District Courts are held. This is the law enacted by Congress, and it is incumbent upon the federal courts to comply with its requirements as near as possible. Therefore, we think that we should have regard for the decisions of the Court of Appeals of the state of Virginia relative to the sufficiency of

the declaration in passing upon the question here involved upon this demurrer, but we do not think the first count of the declaration, considered in connection with the circumstances of this case, is bad for want of sufficient particularity. Plaintiff's whole case is founded upon the alleged negligence of the motorman in operating the car which he had in charge. The leading Virginia case, which is cited by both parties in the argument, is that of *Hortenstein v. Virginia-Carolina Railway Company*, 102 Va. 914, 47 S. E. 996. In that case the Virginia Court of Appeals says, speaking of the requirements in the declaration, that the declaration should be sufficiently specific to inform the adverse party of the ground of the complaint; that the plaintiff is presumed to have knowledge of the facts upon which his action is founded, and if he is in doubt as to the precise nature of the evidence, he may frame his declaration with different counts, varying his statements to meet every possible phase of the testimony. It seems to us that this is precisely what the plaintiff did in this case, basing her cause as we have said solely upon the alleged negligence of the motorman. She has divided her declaration into three several counts; the first charges the injury to her as the result of the negligence of the motorman in operating the car at the point where she was hurt, the second count is his alleged negligence in the failure to keep a proper lookout so as to guard against collision with her, and in the third count is the negligent failure to give a warning of his approach to the place of the collision in order that she might be on the lookout. The Virginia Court of Appeals has said in the case of *Chesapeake & Ohio Railway Company v. Hunter*, 109 Va. 343, 64 S. E. 45, that:

"This court has not laid down, nor does it propose to establish, any unreasonable rules with regard to particularity of averment in declarations in personal injury cases. All that the rule requires is that the declaration shall contain a concise statement of the material facts on which a recovery is demanded. Of course, the evidence relied on to sustain the averments of the declaration need not be pleaded."

In the argument, however, defendant lays stress on the fact that the verdict was a general one, and it being insisted that the first count is bad, therefore, the judgment of the Circuit Court should be reversed; and in support of this view the *Hunter Case*, supra, is cited again and our attention is directed to the following quotation therefrom:

"The verdict of the jury being general, the court cannot say whether it rests upon the case stated in the first count of the declaration or upon that alleged in the second and third counts, which are bad. In this situation, the judgment complained of must be reversed, for the error of the court in not sustaining the demurrer to the second and third counts of the declaration," etc.

[3] We do not think that this rule applies in the case in hand, for in our opinion the first count is not bad because the injury to plaintiff is charged to have occurred at a crossing, and the negligence is alleged to be that of the motorman who was operating the car, and who had the entire control of the operation of the car, at least, whilst it was moving. The plaintiff was attempting to cross the track of the defendant at a point where she had the right to cross, and at a point

where certain well-defined duties are prescribed by the law as devolving both upon the person attempting to cross the track, and upon the servant of the railway company operating cars along its line. So then, this declaration, in our opinion, meets fully the requirements laid down by the Virginia Court of Appeals in the case of *Hortenstein v. Virginia-Carolina Railway Company*, supra, wherein the court said:

"The declaration, and each count thereof, shows the relation between the plaintiff and the defendant, the duty of defendant to plaintiff, the failure of defendant to discharge that duty, and the resulting injury to the plaintiff. The declaration clearly informs the defendant of the nature of the demand against it, and states such facts as would enable the court to say, if the facts were proven, as alleged, that they established a good cause of action. Under such circumstances, the cause of action is stated with sufficient particularity."

[4] Measured by this rule we see no error in the refusal of the trial court to sustain a demurrer to the first count of this declaration, and we go further to say that whilst under the Virginia practice it seems that the several counts separately stated in the declaration are treated as distinct causes of action, yet in a case like this where the whole demand is founded upon a single transaction where the injury complained of occurred at a place which is particularly described in the declaration, and where the relative rights of the plaintiff, and of the defendant, are well established, and where, in the trial upon the pleadings the plaintiff was depending upon the alleged negligence of the defendant as her ground of recovery, and defendant was relying upon the alleged contributory negligence on the part of the plaintiff to defeat her recovery, the entire declaration may be considered in passing upon the question as to whether or not the defendant is sufficiently informed as to the nature of the cause of action to enable it to intelligently defend. We, therefore, dismiss this part of the case without further discussion with the conclusion that there was no error in the action of the court upon the demurrer.

[5, 6] The next question presented is that raised by the defendant's assignment of error based upon exception to the action of the trial court in refusing to direct a verdict for the defendant, first at the close of plaintiff's testimony, and then at the close of all the testimony. The law is well settled that it is not only the province, but the duty, of a trial judge to direct a verdict for a defendant in a civil action when conditions are such as to warrant this course, but this authority is confined to cases in which the testimony offered by the plaintiff, assuming it to be true, and giving it that weight and effect which necessarily follows or may be reasonably inferred from it, fails to make out a case. Such, in our opinion, is not the situation here. The plaintiff alleges that she was crossing a public street in the city of Norfolk at a place where she had a right to cross, and that she was taking due precautions for her safety; that it was in the nighttime and during a rainstorm, and that the defendant negligently, through its agent, so operated a car along the street she was crossing as to run upon her and cause her injury, and she charges specifically that the negligence consisted in the failure of the motorman to keep a proper lookout at that point for persons crossing the street, and also his failure to give

warning of the approach of the car so as to put such persons on guard, and her testimony, as well as that of other witnesses, tended to support these allegations. On the other hand, the defendant contends that the car was operated properly; that the crossing was approached cautiously; that the motorman was on the lookout, and that he gave the usual and necessary warning; that the injury to plaintiff was due to the fact that she attempted to cross the street in a rainstorm without taking any precautions to avoid the danger of approaching cars, and that with an umbrella drawn down closely over her head obscuring her vision she heedlessly ran against the car as it was passing along, and the defendant introduced some testimony to sustain these contentions. So the issue of fact is distinctly drawn as to whether the defendant was guilty of negligence which caused the injury, and as to whether the plaintiff was guilty of contributory negligence on the occasion. If it was shown that both the plaintiff and the defendant omitted to take due care, or to exercise that precaution which devolved upon them, or either of them at the time of the occurrence, and the injury resulted, it then became a question for the jury on the testimony to determine whose negligence was the immediate or proximate cause of the injury.

It is evident that this serious injury to the plaintiff was the result of the want of due care on her part, or on the part of the defendant, and we think that the testimony relating to this question pro and con is such that reasonable men may fairly differ as to what was the proximate cause of the injury. This court, in the case of *Baltimore & Ohio Railroad Company v. White*, 176 Fed. 900, 100 C. C. A. 370, reiterated the established doctrine with reference to the directing of verdicts when it said:

"For it has also become a recognized principle in the administration of the law of negligence that where the facts and circumstances accompanying and surrounding an alleged negligent act are such that reasonable men may fairly differ as to whether there was negligence or not, the issue is for the jury, and it should be so submitted."

*Railroad Company v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, clearly lays down the law upon the last-mentioned principle, and is a leading authority on that subject. We call attention also to the case of *McDermott v. Severe*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162, in which Mr. Justice Day, in delivering the opinion, says:

[7] "Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law, but of fact, and to be settled by the jury under proper instructions. *Railroad Company v. Powers*, 149 U. S. 43 [13 Sup. Ct. 748, 37 L. Ed. 642]; *Railroad Company v. Everett*, 153 U. S. 107 [14 Sup. Ct. 474, 38 L. Ed. 373]."

However, we do not deem it necessary to discuss this question further, because it seems to us clearly that the trial judge properly submitted the issue to the jury.

[8] We come now to the last question which arises upon defendant's requests for instructions to the jury, which were refused by the



court, and also to the assignments of error based upon exceptions to the instructions as given by the court. We will not refer severally to the defendant's requests for instructions, which were 17 in number, nor to the exceptions to the particular parts of the charge as given, because upon an examination of the charge we are of the opinion that it covered the entire case, and the principles of law laid down by the learned judge are those which were pertinent to the issue being tried, and are all that were required to give the jury an intelligent understanding of the law which should be applied to the facts which they might find from the testimony. We have heretofore in discussing this case given an outline of the contentions of the parties, and the character of testimony relied upon by each, and these, with the general statement of facts, disclose the nature of the case and lead to an understanding of the issue which was being tried. The instructions of the court to the jury were as follows:

"This is a suit for damages alleged to have been sustained by the plaintiff by reason of the negligence of the defendant company, while crossing one of the tracks of the said defendant, on Granby street, in the city of Norfolk, and near the intersection of Granby street and City Hall Avenue. The plaintiff is not entitled to recover merely because of having sustained the injury complained of, but you must be satisfied from a preponderance of the evidence, to enable her to recover, that she sustained the injury sued for because of the negligence of the defendant company, or its agents and employes, without negligence on her part proximately contributing to the accident.

"Second Paragraph. That the injury having occurred to the plaintiff while passing along a street of the city, upon and over the tracks of the defendant company, also lawfully upon said street, that you must take into account in determining the question of negligence on the occasion in question the relative duties and obligations due by the parties one to the other, in the exercise of their right to use the said street; which the court charges you is as follows: That they each had an equal right to the use of said street, the obligation and duty imposed upon them one to the other being correlative in that they should each have proper regard to the rights of the other, and each should use reasonable care to avoid collision with and injury to the other in passing upon and over said street.

"Third Paragraph. That it was the duty of the plaintiff before attempting to cross the street at the point in question to look out and listen for approaching cars, and to exercise reasonable care in approaching and crossing defendant's tracks, to avoid coming into collision with moving cars while crossing the street. If you believe from the evidence that she failed to perform these obligations, or either of them, on her part, on the occasion in question, and as a consequence sustained the injuries sued for, she cannot recover in this action, unless you further believe from the evidence that the defendant observed the position of peril in which she had placed herself, or by the exercise of proper care might have observed the same, the defendant neglected to exercise reasonable care on its part, in the operation of, or in stopping its car, and as a consequence the injury sued for was sustained by the plaintiff while in the exercise of proper care on her part, then and in that event the plaintiff may recover.

"Fourth Paragraph. That it was the duty of the defendant company in operating its cars, propelled by electricity over and upon the streets of the city, at the time the plaintiff sustained the injury sued for, to exercise reasonable care on its part to avoid collisions with persons lawfully using said street, and passing over said tracks; that is to say, by and through its officers and employes, to exercise reasonable care in the movement of its said car, and in looking out for and observing persons lawfully using said street, and passing upon and over said tracks, and to give due and timely signal and warning of the approach of said cars. And if you believe from the testimony

that the defendant, by and through its servants and employes, failed and neglected to perform its duty in either of the respects mentioned, and as a consequence the plaintiff, in the exercise of proper care on her part as hereinbefore stated, received the injury sued for, then you should find for the plaintiff.

"Fifth Paragraph. The court further charges you that the plaintiff, in attempting to cross the tracks of the defendant company, and the servants of the defendant company in operating its cars at the point of the accident, each had the right to assume that the other would exercise ordinary care; the motorman that the plaintiff would not unduly thrust herself in a position of danger, and the plaintiff that the motorman would properly operate his car so as not to expose her to unusual danger and peril; and if the jury believe from the evidence that the plaintiff was guilty of negligence in the particular mentioned, by negligently thrusting herself in front of, under or against the moving car, at a time when the motorman had the right to assume that she would not do so, and as a consequence sustained the injury sued for, then she cannot recover in this action; and, on the other hand, if you believe from the evidence that while the plaintiff in the exercise of reasonable care on her part, was attempting to cross the tracks of the defendant company, that the servants and employes of said defendant company either at the time of seeing, or when by the exercise of ordinary care they could have seen and observed the movements of the plaintiff, failed to exercise reasonable care in the operation of its said car for her protection, and as a consequence negligently ran over, upon or against her causing her to sustain the injury sued for, then the defendant is liable, and, in that event, you should find for the plaintiff.

"Sixth Paragraph. You are further charged that if the defendant relies upon the plaintiff's contributory negligence to defeat her right of recovery in this case, the burden to establish such contributory negligence is upon the defendant, unless the existence of the same sufficiently appear from the testimony offered by the plaintiff.

"Seventh Paragraph. You are further charged that negligence as meant in this charge, is the failure to do what reasonably prudent persons would ordinarily have done in like circumstances, having due regard to the proper protection of the life and limb of themselves and others.

"Eighth Paragraph. You are further charged that by reasonable care is meant the exercise of that degree of prudence, care, caution, and foresight that ordinarily a prudent person under like circumstances and conditions would exercise for his or their own protection.

"Ninth Paragraph. You are further charged that in determining the question of whether or not the injury complained of was the direct result of the plaintiff's own negligence, or whether it resulted from the direct negligence of the motorman of the defendant in running and operating his car on the occasion in question, you can take into consideration all the facts and circumstances as proved by the evidence to have existed at the time when, and place where, the injury occurred, and give to such facts and circumstances, and to the testimony of each witness, such weight only as you deem such fact or circumstance or testimony entitled to in connection with all the facts of the case; and that this being a civil case, it is incumbent upon the parties respectively, to establish their several contentions by a preponderance of the testimony.

"Tenth Paragraph. You are further charged that if you find the defendant is liable, then you should give the plaintiff such damages as she has proved in this case, not to exceed \$30,000; and in estimating such damages you should take into consideration: First. Any permanent injury to the plaintiff. Second. Any shock to her system. Third. Any pain and anguish suffered by her."

The duty of the trial judge with respect to instructions to the jury is fully discharged when the law as laid down by him covers the entire case, and it is not error under such circumstances to refuse to give specific requests in the language of counsel. Iron Silver Mining

Company v. Cheesman, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712. In this case the court holds that:

"When the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, it is not bound to give other instructions asked by counsel on the same subject, whether they are correct or not."

We think in the present case that the instructions given met these requirements.

There is no error, and the judgment of the Circuit Court is affirmed. Affirmed.

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GERMANIA SAVINGS BANK & TRUST CO. v. LOEB.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1911.)

No. 2,081.

**1. BANKRUPTCY (§ 154\*)—CLAIMS—SET-OFFS.**

The right of a bank, which is a creditor of a bankrupt, to apply on its debt as a set-off a balance remaining to the credit of the bankrupt in its current account on the date of the bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), is not affected by the fact that the debt to the bank was not due.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451-455; Dec. Dig. § 154.\*]

**2. BANKRUPTCY (§ 166\*)—SET-OFFS—DEPOSITS IN CREDITOR BANK.**

A mercantile company, a short time before its bankruptcy and while in fact insolvent, procured a loan from claimant bank. On reports of the company's condition, at the bank's instance, a conference was held between their attorneys in respect to the bank's claim. An inventory and examination of the company's books was then being made, and its attorney, who did not know of its insolvency, requested that the bank wait until it was completed, and agreed that the company should withdraw from the bank no more than it should subsequently deposit. No express agreement was made that the company should be permitted to withdraw the amount of such subsequent deposits, but the bank waited until it became certain that the company was insolvent, when it refused to pay further checks, and applied the deposit on its note. *Held*, that the arrangement with respect to the money on deposit at the time of the conference appeared to have been made in good faith, and did not constitute a preference in favor of the bank; nor was there any waiver by the bank of its rights as to subsequent deposits, and, since they were made by the company without any intention of giving a preference, no preference resulted, and the bank was entitled to the entire deposit in its hands at the time of the bankruptcy as a set-off.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.\*]

**3. BANKRUPTCY (§ 154\*)—"DEBT."**

The word "debt," as used in Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), relating to the setting off of debts against a bankrupt, includes any debt provable in bankruptcy; and a debt is provable, whether due or not at the time of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 451-455; Dec. Dig. § 154.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Western District of Tennessee.

In the matter of the Block Mercantile Company, bankrupt; Henry C. Loeb, trustee. The Germania Savings Bank & Trust Company appeals from an order requiring it to return a certain sum as a preference as a condition to proving its claim. Reversed.

This is an appeal from an order of the District Court disallowing the claim of appellant against the bankrupt's estate in default of the performance of certain conditions hereafter stated. The proof of claim alleged an indebtedness of the bankrupt to the bank of \$10,387.39. The proof was construed as claiming that amount as a balance remaining of \$20,000 loaned by the bank, less \$9,612.61 deposited by the bankrupt in the bank and applied by the latter as an offset against the original indebtedness. It is alleged in such proof, with reference to the origin of the debt, that on or about January 30, 1908, the bankrupt secured from claimant \$20,000, upon representations that the company had a paid-in capital stock of \$80,000; that it was a successful corporation, and had made profits in excess of \$30,000; that on February 13th claimant first learned of the falsity of said representations, and thereupon demanded back its money. The trustee excepted to the claim upon the grounds, first, that the bank had received a preference of a large amount within four months before the bankruptcy, while the Mercantile Company was insolvent; and, second, that a large amount of the bank deposits were made under an agreement, between the representatives of the bankrupt and the bank respectively, that they should be held as a special deposit, and that no right of offset existed as to such amount.

The referee reported, in substance sufficient for this opinion, the fact of the making of the loan of \$20,000 about January 28, 1908; that about February 1st following it became known to the officers of the Mercantile Company that one of its officers was short in his accounts about \$4,000, and had forged \$3,000 of the stock of the company; that at least one of the officers of the Mercantile Company knew that as much as \$35,000 of the capital stock of the company had not been paid for; that part of this forged stock had been hypothecated with appellant; that in order to avoid trouble with one of the stockholders, who had become dissatisfied, the president of the Mercantile Company had bought his stock, giving in part payment therefor the check of the Mercantile Company upon the appellant bank; that, for the purpose of ascertaining the exact condition of the company, its attorney had ordered an inventory taken; that on February 5, 1908, the officers and agents of the appellant bank knew of certain of the irregularities before stated, were advised of the order for taking an inventory, and that the books of the Mercantile Company were being audited, and had sufficient information to put them upon inquiry respecting the insolvency of the Mercantile Company; that the latter was at the time actually insolvent, and that its officers knew it; that on February 5th a conference was had between the respective attorneys of the bank and the bankrupt—the former having sent for the president of the Mercantile Company, and the attorney appearing in his stead, on account of the alleged illness of the president; that both attorneys realized that the Mercantile Company was in a critical condition; that the bank's attorney desired to protect its interests, and that the attorney of the bankrupt "realized that it would be dangerous at that time for any action to be started against the company, and was willing to do anything reasonable to prevent litigation"; that the bankrupt had at the time on deposit in the bank \$5,970.23; that the bankrupt's attorney thought that, unless the bank could at once be satisfied, it would refuse to cash checks for the money then on deposit; that the bankrupt's attorney did not then know that his client was insolvent, and stated that he was informed and believed that it was solvent, that it owed not more than \$65,000 and had \$100,000 of assets, but that the exact condition could not be known until the examination of the books and taking of inventory were completed, and stated that if the bank were to take steps at that time to protect its interests the collapse of the bankrupt's business would result, and asked that no action be taken by the bank, but that

matters "remain as they are," under an arrangement that the Mercantile Company should draw out no more than it should subsequently deposit—thus always leaving a balance equal to the existing balance, and thus the bank be not prejudiced in case the Mercantile Company should prove insolvent; but that, while the evidence did not show whether the bank's attorney replied to this proposition, no objection was made to it, and that, the bank having accepted subsequent deposits, the Mercantile Company's attorney understanding the proposition was satisfactory, the former was bound by the transaction.

It appeared that on February 11th the accounting of the Mercantile Company's affairs was completed, showing that it owed upwards of \$138,000, instead of not more than \$65,000, as believed by its attorney at the time of the conference of February 5th; that but \$28,000 of the \$80,000 capital stock subscribed had actually been paid for; and that the inventoried assets amounted, at the valuation placed upon them, to but slightly more than the amount of the debts. The bank, upon learning this situation, on February 11th or 12th, refused to honor further checks of the Mercantile Company, and its checks to the amount of more than \$6,000 drawn, and in part issued, for current expenses or current debts, were accordingly either dishonored by the bank or withheld from delivery, by reason of such notification from the bank. On February 13th the latter demanded from the Mercantile Company the return of the \$20,000 borrowed, together with check for the balance of the latter's bank deposit, with notice that the bank had already applied the same upon said indebtedness. The creditors' petition for bankruptcy was filed the next day.

The referee held that the arrangement by which the money then on deposit should not be checked against did not constitute a preference under the circumstances of the case, including the fact that the bankrupt's attorney knew that if any of the representations made to the bank, on which the \$20,000 was borrowed, were untrue, the latter could repossess itself of the money then on deposit, and that he also must have known that in case of insolvency proceedings the bank would have the right to offset the money then on deposit, and accordingly held that the bank was entitled to offset the balance on deposit February 5, 1908, against the bankrupt's indebtedness. The amounts deposited in the bank after February 5th and until February 13th, less the amount of the checks cashed between those dates, was \$4,514.08. The referee held that the Mercantile Company had the right to control its deposits made after February 5th, and that in view of the talk between the attorneys "the bank must receive the deposits as suggested, or decline them"; that it was the intention of the attorney and other officers of the Mercantile Company that the rights of both parties should be fixed on February 5th; and that the subsequent deposits were made by the agents of the Mercantile Company "with the understanding that they were not to be molested by the bank and that they would have the right to withdraw them as they saw fit"; and that as the Mercantile Company's affairs were being conducted by subordinate agents, who were striving to preserve the assets and protect the interests of all creditors alike until the exact condition of the business could be ascertained, the deposits made after February 5th were not made in the ordinary business way, but in such way as to create a trust relation, and thus to preclude a right on the part of the bank to offset them against the Mercantile Company's debt. It was accordingly ordered that upon the payment of the latter balance (\$4,514.08), deposited after February 5th, the bank might prove its claim for what remained after making the offset of the balance previous to that date, together with its claim for the \$4,514.08 so to be paid in, and that in default of such payment the entire claim should be disallowed.

The referee's order was reviewed by the District Judge, upon petitions therefor by both the bank and the trustee. The judge agreed with the referee as to the facts relating to the deposit balance of February 5th, but was of opinion that the agreement and understanding that the bank should withhold the taking of legal proceedings against the bankrupt until invoices should be taken and the exact condition of the Mercantile Company ascertained, and that the latter should not check against this balance, in connec-

tion with the arrangement for further deposits to be checked against, amounted to the giving of a preference to the bank, under section 60 of the act, and accordingly held that the bank had no right to offset the balance of February 5th against the bankrupt's debt. As to the balance of deposits made after February 5th, the judge approved the action of the referee in holding that such balance was a trust fund, and, while not in formal terms confirming the referee's conclusions of fact, in effect did so, holding that the bank's refusal to honor checks that were drawn by the bankrupt against this subsequent balance, and its attempt to apply the same to the indebtedness which the bankrupt owed the bank, amounted to a conversion. An order was accordingly entered denying the offset of \$5,970.23, but providing that upon the payment of that sum to the trustee the bank might prove its claim for the entire amount of the debt, and that in default of such payment the entire claim be disallowed, but adjudging that the bank is a debtor to the estate of the bankrupt in the amount of \$4,514.08, and rendering judgment in favor of the trustee accordingly, with interest from February 5, 1908, with provision for the withholding of dividends upon the bank's claim until the last-named sum, with interest, be paid, as well as for issue of execution against the bank for any balance thereof in case the item of \$5,970.23, with interest, should not be paid, or in case the dividends did not amount to \$4,514.08, with interest. The costs of the proceedings for review were adjudged against the bank. It is conceded by appellee that the proper balance on deposit February 5, 1908, was \$5,098.53, instead of \$5,970.23, as found by the referee.

Joseph Hirsh, Leo. Goodman, and W. A. Percy, for appellant.  
J. C. Wilson and J. W. Apperson (D. E. Myers and K. D. McKellar, on the brief), for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge (after stating the facts as above).  
[1] The first question presented is whether the agreement of February 5th between the Mercantile Company and the bank created, as to the then existing deposit balance of \$5,098.53, a preferential transfer within the meaning of the bankruptcy act. Section 60a of the act provides that:

"A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition \* \* \* made a transfer of any of his property, and the effect of the enforcement of such \* \* \* transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 68a provides that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

It has been authoritatively decided by the Supreme Court, in considering these two sections, that the balance of a regular bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by it, and may prove its claim for the amount remaining due on the notes. *N. Y. County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380.

The Massey Case is decisive of the question we are considering, unless the case before us is distinguishable either by the fact that the notes here in question were not due at the time of the bankruptcy, or because of the existence of fraud or collusion between the bank and the Mercantile Company, with the view of creating a preferential transfer.

As to the nonmaturity of the notes:

[3] The word "debt," as used in section 68a includes any debt provable in bankruptcy. Bankr. Act 1898, § 1, cl. 11; Loveland on Bankruptcy (3d Ed.) p. 369. And a debt is provable, whether due or not at the time of bankruptcy. Bankr. Act 1898, § 63a (1). It is thus immaterial to the application of section 68a whether or not the notes were due. Collier on Bankruptcy (8th Ed.) p. 793; Loveland on Bankruptcy (3d Ed.) p. 372; *Moch v. Market St. National Bank* (3d Circuit), 107 Fed. 897, 47 C. C. A. 49; *In re Semmer Glass Co.* (2d Circuit), 135 Fed. 77, 67 C. C. A. 551.

[2] A careful consideration of the record constrains us to the opinion that there was no fraud or collusion between the bank and the bankrupt for the purpose of creating a preferential transfer with respect to the deposit balance in question. It is not, and could not be, contended that there was any collusion in respect to creating this balance. If collusion existed, it must be found in the agreement between the bank and the Mercantile Company that the deposit should remain in the bank during the investigation of the solvency of the Mercantile Company, and for the purpose of permitting the bank to apply this balance upon its notes in case the Mercantile Company should turn out to be insolvent. This question must be answered in the light of existing conditions. The suggestion that the balance be not drawn upon came from the Mercantile Company's attorney, because he thought such arrangement only fair to the bank as preventing prejudice to it, through its failure to take action to protect its interests, including the possible repudiation of the credit as obtained by misrepresentation. The Mercantile Company was at the time actually insolvent. The bank had the power (as distinguished from the right) to refuse checks upon its deposit balance. If the Mercantile Company proved insolvent, or the credit turned out to have been obtained by fraudulent misrepresentations, the bank had the right to so refuse. Such refusal would naturally have tended to precipitate hostile action by the creditors of the Mercantile Company, and when the condition of the company was actually learned would naturally have brought about bankruptcy proceedings. It was, to our minds, entirely proper that the Mercantile Company should, in these circumstances, arrange for a continuance of the existing status, which, should the Mercantile Company prove solvent, would be of benefit to it, and, should it prove insolvent, would merely give the bank the same rights as it would have if then existing insolvency were recognized. The transaction in no sense amounted to a hypothecation of this balance, as suggested by appellee's counsel. The fact that the bank had reason to believe the Mercantile Company was insolvent did not affect its right to set-off. In the Massey Case a portion of the deposits held applicable by way

of set-off were made after the bank had knowledge of the debtor's insolvency. The testimony of the attorney of the Mercantile Company, in our opinion, distinctly repels the inference of an intent to give the bank a preference. We think the bank should have been allowed to offset the deposit balance of February 5th upon the bank's notes.

As to the balance of deposits made after February 5th:

If the bank held these deposits as trustee for the Mercantile Company, the right to set off the same against the latter's notes did not exist. Under the authority of *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571, the bank was entitled to prove its debt with the set-off in question eliminated, but remained a debtor to the bankrupt for the amount of the deposits; and if such trust relation existed, the action taken by the court in protection of the bankrupt's estate, with respect to dividends on the bank's claim, in case of the latter's failure to make payment of the trust fund, was proper, unless as regards the award of execution for balance not covered by dividends, as to which question we do not find it necessary to express an opinion.

The alleged trust relation, including the conversion recognized by the District Judge, rests upon the existence of an understanding between the bank and the Mercantile Company that the latter should be at liberty to withdraw the entire amount of its deposits made after February 5th, and that the bank should not be at liberty to set off against the Mercantile Company's notes any balance that should not be so drawn out, and that such deposits were not made in the ordinary course of business, but became in fact a special deposit. Upon a careful examination of the record, we are constrained to hold that the evidence does not warrant such conclusion. The referee has not found as a fact that there was any agreement to that effect between the parties, or even an understanding to that effect on the part of the bank. As we read the record, there is no direct testimony of any express agreement or mutual understanding to that effect. There is nothing in the testimony of the bank's attorney which, in our opinion, warrants such inference. On the other hand, the attorney for the Mercantile Company, while testifying to the statement to the bank's attorney that he would see that the Mercantile Company should not make withdrawals in excess of the new deposits, does not state that the bank was even asked to agree that all the new deposits might be checked against. The substance of the testimony of the Mercantile Company's attorney on this point is that he was anxious to have the banking relations continued without hostile steps upon the part of the bank, and that in order to induce the latter to continue such relations he agreed that the bank's status should not be impaired by an attempt on the part of the Mercantile Company to withdraw more than it should deposit. It is true that the Mercantile Company's attorney testified that his "idea was that the proposition was that the Block Mercantile Company should be absolutely free to withdraw every cent that it deposited after that date," and that "if there had been any scheme on the part of the bank, or anything that would have kept us from using the money dur-



ing this investigation, I would have had to make some other arrangement and found another place to deposit," and that if he had understood in his own mind that his clients could not withdraw against subsequent deposits he would not have advised them to make their deposits in the same bank. To the definite question as to the bank's acceptance or rejection of the suggestion he replied:

"I want to say this: That Mr. Hirsh [the bank's attorney] was pressing me for information which I did not have, and I was holding him up until I could get it, so it looked to me like a fair proposition. Now, as to whether that was accepted or rejected, in this way it must have been that I thought it was going to go through. I mean by that certainly I would be permitted to withdraw against deposits, or I never would have done it."

And again:

"I have stated repeatedly in this examination that I could not remember what answer that Mr. Hirsh made to my suggestion, as to continuing present deposits intact and the subsequent deposits to be withdrawn."

This testimony, in our opinion, falls short of evidencing a contract or understanding whereby the Mercantile Company should, under any and all circumstances, have the right to draw out all the new deposits, or whereby the new deposits should be held in any way as a special deposit differing from the ordinary bank deposit. The attorney of the Mercantile Company seems not unnaturally to have assumed that so long as the Mercantile Company was continuing to do business in the usual way, and in advance of a development of its insolvency, checks on the bank account would be honored. But we find no agreement or mutual understanding to that effect. Such course was in fact taken; for it was not until after the accounting of the Mercantile Company's affairs was completed, showing that its financial condition was much worse than believed by its attorney on February 5th, and suggesting probable insolvency, and indicating that a portion at least of the credit extended to the Mercantile Company was procured by false representations, that the bank refused to honor further checks. In our opinion there was, to say the least, no room for finding an understanding between the bank and the bankrupt that the bank waived its right of set off on account of any balance that might remain after such situation was found to exist. Nor do we think that the fact that the bankrupt's business was during the examination of its affairs being managed by subordinates, rather than by its usual officers, changed the nature of the deposits from the ordinary relation.

Did the application upon the bankrupt's notes of the amount of the bank deposits made after February 5th amount to an unlawful preference under the bankruptcy act? Neither the referee nor the judge so found, nor are we able to so find. It is true that on and after the 5th of February the bank had reason to believe that the Mercantile Company was insolvent. It is also true that the application upon the bank's debt of this balance of deposits, accumulated after notice of possible insolvency of the Mercantile Company, in fact enables the bank to obtain a greater dividend on its claim than creditors generally obtained. But, unless it was the intention of the parties to so accumulate deposits for the purpose of preferring the bank, the transaction did not

create a preference under the bankrupt act. This view is supported by the case of *New York County Bank v. Massey*, supra. As before remarked, a considerable portion of the deposits allowed as a set-off in that case was made after actual knowledge on the part of the bank of the insolvency of its customer. As said in that case, speaking of a deposit of money to one's credit in a bank:

"It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

We not only find nothing in the record to sustain an inference that it was the intention of the parties to give a preference to the bank, but, on the other hand, the testimony of the bankrupt's attorney emphatically negatives such intention. He says:

"There was no arrangement made by which the Block Mercantile Company were to make deposits for the purpose of exceeding its withdrawals."

And again, in reply to a question whether there was any suggestion, direct or indirect, that the deposits of the Mercantile Company should be made so that the bank's debt would be paid in the event of bankruptcy, he said:

"There was no such arrangement, and there was nothing said at that time or in that conversation that even savored of such an arrangement. At that time I had no idea that there would ever be a bankruptcy proceeding."

For these reasons we are constrained to hold that there was error in not allowing the set-off as to the deposits made after February 5th, as well as the balance existing on that date. It follows, from the views we have expressed, that the order of the District Court should be reversed, with directions to allow the balance claimed in full after the application thereon, by way of set-off, of the entire amount of bankrupt's deposit balance in the bank.

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UNITED STATES TRUST CO. OF NEW YORK et al. v. CHICAGO TERMINAL TRANSFER R. CO. et al.

BRAINARD et al. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1911.)

No. 1,693.

1. EQUITY (§ 114\*)—INTERVENTION—NATURE OF RIGHT TO INTERVENE.

Applications for leave to intervene are of two kinds: In one the applicant has other means of redress open to him, and it is within the court's discretion to refuse to incur the main case with collateral

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inquiries; in the other, the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending cause, and in such case the right to intervene is absolute, and the rejection of the petition is a final adjudication, and therefore appealable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 275-279; Dec. Dig. § 114.\*]

**2. EQUITY (§ 114\*)—FRAUD (§ 31\*)—INTERVENTION—RIGHT TO INTERVENE—ELECTION OF REMEDIES.**

One whose property rights have been injured by a fraud may elect to accept the situation created by the fraud and seek to recover his damages, or he may elect to repudiate the transaction and seek to be placed in statu quo; but the law should not make the election for him, and, if he elects to repudiate and recover his property, and such recovery cannot be had except by intervention in a pending suit, his right to intervene is not destroyed by the fact that he had an election of remedies.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 275, 279; Dec. Dig. § 114;\* Fraud, Cent. Dig. § 27; Dec. Dig. § 31.\*]

**3. EQUITY (§ 114\*)—INTERVENTION—CONSTRUCTION OF CONSENT ORDER.**

After entry of a decree of foreclosure against a terminal railroad company, a lessee company asked for and obtained an order permitting it to redeem from the decree and be subrogated to the rights of the complainant therein. The stockholders of the terminal company, through a committee appeared by counsel and consented to the order, although claiming orally that the lease was fraudulent. The order recited that it was without prejudice to the right of the mortgagor or its stockholders to contest the validity of the lease and should not be held to determine such validity, but that no subsequent decree between the parties should affect or impair the subrogation or the right of the lessee to collect the amount of the decree "in the same manner and with the same rights as the original bondholders would have had." *Held*, that under the provisions of such order the stockholders of the terminal company were not entitled to intervene in the foreclosure suit for the purpose of attacking the decree as well as the lease on the ground that the latter was fraudulent and brought about the default and foreclosure, but that they were limited to a proceeding in some proper forum to hold the lessee liable in damages.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 114.\*]

**4. EQUITY (§ 71\*)—LACHES—INTERVENTION TO ATTACK DECREE.**

Where, after the entry of a decree of foreclosure against a terminal railroad company on a mortgage securing its bonds, a lessee of its property obtained an order authorizing it to redeem from the decree and be subrogated to all the rights of the complainant thereunder, with the knowledge of the stockholders of the company, who, however, then claimed that the lease was fraudulent and made pursuant to a conspiracy to bring about the foreclosure, it was then incumbent on them, if they desired to contest the validity of the decree and seek a cancellation of the lease and a reinstatement of the company as a going concern, to take prompt action to that end, and a delay of two years before pressing for a consideration of their alleged rights constituted such laches as authorized the court in its discretion to deny them leave to intervene in the foreclosure suit for that purpose.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 71.\*]

**5. APPEAL AND ERROR (§ 95\*)—EQUITY (§ 114\*)—APPEALABLE ORDERS—INTERVENTION—EFFECT OF DENIAL OF PETITION.**

An order denying a petition to intervene in a pending cause, if petitioners were entitled to intervene as a matter of right, was a final order and appealable, and in any event until it is set aside, either by the court

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which entered it or by an appellate court, petitioners are not entitled to a hearing on a second petition based on the same grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 652; Dec. Dig. § 95; \* Equity, Dec. Dig. § 114.\*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the United States Trust Company of New York and John A. Stewart, trustees, against the Chicago Terminal Transfer Railroad Company and others. Frank Brainard, James H. Ralph, Arthur E. Friswell, and others, stockholders of defendant company, appeal from an order denying their petition for leave to intervene, and from an order denying a motion to vacate a sale of defendant's property. Affirmed.

Charles S. Holt and George Welwood Murray, for appellants.

Herbert R. Preston, William J. Calhoun, and James M. Sheean, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Two appeals are presented in the one record.

I. The first predicates error on the court's refusal to allow appellants as owners and representatives of common stock in the Terminal Company to intervene after foreclosure decree in the suit of the Trust Company, mortgagee, against the Terminal Company, mortgagor, the Baltimore & Ohio Railroad Company, lessee of part of the mortgaged premises, and others.

Default in paying interest on the \$15,140,000 of bonds occurred in January, 1905; suit was begun in February, 1906; a receiver was appointed in April, 1906; and the foreclosure decree was entered in February, 1907. The decree provided that the purchaser should have six months in which to elect whether or not he would adopt the Baltimore & Ohio and other leases.

In March, 1907, the Baltimore & Ohio filed its petition for leave to redeem as lessee and to be subrogated to the rights of complainant. The stockholders had knowledge of this petition, appeared in court by counsel, and (though stating orally that the lease was fraudulent and had greatly damaged the Terminal Company) agreed to the entry of an order on April 16, 1907, that the Baltimore & Ohio Company might redeem by the payment of the amount theretofore decreed, with subsequently accruing interest, and that upon such payment the company should become entitled to all the legal and equitable rights of the bondholders. The order, however, contained the following proviso:

"This order is expressly made without prejudice to the rights of the Chicago Terminal Transfer Railroad Company, or the receiver of said company, or any stockholder of said company hereafter permitted by the court so to do, to contest the validity or effect of the lease of April 1, 1903, between the Chicago Terminal Transfer Railroad Company and the Baltimore & Ohio and Chicago Railroad Company and the Baltimore & Ohio Railroad Company, as fully and freely in all respects as if this order had not been made. Nor shall the entry of this order be held at any time or in any proceedings

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hereafter, as determining the validity or effect of said lease, and is expressly made without prejudice to the right of the company or the receiver of the company or the stockholders of the company to litigate all questions raised by the answer of the Chicago Terminal Transfer Railroad Company. The entry of this order shall not be held as a determination by the court as to whether said amount of money so to be paid by the said Railroad Company shall be payment or as a redemption. But no decree hereafter entered in adjudicating any controversy between the Chicago Terminal Transfer Railroad Company, its receiver or stockholders, and the Baltimore & Ohio and Chicago Railroad Company and the Baltimore & Ohio Railroad Company shall affect or impair the subrogation under this order of the said railroad companies or the one making payment hereunder to the rights of the bondholders of the Chicago Terminal Transfer Railroad Company or their or its right to collect the amount of the decree heretofore entered in this cause with interest thereon, in the same manner and with the same rights as the original bondholders would have had."

On May 16, 1907, the Baltimore & Ohio filed a petition that the foreclosure decree be amended so that the sale should be subject to their lease instead of giving the purchaser a six months right of election.

On June 24, 1907, representatives of the stockholders' protective committee filed a petition for leave to intervene for the purpose of setting forth the fraud in connection with the Baltimore & Ohio lease. This petition is not copied in the record, but is referred to in the present petition as being of the nature just stated. It was never called up for action. The excuse is given that negotiations were pending between the Baltimore & Ohio and the committee for the purchase of the stock controlled by the committee. But reference to the exhibit attached to the present petition shows that the negotiations (which were later consummated) related only to the purchase of preferred stock.

Claiming that the Baltimore & Ohio's purchase of their preferred stock was only a "partial settlement" and that the situation required or justified an abandonment of their first petition, the stockholders filed a second petition on February 3, 1909. The court entered an order on April 17, 1909, denying them leave to intervene. This petition set forth a conspiracy, alleged to have originated with Harriman and associates, to ruin the Terminal Company. The charge was that the conspirators obtained control of the management of the Terminal and Baltimore & Ohio Companies, and with great profit and advantage to themselves, caused the Terminal Company to make the lease in question to the Baltimore & Ohio at a shockingly inadequate rental; that the conspirators intended that the insolvency of the Terminal Company should result; that the Terminal Company had consequently suffered not only loss of rental but all the damages that flowed from the default and foreclosure. One paragraph from this second petition will illustrate its scope and object:

"That the Baltimore & Ohio, being party to said fraud and conspiracy immediately and directly resulting in the default on the bonds and in the foreclosure suit, which bonds are now owned by the Baltimore & Ohio, is by reason of such fraud and conspiracy not entitled to further prosecute said foreclosure proceedings in a court of equity until it has purged itself of said fraud and conspiracy and accounted and paid to the Terminal Company the damages which have been suffered by the Terminal Company as

the result of said fraud and conspiracy; that this honorable court, however, should retain jurisdiction of the subject-matter, ascertain the damages suffered by the Terminal Company, direct the payment thereof to the Terminal Company or its receiver, and permit the Terminal Company or its receiver to pay the Baltimore & Ohio the overdue interest on the bonds and reinstate the bonds and mortgage to their original position, as the result of which the Terminal Company will be again solvent, able to conduct its public functions and duties and to promptly meet the interest thereafter accruing upon its mortgage debt."

On October 27, 1909, the Baltimore & Ohio filed a motion for leave to withdraw its petition of May 16, 1907, to modify the decree, and for directions to the master to sell under the decree as it stood. This motion was granted the next day.

On October 6, 1909, the stockholders had moved for leave to file another intervening petition. The hearing of this motion was set for November 9, 1909. What the form of the proposed petition was does not appear from the record. After the Baltimore & Ohio's action of October 27, 1909, the petition was tendered in its present form, and leave to intervene was denied on January 5, 1910, by the order now on review. Outside of averments of the change in attitude of the Baltimore & Ohio on October 27, 1909, this petition, on comparison with the second, is found to be the same in substance and effect. It counts on the same fraud and conspiracy and likewise seeks to vacate the foreclosure decree, cancel the lease, wipe out the default by means of an accounting of damages, and restore the status which the Terminal Company prior to the conspiracy had enjoyed as a going concern. It admits that the stockholders were aware of the fraudulent transactions therein set forth ever since the beginning of the foreclosure proceedings in February, 1906.

[1] Applications for leave to intervene are of two kinds. In one the applicant has other means of redress open to him, and it is within the court's discretion to refuse to incumber the main case with collateral inquiries. In the other the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending cause. In this latter class the right to intervene is absolute, and the rejection of the petition is a final adjudication and therefore appealable. *Credits Commutation Co. v. United States*, 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782; *Minot v. Mastin*, 95 Fed. 734, 37 C. C. A. 234; *United States v. Philips*, 107 Fed. 824, 46 C. C. A. 660; *In re Columbia Real Estate Co.*, 112 Fed. 643, 50 C. C. A. 406; *Thomasson v. Guaranty Trust Co.*, 159 Fed. 126, 86 C. C. A. 514.

[2] Remedy for the wrong done to the Terminal Company (on whose right of action the stockholders must stand) has two aspects. A victim whose property rights have been injured by a fraud may elect to accept the situation created by the fraud and seek to recover his damages; or he may elect to repudiate the transaction and seek to be placed in statu quo. But the law should not make the victim's election for him. If he chooses to repudiate the transaction and recover his property, and if such a recovery cannot be had except by intervention in a pending suit, we think his right to intervene is not destroyed by the

fact that it was open for him to accept the situation and sue for damages.

Conceding for the purposes of this decision that the stockholders' final petition made a sufficient showing of their right to redress the injuries put upon the Terminal Company, and of the Terminal Company's right to rescission, accounting, and restoration of prior status, we are nevertheless constrained to affirm the order on account of the following considerations disclosed by the petition and the record in connection therewith.

[3] 1. Shortly after the decree was entered, the Baltimore & Ohio petitioned for leave to pay for the bonds and to be subrogated to all the rights of the complainant. The stockholders, with notice of this petition, and with full knowledge of the fraudulent transactions which would prevent the Baltimore & Ohio from availing itself of the decree and which would require a court of equity to open up the decree in the hands of the Baltimore & Ohio and compel it to account, wipe out the default, and restore the Terminal Company to a live condition, appeared in court and agreed to the order of April 16, 1907. This order, apart from the proviso, put the decree into the hands of the Baltimore & Ohio as free from assault as it was in the hands of the complainant. The proviso contains apparently conflicting statements. On the one side are the expressions that the order of subrogation was without prejudice to the right of the Terminal Company (or its stockholders if permitted to intervene in its behalf) to contest the validity or effect of the Baltimore & Ohio lease, and that the order should not be held determinative of the validity or effect of the lease or the character of the Baltimore & Ohio's payment for the bonds. On the other is the declaration that no decree thereafter entered in adjudicating any controversy between the Terminal Company (or its stockholders) and the Baltimore & Ohio should impair the subrogation of the Baltimore & Ohio to the rights of the bondholders or its right to enforce the decree "in the same manner and with the same rights as the original bondholders would have had." If the reservations in the proviso in favor of the Terminal Company and its stockholders were to be taken as authorizing a subsequent vacation of the foreclosure decree with the view of canceling the Baltimore & Ohio lease, avoiding the default on the bonds, and restoring the Terminal Company to the condition of a going concern, they would not only destroy the order itself, but would be in irreconcilable conflict with the final and explicit terms explanatory of the total effect of the order and proviso. The only way by which the various conditions of the proviso can be harmonized, and effect thereby be given to all of them and to the order itself, is by seeing that the court cut off the right of the Terminal Company and the stockholders (then before it) to attack the foreclosure decree and the right of sale thereunder, and preserved the right of the Terminal Company and the stockholders to hold the Baltimore & Ohio answerable, in any proper forum and by any proper procedure, for all the damages caused by the fraud and conspiracy to which it was a party, without the possibility of the Baltimore & Ohio's successful use of the foreclosure decree, the order

of subrogation, its payment for the bonds whether as purchaser or redeemptor, and a sale in fulfillment of the foreclosure decree and subrogation order, as means of obstructing or embarrassing the controversy. Whether the demand for damages should be prosecuted by original declaration, or original bill, or through a discretionary intervention in the pending cause (and it is obvious that the keeping open of the cause for such a purpose would not affect the foreclosure decree or delay its execution), in no event was the position of the Baltimore & Ohio as owner of the decree and as successor to the complainant's right to enforce the decree to be assailed by an intervention. Such was the construction put upon the subrogation order and proviso by the circuit judge, who, finding that "the petitioners, under the guise of attacking the lease, seek to annul the decree," denied leave to intervene for such a purpose.

[4] 2. Order of subrogation was entered on April 16, 1907. On May 2d the Baltimore & Ohio acted thereon and paid complainant \$16,990,631.92 for the decree. On the 16th the Baltimore & Ohio petitioned that the property be sold subject to its lease. Assuming that the subrogation order left the stockholders free to seek a vacation of the decree, a cancellation of the lease, and a restoration of the previous status, we think that equity would require prompt action. The stockholders had had knowledge of the alleged fraud for more than a year. Such an attack would cause a heavy cloud to hang over a seemingly impervious final decree and would delay an important cause that was ready to be closed and put off the docket by a sale in execution of the decree. The stockholders did begin with sufficient promptness. They filed their petition on June 27, 1907. But they took no further steps in court until February 3, 1909. They never pressed for action upon this petition and finally abandoned it. Two excuses are offered.

The first is that the Baltimore & Ohio had pending its petition that the property be sold subject to the lease. Whether the sale should be subject to the lease or subject to the purchaser's right to reject or adopt the lease was a question that did not touch the stockholders' standing as intervenors of right and not of grace. To be intervenors of right they had to stand on the impossibility of their obtaining, except by intervention, the necessary relief by a vacation of the foreclosure, a cancellation of the lease, and a restoration of the prior status. The necessity and the facts to support it were known to the stockholders, and the situation in that respect was not affected by the Baltimore & Ohio's petition to have the sale made subject to the lease.

The other excuse is that delay was justified by the Baltimore & Ohio's negotiations with them respecting the purchase of their stock. This would be good if there had been any negotiations looking to the purchase of their common stock. But the exhibit puts the fact beyond cavil that the only negotiations related to preferred stock. This was notice that the Baltimore & Ohio intended to ignore their interests as common stockholders; interests having a different origin and a different standing from their interests as preferred stockholders. When the Baltimore & Ohio purchased their preferred stock at less



than a quarter of its face value, there was not a "partial settlement," but a full settlement, of all matters in negotiation. And the agreed value put by these adversaries upon the preferred stock might possibly be taken as a mutual recognition that the common stock had nothing but a maneuvering value.

On February 3, 1909, the stockholders filed a second petition. There was no showing that any facts of fraud antedating the final decree had come to their knowledge within the three years preceding the filing of this petition. The excuses for delay on the first petition have been found to be without color. The filing of a second petition, without any change affecting the situation, without any suggestion of insufficiency or excusable omissions in the first petition, should not restore a lapsed diligence.

The order denying leave to intervene on the second petition was entered on April 17, 1909. On October 6, 1909, the stockholders asked leave to file a third intervening petition. Counsel for the stockholders do not show wherein the second petition was insufficient. Our comparison leads to the conclusion that the second states just as good a cause of action as the third for relief by vacation of the decree, cancellation of the lease, and restoration of the prior status. The only excuse offered for the additional delay on the part of the stockholders and a further attempt in the Circuit Court after the denial in April is the change of situation produced by the Baltimore & Ohio's withdrawal of its petition for a sale subject to the lease. But, as already stated, this had nothing to do with the attack on the decree. Both petitions were challenges of the right of the Baltimore & Ohio to avail itself of the decree through any kind of sale, by reason of the fraud in the lease and the conspiracy to ruin the Terminal Company, or to have any benefit from its purchase of the bonds except on an accounting for all the damages occasioned by the fraud and conspiracy. These various moves do not impress us as being the acts of a suitor in equity who is conscious that he has a substantial interest and a substantial ground for asserting that interest, and who is anxious to prosecute his substantial rights with all reasonable diligence and without unnecessarily obstructing the course of litigation of other issues to which he is not a party.

[5] 3. If the order of January 5, 1910, denying leave to intervene, is appealable, it is so because it is a final order or decree against appellants. If so, the order of April 17, 1909, denying leave to intervene, was equally a final order or decree. If, prior to April 17, 1909, the stockholders had an absolute right to intervene on the cause of action stated, they had as perfect a right to file their petition and be heard as they would have to file their original bill or declaration on any cause of action and be heard. Suppose a suitor should file an original bill, and the court should decline to hear him and should enter a final decree dismissing the bill for lack of merit on its face. Could such a suitor require the court to hear the same cause of action on a second bill which disclosed the former proceedings and adjudication? We are of opinion that the answer applies to the present case. No inadvertence or mistake, as ground for amendment of the second pe-

tion, was advanced. If there had been ground for amendment, the amendment should have been made before the final order was entered. If the ground was not known until afterwards, an application to vacate the final order or a petition for review should have been made in the Circuit Court. Without getting rid of that final order by proceedings either in the Circuit Court or on appeal, the stockholders could not thereafter compel a hearing of the same complaint. If that is not so, then appellants might also have ignored the final order of January 5, 1910, and have renewed their application as many times as they pleased.

II. The second appeal is from an order overruling appellants' motion to vacate the sale. The court fixed the minimum selling price at \$15,140,000. The Baltimore & Ohio bid in the property at \$16,000,000. Appellants' motion was grounded on the Baltimore & Ohio's alleged suppression of competition in bidding, whereby the property was sold at an inadequate price. Appellants' highest valuation, an unsupported averment, is \$30,000,000. As this is less than the sum of the mortgage debt, some \$19,000,000 at the time of the sale, and the \$17,000,000 of preferred stock, it is apparent that a resale could not benefit the common stockholders.

The orders appealed from are affirmed.

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### GUERNSEY v. IMPERIAL BANK OF CANADA.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1911.)

No. 2,907.

*(Syllabus by the Court.)*

**1. COURTS (§ 372\*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS—COMMERCIAL LAW.**

It is a duty which the federal courts may not renounce to form independent opinions and render independent decisions upon questions of commercial or general law and of right under the Constitution and laws of the nation of which they have jurisdiction, and the decisions of the state courts are not controlling, but persuasive thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.\*]

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

**2. BILLS AND NOTES (§ 386\*)—CONFLICT OF LAWS—INDORSEMENT—NOTICE OF DISHONOR GOVERNED BY LAW OF PLACE WHERE NOTE PAYABLE.**

The manner of giving and the sufficiency of a notice of dishonor, in a case where commercial paper is indorsed in one jurisdiction and is payable in another, is governed by the law of the place where it is payable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1051-1054; Dec. Dig. § 386.\*]

**3. BILLS AND NOTES (§§ 224, 386\*)—INDORSEMENT—VALIDITY AND EXTENT OF CONTRACT GOVERNED BY LAW OF PLACE OF INDORSEMENT.**

The laws of the place where the indorsement is signed or is delivered so that it becomes a contract govern the validity and extent of the con-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tract, and therefore the necessity of some presentment, demand, protest, and notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 526, 1051-1054; Dec. Dig. §§ 224, 386.\*]

**4. BILLS AND NOTES (§§ 117, 386\*)—INDORSEMENT—LAW OF PLACE WHERE PAYABLE GOVERNS METHOD OF PROTEST AND NOTICE.**

The law of the place where commercial paper is payable governs the days of grace, the time and the manner of making the presentment, the demand, and the protest, and of giving the notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 248-254, 1051-1054; Dec. Dig. §§ 117, 386.\*]

In Error to the Circuit Court of the United States for the District of Wyoming.

Action by Imperial Bank of Canada against Charles A. Guernsey. Judgment for plaintiff, and defendant brings error. Affirmed.

John D. Clark (Gibson Clark and William A. Riner, on the brief), for plaintiff in error.

Edgar M. Morsman, Jr. (Charles W. Burdick, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This is an action by the owner of a promissory note payable in Canada made and indorsed in Illinois to recover the amount due upon the note from the indorser. Presentment, demand, and protest were made, and notice of dishonor was given in compliance with the law of Canada, but the indorser claims, and it is conceded, but neither admitted nor decided, that the notice would have been insufficient to charge the indorser if the note had been payable in Illinois. The court below held that the notice was good and rendered a judgment against the indorser. The latter's counsel insist that this ruling is error on the ground that the sufficiency of the notice is governed by the law of the place of indorsement and not by the law of the place of payment. To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that state was, when the indorsement was made, and it still is, that when commercial paper is indorsed in one jurisdiction and is payable in another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. *Wooley v. Lyon*, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There is another reason why the position of counsel for the indorser is not sound. The rule that the manner of giving and the sufficiency of the notice of dishonor are governed by the law of the place of indorsement is impractical, unfair, and unjust because the notary at the place of payment must give the notice, and it is often impossible in the time allowed to him by the law for him to find out where each indorsement was made and what the law of the place of each indorsement is upon the subject of notice of dishonor. On the other hand, commercial paper shows on its face where it is payable. Each indorser, when it is presented to him for his indorsement, has time and opportunity before he signs it to learn where it is payable to ascertain if he desires the law of that place, and to decide for himself with full knowledge and upon due consideration whether or not he will agree to pay the amount specified therein if the maker fails to do so and the paper is presented, the payment is demanded, the protest is made, and the notice of dishonor is given according to that law. In the decisions upon this question there is a direct and irreconcilable conflict. The established rule in England, the rule in Illinois, and the stronger and better reasons are that, where an indorsement is made in one jurisdiction, and the commercial paper is payable in another, the manner of giving notice of dishonor and the sufficiency thereof are governed by the law of the place where the paper is payable. *Rothschild v. Currie*, 1 Q. B. 43, 49, 50; *Roquette v. Overman*, L. R. 10 Q. B. 525; *Hirschfeld v. Smith*, L. R. 1 C. P. 340, 350, 352; *Wiseman v. Chiappella*, 23 How. 368, 380, 16 L. Ed. 466; *Pierce v. Indseth*, 106 U. S. 546, 550, 1 Sup. Ct. 418, 27 L. Ed. 254; *Wooley v. Lyon*, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867; *Union National Bank v. Chapman*, 169 N. Y. 538, 543, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614. This rule commends itself to the judgments of the writers of the text-books; they approve it and urge its maintenance in preference to its opposite. *Wood's Byles on Bills & Notes* (8th Ed.) 404, 405; 2 *Parsons on Notes & Bills* (2d Ed.) 344, 345; 1 *Daniel on Negotiable Instruments* (5th Ed.) § 901. There are, however, many authorities to the contrary. *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439, 444, 27 Am. Dec. 137; *Huse v. Hamblin*, 29 Iowa, 501, 504, 4 Am. Rep. 244; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *Carroll v. Upton*, 2 Sandf. (N. Y.) 171; *Snow v. Perkins*, 2 Mich. 238, 241.

[1] But the question is one of commercial law upon which the decisions of the state courts, though persuasive, are not controlling, in the national courts. It is a duty of the federal courts which they may not renounce to form independent opinions and to render independent judgments upon questions of commercial law, of general law, and of right under the Constitution and laws of the nation. Every citizen of the United States, who has the right to prosecute his suit in a federal court, has also the right to the independent opinion and decision of that court upon every determining question of commercial or general law which he presents for its consideration. *Independent School Dist. v. Rew*, 49 C. C. A. 198, 208, 111 Fed. 1, 11, 55 L. R. A. 364; *Railroad Company v. Lockwood*, 17 Wall. 357, 368, 21 L. Ed. 627;

Swift v. Tyson, 16 Pet. 1, 10, 10 L. Ed. 865; Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359.

Upon the question in hand the decisions of the state courts are in conflict. The decisions of the Supreme Court tend toward the adoption of the more reasonable and practical rule. In *Musson v. Lake*, 4 How. 262, 278, 11 L. Ed. 967, cited by counsel for the plaintiff in error, the only question presented for decision was whether or not the certificate of a notary of New Orleans that he had there protested a note payable in that city but indorsed in Mississippi was evidence in a Mississippi court of the presentment of the note when the certificate failed to mention the presentment, and the court held that it was not such evidence. It is true that there is a statement in the opinion in that case that the contract of indorsement was made and was to be performed in Mississippi, and that the construction of the contract and the diligence necessary to be used by the plaintiffs to entitle them to a recovery must be governed by the law of that state. But this remark was unnecessary to the decision of the case, and, if it referred to the manner of charging the indorser by protest and notice of dishonor, it has been overruled by the subsequent decisions of that court. Thus in *Wiseman v. Chiappella*, 23 How. 368, 380, 16 L. Ed. 466, in an action by the holder of an acceptance drawn by *Durden & Co.* in Mississippi payable in New Orleans and indorsed by the payees, against the notary for negligence in presenting the paper and demanding its payment, the Supreme Court said:

"There has always been a requirement in both countries, and everywhere acknowledged in the United States, which protects the defendant in this suit from any responsibility to the plaintiff. The requirement is this: That the protest was made in this case in conformity with the practice and law of Louisiana where the bill was payable."

And the court cited, in support of this proposition, *Rothschild v. Caine*, 1 Adol. & Ell. 43 (which is the same case cited above as *Rothschild v. Currie*, 1 Q. B. 43, wherein the Court of Queen's Bench held that the manner of giving and the sufficiency of the notice of dishonor of a bill of exchange indorsed in England payable in France was governed by the law of France); *Chew v. Read*, 11 Smedes & M. (Miss.) 182.

In *Pierce v. Indseth*, 106 U. S. 546, 550, 1 Sup. Ct. 418, 27 L. Ed. 254, an acceptance drawn in Minnesota on a bank in Norway payable in Norway was presented and protested according to the law of Norway, and the Supreme Court decided that the law of the place where the bill was payable, and not the law of the place where it was drawn, governed the time and manner of the presentation of the bill and of its protest, and added:

"It sometimes happens that the several parties to a bill, as drawers or indorsers, reside in different countries, and much embarrassment might arise in such cases if the protest was required to conform to the laws of each of the countries. One protest is sufficient, and that must be in accordance with the laws of the place where the bill is payable."

[2] For the same reasons one manner of giving notice of dishonor, and that in accordance with the laws of the place where the bill is payable, is sufficient, and notices in the different methods prescribed

by all the laws of all the countries and states in which drawers or indorsers may happen to sign bills or notes are not required to charge them with their intended liability. The conclusion is that, where a bill is drawn or a note is indorsed in one jurisdiction and is payable in another, the laws of the place where it is payable govern the manner of giving, and the sufficiency of, the notice of dishonor, the time and manner of the presentation and demand, and the manner of the protest thereof.

The argument for the opposite rule is based on the conceded fact that the indorsement is an independent contract that, on condition that the paper is presented, demanded, and protested, and notice of dishonor is given, the drawer or indorser will pay the note if the drawee or the maker fails so to do. The next step in the argument is the assertion which is sustained by many and respectable authorities that the indorser does not agree to pay the note where it is payable, but at the place where he signs or delivers it. Daniel on Negotiable Instruments (5th Ed.) § 899. From this statement, without more, the argument jumps to the conclusion that the manner of giving and the sufficiency of the notice of dishonor is governed by the law of the place of the making or of the delivery of the indorsement. It is not easy, however, to find in the contract of indorsement an agreement not to pay at the place where the note is payable, or at any other place, except at the place where the indorsement happens to be signed and delivered. Take the case in hand. This note was payable on its face at the bank in Canada and the indorser must have known it when he signed it. He resided in Wyoming, he made his indorsement in Chicago, he did not write into his contract of indorsement any limitation to the effect that he would pay the note where he signed it but would not pay it where it was payable, and no sound reason occurs to us why his contract was not to pay the note in Canada where it was payable by its plain terms if the maker failed to do so and he was properly charged as indorser. The purpose of an indorsement is the promise to do what the maker undertakes to do if the latter fails, and that is to pay the note where it is payable. After the maker failed to pay this note and the protest had been made and the notice had been given, it was not necessary to the maintenance of an action against the indorser to present this note or to demand payment of it in the state of Illinois. An action against him could have been maintained immediately wherever process could have been served upon him, in Canada, in Illinois, or in Wyoming. For these reasons the position that the indorser agrees to pay the note where he happens to sign or deliver it, and not where it is payable, when the note is a contract of the maker to pay it at the specified place, does not commend itself to our judgment. If, however, that were the import of the indorsement, it would not follow that the manner of giving and the sufficiency of the notice of dishonor are governed by the law of the place of indorsement, and not by the law of the place where the note is payable. The authorities which relate to the laws applicable to the validity and extent of indorsements, the necessity of presentment, demand, protest, and notice of dishonor, and the manner of making the presentment de-

mand, and protest and of giving the notice, are too numerous for review; but from the stronger and better reasons and from these decisions these rules may be safely deduced.

[3] The laws of the place where the indorsement is signed or is delivered so that it becomes a contract govern the validity and extent of the contract and therefore the necessity of some presentment, protest, and notice of dishonor. *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137. It is a curious fact that the remark in the opinion in this case that notice of dishonor is governed by the law of the place of indorsement, which is the real foundation of that doctrine announced in subsequent cases, was an obiter dictum. The question did not arise in the case at all. *Story's Conflict of Laws* (7th Ed.) § 360; *Musson v. Lake*, 4 How. 262, 11 L. Ed. 967; *Columbia Finance & Trust Co. v. Purcell* (C. C.) 142 Fed. 984; *Hatcher v. McMorine*, 15 N. C. 122; *Raymond v. Holmes*, 11 Tex. 54; *Briggs v. Latham*, 36 Kan. 255, 259, 13 Pac. 393, 59 Am. Rep. 546; *Williams v. Wade*, 1 Metc. (Mass.) 82; *Amsinck v. Rogers*, 189 N. Y. 252, 257, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858; *Givens & Herndon v. Western Bank*, 2 Ala. 397, 400; *Holbrook v. Vibbard*, 3 Ill. 465, 468; *Artisan's Bank v. Park Bank*, 41 Barb. (N. Y.) 599; *Commercial Nat. Bank v. Simpson*, 90 N. C. 467, 471; *Douglas v. Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874.

[4] But the law of the place where the note is payable governs the days of grace, the time and the manner of making the presentment, the demand and the protest, and the time and manner of giving the notice of dishonor. *Rothschild v. Currie*, 1 Q. B. 43, 49, 50, 1 Adol. & Ell. (N. S.) 43; *Roquette v. Overman*, L. R. 10 Q. B. 525; *Hirschfeld v. Smith*, L. R. 1 C. P. 350; *Wiseman v. Chiappella*, 23 How. 368, 380, 16 L. Ed. 466; *Pierce v. Indseth*, 106 U. S. 546, 550, 1 Sup. Ct. 418, 27 L. Ed. 254; *Woolley v. Lyon*, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867; *Union Nat. Bank of Chicago v. Chapman*, 169 N. Y. 538, 543, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614.

Other questions were presented and argued in this case but the conclusion which has been reached renders them all immaterial, and the judgment below must be affirmed.

It is so ordered.

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#### FOSTER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. June 14, 1911.)

No. 1,012.

**CRIMINAL LAW (§§ 762, 863\*)—TRIAL—INSTRUCTIONS INVADING PROVINCE OF JURY—OPINION AS TO GUILT OF DEFENDANT.**

Although the trial judge in a federal court may express an opinion as to the weight of evidence in civil cases and as to the guilt of a defendant in criminal cases, yet the greatest caution should be used in the exercise of this power, and the jury should be left free and untrammelled in the determination of questions of fact which are to be passed on by them; and in no instance should the judge express an opinion as to the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 188 F.—20

guilt of a defendant after the case has been submitted to the jury, and they have reported their inability to agree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 2065-2067; Dec. Dig. §§ 762, 863.\*]

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke.

J. D. Foster was convicted of a criminal offense, and brings error. Reversed.

For opinion below, see 183 Fed. 626.

The plaintiff in error (defendant below) was indicted at the April, 1910, term of the United States District Court for the Western District of Virginia, at Danville, Va., under an indictment in pursuance of section 3296 of the Revised Statutes (U. S. Comp. St. 1901, p. 2136), which indictment contained two counts; the first charging that the defendant removed, aided and abetted in the removal of, certain distilled spirits to a place other than the distillery warehouse provided by law, and the second count charged that the defendant unlawfully concealed, and aided and abetted in the concealment of, certain distilled spirits. The defendant was also indicted at the same time under sections 3258, 3279, 3281, and 3242 of the Revised Statutes (pages 2112, 2126, 2127, 2094), charging him with illicit distilling. On this indictment, however, a verdict of not guilty was rendered by direction of the court. The defendant was tried upon the indictment under section 3296, and convicted on the first count thereof, which count charged removing, aiding and abetting in the removal of, distilled spirits. The evidence upon which this conviction was obtained was as follows: Shortly before Christmas of the year 1909, B. F. Stultz, deputy marshal, Floyd Gray, deputy collector, J. S. Shackelford, and T. J. Burnett left Martinsville in Henry County, Va., in a covered wagon and went in the direction of Patrick county for the purpose of making a raid. They passed the home of J. D. Foster, which is located in Henry county, and drove several miles further west towards the Patrick county line and continued until about dark, when they stopped by the side of the road and "took up camp." Stultz, Gray, and Burnett remained in the wagon, which had been stopped by the side of the road, and had a lighted lantern in the wagon at the time. Soon after they stopped, hearing a wagon coming from the rear, they turned the lantern down and J. D. Foster drove up in a one-horse wagon and stopped. As soon as he stopped he began a conversation with J. S. Shackelford, who had started a fire by the side of the road, in which Foster said to Shackelford: "I am a blockader, and I suppose you are," and further stated to Shackelford in the conversation: "I am going up in the mountains to get some whisky for Christmas, but will have none to sell; what I'll have will not be a drop in the bucket for my customers, but if you are here when I return I will give you a drink." Immediately after this conversation Foster drove on toward Patrick county and Stultz and Gray followed him. After following in the direction which Foster had gone for about three miles, Stultz and Gray found Foster's horse and the one-horse wagon standing tied in or near the road. They waited at the wagon for some time for Foster to return. In a short while they saw Jehu Scott and Frank Hairston coming through the brush toward the road carrying an unstamped barrel of whisky, the barrel being tied to a pole. Scott carrying one end of the pole and Hairston, the other. Foster was walking behind the two, saying "gee and haw" as they were coming along. The barrel of whisky was placed by the side of the road and at that time Foster asked Scott and Hairston how much whisky they had made and if they were going to make any more. Afterwards Foster untied his horse and wagon and turned around in the road and brought it back to where the barrel of whisky had been placed. Foster got up in the wagon and was leaning over in the act of receiving the barrel into the wagon as Scott and Hairston were lifting it up when Officers Stultz and Gray ran up and made the arrests. Foster admitted that he had a conversation with Shackelford. Among other

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



things, he also testified: "That Jehu Scott and Frank Hairston owned a blockade distillery, and that he had no interest in it; that on his way he met Jehu Scott and Jehu told him that he had some whisky, and told him that he would give him his Christmas 'dram' if he would carry the whisky home for him, and he (Foster) agreed to do it. Then he drove on a half mile or more, and drove out on the side of the road and tied his horse, and took the runlet out and set it down near the wagon, and then I went with Scott to the distillery. Pretty soon Scott and Frank Hairston came along with a keg of whisky on a pole and carried it out to the road, within 30 or 40 feet from where the wagon was. I turned my wagon around and drove it near the barrel. We were talking about the whisky, and I was standing up in the wagon holding the horse. I was going to haul the barrel. Frank and Jehu were out on the side of the road in the dark where the whisky was. I think they were in the act of taking it up, but I couldn't exactly well see what they were doing. About that time the officers ran up and arrested us. I had nothing whatever to do with the whisky, and had not touched or carried it at all." The defendant was found guilty on the count charging him with removing, aiding and abetting in the removal of, distilled spirits or untax-paid whisky, and the judgment of the court was pronounced, and from this judgment this case comes here on writ of error.

R. H. Willis (Hairston, Hairston & Willis, on the brief), for plaintiff in error.

Barnes Gillespie, U. S. Atty. (Thomas J. Muncey, Asst. U. S. Atty., on the brief), for the United States.

Before PRITCHARD, Circuit Judge, and DAYTON and CONNOR, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). There are several assignments of error, but we think that the fourth assignment is perhaps the most important, involving, as it does, the question as to the extent to which the court should go in expressing an opinion as to the weight of evidence, and also the further question as to whether, under any circumstances, the court should express an opinion as to the defendant's guilt after the jury has had under consideration the evidence, and at a time when they have failed to agree as to their verdict. In the case of *Starr v. United States*, 153 U. S. 624, 14 Sup. Ct. 923 (38 L. Ed. 841) Chief Justice Fuller, in speaking for the court, said:

"It is true that in the federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he thinks proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of fact are ultimately submitted to the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. *Rucker v. Wheeler*, 127 U. S. 85, 93 [8 Sup. Ct. 1142, 32 L. Ed. 102]; *Lovejoy v. United States*, 128 U. S. 171, 173 [9 Sup. Ct. 57, 32 L. Ed. 389]. But he should take care to separate the law from the facts, and leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. *McLanahan v. Universal Insurance Company*, 1 Pet. 170, 182 [7 L. Ed. 98]. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to. *Tracy v. Swartwout*, 10 Pet. 80, 96 [9 L. Ed. 354]; *Games v. Stiles*, 14 Pet. 322 [10 L. Ed. 476]. The same rule prevails in the courts of many of the states, and in the charge in *Commonwealth v. Selfridge*, referred to by the court below, these views were ex-

pressed upon the subject: 'As to the evidence, I have no intention to interfere with its just and natural operation upon your minds. I hold it the privilege of the jury to ascertain the facts and that of the court to declare the law to be distinct and independent. Should I interfere with my opinion with the testimony in order to influence your minds to incline either way, I should certainly step out of the province of the judge into that of the advocate. All that I can see necessary and proper for me to do in this part of the cause is to call your attention to the points or facts on which the cause may turn, state the prominent testimony in the case which tends to establish or disprove these points, give you some rules by which you are to weigh the testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and law can be clearly discriminated, I should always wish the jury to leave the stand without being able to ascertain what the opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced to weigh the testimony and settle the merits of the cause.' So the Supreme Court of Pennsylvania says: 'When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the peculiar case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice.' *Burke v. Maxwell*, 81 Pa. St. 139, 153. See, also, 2 Thompson on Trials, §§ 2293, 2294, and cases cited. It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling. *Hicks v. United States*, 150 U. S. 442, 452 [14 Sup. Ct. 144, 37 L. Ed. 1137]. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances."

While the decision of the lower court in the foregoing case was reversed because there was an abuse of this power by the court below, yet the court in that instance announced the rule that although while a judge of a federal court may, under proper conditions, express an opinion as to the guilt of a defendant, yet in the exercise of this power he should give a full and complete review of the evidence both for and against the defendant, and should be very careful not to say anything calculated to exert a controlling influence upon the minds of the jury in ultimately determining the facts which are alone to be passed upon by them.

In the case of *United States v. Garst* (C. C. A.) 180 Fed. 339, the question arose as to whether a judge after the jury had retired and had failed to agree could properly express an opinion as to the defendant's guilt. In that case Judge Keller, speaking for this court, said:

"That in the federal courts the judge may express his opinion as to the guilt or innocence of the accused, if such an expression of opinion is given to the jury with proper explanation that it has no binding force whatever, is well established, and we should be very reluctant to say that an expression of opinion so guarded was error. Yet at the same time we are of opinion that ordinarily, if it is thought proper in a given case to give the jury the benefit

of the court's opinion for what it may be worth, there would seem to be no good reason why such opinion should not be given in connection with the charge of the court and the instructions submitted, so that there should be no possible danger of its making more of an impression upon the mind of the jury than the court desired, or that it properly should make. If given in such a way and at such a time, we are persuaded that it could have no more weight with the jury than that properly accorded to the views of an intelligent, unprejudiced man, learned in the law and attentive to the evidence, and so given would never be accorded undue weight; but it is entirely possible that if that same jury has been considering the case patiently and has been unable to agree, and they are then called in by the judge of the court and told that he has reflected upon the case, and that in his opinion the defendant is guilty, and he marshals the reasons for his opinion, there is some danger that his opinion will exercise an influence which would not have been accorded to it had it been expressed along with the submission of the legal instructions and immediately in connection with the arguments of counsel; and this may, and, indeed, under such circumstances, is quite likely to be true, even though the court carefully endeavors to keep its influence within the bounds assigned to it by the approved practice of the federal courts."

We endeavored in that case to make it clear that under no circumstances should the trial judge express an opinion as to the guilt of the defendant after the jury had retired and at a time when they had failed to agree as to their verdict. In this case it appears from the defendant's bill of exceptions No. 5 that:

"After the jury had returned into the courtroom and stated to the court their inability to agree, and had been further instructed by the court, as set forth in defendant's bill of exceptions No. 4, and had again returned to their room to consider their verdict, the jury again returned to the courtroom and stated to the court that they were unable to agree."

Whereupon the court made the following statement to the jury:

"The practice in the federal courts permits the court to express to the jury his opinion of the guilt or innocence of the defendant. You are cautioned, however, that you are not bound by the opinion of the court, and that the ultimate decision of the case is for you. I am of the opinion that the evidence in this case shows that the defendant, Foster, after having agreed to haul the whisky, turned his wagon around for the purpose of receiving untax-paid whisky, with the intent to remove the same, as charged in the indictment, and for this reason I am of the opinion that the evidence shows the defendant guilty in the count of the indictment charging him with aiding and abetting in the removal of untax-paid whisky, but you are again cautioned that you are not bound by the opinion of the court, and this is submitted to you for what you may think it worth."

After the foregoing statement, it appears that the jury retired to their room and in a short time brought in a verdict of "guilty." While it is true that the learned judge stated to the jury that they were not bound by any opinion he had expressed, yet we cannot escape the conclusion that, had it not been for the fact that the judge gave it as his opinion that the defendant was guilty, the jury would not have agreed and there would have been a mistrial. Once a jury has retired, as in this instance, and upon consideration of the facts the jurors are unable to agree as to their verdict, the slightest expression from the presiding judge as to the guilt or innocence of the defendant must necessarily have a controlling influence upon the minds of the jury; and this, in our judgment, is precisely what occurred in this case.

It should be borne in mind that the judges of the various state courts in this circuit are not permitted to express an opinion as to the weight of testimony, nor are they permitted to express an opinion as to the guilt of a defendant. Our people have become accustomed to this system, and as a consequence jurors attach great importance to any expression coming from the presiding judge, feeling, as they do, that it is only in exceptional cases that he expresses an opinion as to any matter that may be submitted to them, and when he does they feel that they are bound by the same. Under these circumstances an expression of opinion from a federal judge in this circuit necessarily carries more weight than would the opinion of a federal judge in a circuit where a different rule prevails in the state courts. While the learned judge who heard this case below employed language that clearly informed the jury that they were not bound by any expression that he may have made, nevertheless the circumstances surrounding the trial of this case are such as to impel us to the conclusion that the jury was influenced in a large measure by the opinion of the court. It may be that in many instances jurors refuse to find defendants guilty notwithstanding the fact that the evidence is such as to justify them in doing so, and thus permit those who are guilty to escape punishment. While this is to be deplored, yet the rule which leaves all questions of fact to be passed upon by the jury should never be relaxed or modified if the rights and liberties of the citizen are to be preserved. Notwithstanding the trial judge may express an opinion as to the weight of evidence in civil cases and as to the guilt of a prisoner in criminal cases, the greatest caution should be used in the exercise of this power, and the jury should be left free and untrammelled in the determination of questions of fact which are to be passed upon by them, and in no instance should the trial judge express an opinion as to the guilt of the defendant after the case has been submitted to the jury and at a time when they have failed to agree as to their verdict.

For the reasons stated, the judgment of the lower court is reversed, a new trial granted, and the case remanded, with instructions to proceed in accordance with the views herein expressed. Reversed.

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#### ONTAI v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1911.)

No. 1,929.

**1. ARMY AND NAVY (§ 40\*)—OFFENSES BY CIVILIANS—PURCHASING PROPERTY FROM SOLDIER—"PUBLIC PROPERTY."**

Clothing furnished to a soldier by the United States under a clothing allowance does not become his private property which he has a right to dispose of while in the service, but is "public property" within section 35 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1095 [U. S. Comp. St. Supp. 1909, p. 1401]), which makes it a criminal offense to knowingly purchase or receive in pledge from any soldier "any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier \* \* \* under a clothing allowance or other-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wise, such soldier \* \* \* not having the lawful right to pledge or sell the same."

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 83-87; Dec. Dig. § 40.\*

For other definitions, see Words and Phrases, vol. 6, p. 5815; vol. 8, p. 7773.]

2. ARMY AND NAVY (§ 40\*)—CONSTITUTIONAL LAW (§ 258\*)—CRIMINAL LAW (§ 1213\*)—OFFENSES BY CIVILIANS—CONSTITUTIONALITY OF STATUTE.

Section 35 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1095 [U. S. Comp. St. Supp. 1909, p. 1401]), which authorizes the imposition of a maximum fine of \$500 and imprisonment for not more than two years upon a civilian for knowingly purchasing or receiving in pledge any public property from a soldier, is not unconstitutional as providing for an excessive fine or a cruel and unusual punishment, nor as providing for the taking of property without due process of law.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 40;\* Constitutional Law, Cent. Dig. § 748; Dec. Dig. § 258;\* Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.\*]

In Error to the District Court of the United States for the Territory of Hawaii.

Criminal prosecution against Carl Ontai. Judgment of conviction, and defendant brings error. Affirmed.

The plaintiff in error was convicted under an indictment which charged that he "did feloniously, willfully, and knowingly purchase from Wyatt L. Clay, then and there being a soldier employed in the military service of the United States, he, the said Wyatt L. Clay, not having the lawful right to sell the same, certain public property of the said United States of America, to wit, one shirt, of the value of \$2.50." The evidence on the trial showed that the plaintiff in error knowingly purchased a certain shirt from Wyatt L. Clay, who was then and there a soldier in the military service of the United States, as was known to the plaintiff in error, and that the shirt had been issued to such soldier under the laws of the United States and the regulations of the War Department as a clothing allowance. The statute under which the plaintiff in error was indicted and convicted is section 35 of the Penal Code of the United States, the latter portion of which reads as follows: "Whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars and imprisoned not more than two years."

Philip L. Weaver, for plaintiff in error.

Robt. T. Devlin, U. S. Atty., Robert W. Breckons, U. S. Atty., and William T. Rawlins and Earl H. Pier, Asst. U. S. Attys.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the refusal of the court to instruct the jury to acquit the plaintiff in error on the ground that the property which he purchased of the soldier had been allowed to the latter under a clothing allowance, whereby it became his individual private property, held

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by him subject only to his contract with the United States not to dispose of the same, but with a tenure which permitted another to purchase the same without incurring any penalty for violation of the statute, and it is contended that the indictment having charged the purchase of public property of the United States, and the proof having shown that the purchase was an article of clothing which had been allowed to a soldier, the variance between the indictment and proof was fatal. The plaintiff in error cites *United States v. Michael* (D. C.) 153 Fed. 609, a case in which the court, in construing section 5438 of the Revised Statutes (U. S. Comp. St. 1901, p. 3674), held that a civilian did not commit a penal offense in purchasing from a soldier clothing issued to the latter during the term of his enlistment, and that clothing when issued to an enlisted soldier under the rules of the War Department was no longer public property, but was the soldier's private property. That decision, however, in our opinion is not sustained by reason or by authority. The contrary was held in *United States v. Hart* (D. C.) 146 Fed. 202; *United States v. Koplik* (C. C.) 155 Fed. 919; *United States v. Smith* (C. C.) 156 Fed. 859. It is true that one of the promises held out to the soldier about to enlist is the payment to him of a certain sum of money, and the allowance to him of certain specified clothing. But the clothing which he receives is held by a different tenure from the money. The latter is the soldier's to spend at his will. The clothing is part of his equipment for services which he is to render to the United States. He gets no property right in it other than the right to wear it. It is as much a portion of his equipment as is his gun or his ammunition. It remains public property of the United States. Section 1242 of the Revised Statutes (U. S. Comp. St. 1901, p. 876) declares that the clothing furnished by the United States to any soldier shall not be sold, bartered, or exchanged, pledged, loaned or given away. Section 3748 (U. S. Comp. St. 1901, p. 2527) provides for the seizure of such public property which has been sold or bartered, pledged, loaned, or given away. The decisions above cited were all rendered prior to the enactment of the present statute as it is expressed in section 35 of the Penal Code. By that section the intention of Congress is made clear beyond question to declare all property secured by a soldier under his clothing allowance to be public property of the United States. That statute specifies "any" arms, equipment, ammunition, clothing, etc., "or other public property," and then follows the words: "whether furnished to the soldier, sailor, officer or person under a clothing allowance or otherwise"—thus expressing the will of Congress that a soldier shall acquire no right in any such property, and that one who, knowing him to be a soldier, shall purchase the same, shall incur the penalty denounced by the act.

[2] We find no merit in the contention that section 35 is unconstitutional as providing for an excessive fine or cruel and unusual punishment prohibited by the eighth amendment. The statute provides for a maximum punishment of imprisonment for two years, and a fine of \$500. It vests in the trial court discretion to adjust the punishment to the offense. It is conceivable that offenses might be committed

under the statute which would deserve the full measure of punishment permitted thereby. The contention that the act is unconstitutional as providing for the taking of property without due process of law assumes that the property belongs to the soldier, an assumption which we have already considered and discussed.

The judgment is affirmed.

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ANDREWS v. LADD.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1911.)

No. 1,912.

**MINES AND MINERALS (§ 112\*)—MINERS' LIENS—ALASKA STATUTE.**

Carter's Ann. Civ. Code, Alaska, § 262, giving a lien for work done in the development of a mine, does not give a lien to a miner for work on a placer claim, such as sluicing and taking out the gold.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 233-235; Dec. Dig. § 112.\*]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

Suit in equity by Henry Ladd against J. R. Andrews. Decree for complainant, and defendant appeals. Reversed.

James B. Kinne and James W. Bell, for appellant.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The appellee brought a suit to foreclose laborers' liens on the Corning claim, on Bourbon creek, in the Cape Nome mining and recording district of Alaska, one of which liens, it was alleged, had accrued in his own behalf, and the others on behalf of other claimants, who had assigned to him. The court below allowed four of the claims, and entered a decree enforcing the same against the mining claim.

The complaint alleged that the work was done in developing the claim, and the lien notices also contained the statement that the work was done in developing the claim. The appellant in his answer denied substantially all of the averments of the complaint, including the allegation that the work was done in developing the mining claim. The bill of exceptions shows that no proof whatever was offered in the court below that the work done by the lien claimants was development work. One of them testified that he worked for the lessees of the claim, that they were operating the claim and taking out gold, and that his work was general mining work. The others testified that they "worked on the claim," stating the time during which they worked, and the wages they were to receive. There was other evidence showing that the work performed by the lien claimants was general mining work, done for the lessees of the mining claim, and not development work. For ordinary work upon a placer mining claim,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such as sluicing and taking out the gold, the statute of Alaska, as we have construed it in *Pioneer Mining Co. et al. v. Delamotte et al.* (C. C. A.) 185 Fed. 752, affords no lien to the miner.

For the error of the court below in allowing and enforcing the liens, in view of the issues and the evidence, the decree must be reversed, and the cause remanded for a new trial.

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AMERICAN STOKER CO. v. UNDERFEED STOKER CO. OF AMERICA  
et al.

(Circuit Court of Appeals, Third Circuit. June 12, 1911.)

No. 1,474.

PATENTS (§ 328\*)—INFRINGEMENT—UNDERFEED FURNACE.

The Garden patent, No. 648,251, for an underfeed furnace, is of narrow scope and is not infringed by the furnace of the Daley patent, No. 644,664, which, although it employs the single novel feature of the Garden patent, employs a different combination of elements to accomplish a different purpose.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Suit in equity by the American Stoker Company against the Underfeed Stoker Company of America and David Hunter, Jr. Decree (182 Fed. 642) for defendants, and complainant appeals. Affirmed.

H. C. Lord, for appellant.

Frederick P. Fish, Walter H. Chamberlin, and J. L. Stackpole, for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and McPHERSON, District Judge.

LANNING, Circuit Judge. The complainant, American Stoker Company, owner of the James Garden patent, No. 648,251, for improvements in furnaces, charges the defendants with infringement of the patent. The defenses are the usual ones of invalidity of the patent and noninfringement. In its opinion the Circuit Court held the patent valid but not infringed. 182 Fed. 642. The decree, however, simply dismissed the bill without stating the reason therefor. It is not difficult to point out substantial differences between the furnace described in the Garden patent and the furnace made by the defendants.

Garden, in the specification of his patent, shows that he has on each side of his fuel conduit an elongated box or pipe for conveying compressed air to the combustion chamber into which the air is forced through tuyère openings in the box or pipe. As the air is thus forced into the combustion chamber, a pressure is produced sufficient to drive gases down through an ordinary grate into the furnace room. This creates a dangerous condition for workmen and also speedily destroys the grate. In order to overcome this evil, Garden says he dispenses

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



with the usual grate and substitutes therefor dead-plates of cast iron, removing the ashes through suitable doors in the front of the furnace upon a level with the dead-plates. He further says that:

"In lieu of the cast-metal dead-plates, the bottom of the furnace may be built up solidly with fire brick, except the air passages leading to the tuyères, thus leaving no opening corresponding to the usual ash pit beneath."

Thus is the primary object of the patent made clear, which, to quote the words of the patent, is "to so construct a furnace, in combination with an underfeed mechanical stoker, that the air may be supplied to the furnace at the point of combustion, while at the same time the gases formed may be prevented from returning or escaping otherwise than through the flue or stack designed therefor." It was not new to supply air at the point of combustion, but Garden claimed that it was new to prevent the downflow of noxious gases by substituting dead-plates for an open grate. The three claims of his patent are as follows:

"1. A sealed or grateless underfeed furnace in which is combined a fuel conduit adapted to feed the fuel from beneath, means for introducing the fuel thereto, air openings within or in operative proximity to said conduit, means for forcing air into the furnace through said openings, laterally-projecting sealed or air-tight ledges over which the fuel may spread and be consumed when forced upwardly through the conduit, and means for preventing the admission of air except through said air openings within or adjacent to the conduit, whereby air may be introduced under pressure, a backflow of gases prevented, and combustion insured, substantially as described.

"2. The combination with a furnace of the class described, of an underfeed conduit, means for introducing fuel thereto, means for introducing a blast of air to openings adjacent to the conduit and dead-plates forming laterally-projecting air-tight ledges for the reception and support of the fuel, substantially as set forth.

"3. The combination with a furnace of an underfeed conduit, means for introducing fuel thereto, means for introducing a blast of air to openings adjacent to the conduit; the bottom of said furnace being entirely closed adjacent to the sides of said conduit."

The fuel conduit, the means for introducing the fuel thereto, the air openings adjacent to the conduit, and the means for forcing air into the furnace through the openings, mentioned in these claims, were all old elements in a furnace. By the sealed or air-tight ledges of the first claim, the dead-plates of the second claim, and the closing of the bottom of the furnace adjacent to the sides of the conduit mentioned in the third claim, the downflow of gases is prevented.

The defendants' furnace is a very different structure, and it possesses features not found in Garden's furnace. It has the fuel conduit, the means for introducing the fuel thereto, the air openings adjacent to the conduit, and the means for forcing air into the furnace through the openings, just as Garden and others have them. It also has the air-tight ledges of Garden's first claim, the dead-plates of his second claim, and the bottom combustion chamber adjacent to the sides of the fuel conduit is closed as in Garden's third claim. But Garden's claims are combination claims each having means for supplying air to the furnace at the point of combustion and designed also to prevent the downflow of gases into the furnace room. The defendants' structure

possesses no elongated box or pipe for conveying compressed air to the combustion chamber. The bottom of their furnace cannot be built up solidly with fire brick. In the defendants' furnace, the dead-plates form both a bottom for the combustion chamber and a roof for the compressed air chamber. All the space beneath the dead-plates is filled with compressed air, which is forced into the combustion chamber through the openings along the sides of the fuel conduit. As the air is forced into the air chamber, it circulates there and extracts heat from the dead-plates, thereby preserving them, and is itself heated before it is forced into the combustion chamber, thereby aiding combustion.

The prior state of the art is such that the Garden patent, if valid at all, must be a narrow one. In the Evan W. Jones patent, No. 470,052, dated March 1, 1892—more than two years before the application for the Garden patent was filed—it was expressly stated that the grate was not depended on for the supply of air to carry on combustion, and that the ashes and other débris might be allowed to pile up on the grate to any reasonable depth. A layer of ashes and débris over a grate sufficient to prevent the passage of air upwards through the grate into the combustion chamber would probably retard, if not prevent, the passage of the gases downwards through the grate from the combustion chamber. It is shown, however, that there was at times in the Jones furnace a very objectionable downflow of gases. To overcome that defect, plates were placed over the portions of the grate adjoining the sides of the fuel conduit. This seems to have been done in Chicago as early as the spring of 1893. Indeed, there is testimony that it was done in Portland, Or., in 1891. In any event, assuming the Garden patent to be valid, its claims cannot be broadened by construction beyond what is reasonably necessary to accomplish the stated primary object of the patent. Garden never conceived the object of the defendants' combination. That effect is not even remotely hinted at in the Garden patent or suggested by it. It is set forth in the Fred A. Daley patent, No. 644,664, dated March 6, 1900, under which it is alleged the defendants' furnace is constructed. In that patent Daley declares that theretofore air had been conveyed through the tuyère openings from tuyère boxes. In furnaces of that character, says he, it had been proposed to provide means for closing the ash-pit to prevent the backflow of gases and for other purposes; said means usually being in the form of iron dead-plates located along the sides of the fuel retort or conduit. These dead-plates, he further says, were soon destroyed because of the excessive heat to which they were subjected.

"My invention," says he in his specification, "has for its object, first, the provision of improved means for conveying air under pressure through the tuyère openings, whereby the expensive tuyère boxes heretofore employed for this purpose may be dispensed with, and, second, in so constructing furnaces employing dead-plates that the dead-plates may be cooled by the incoming air under pressure before the air is directed upon the burning fuel, so that the life of the dead-plates may be greatly increased; and it is in connection with furnaces employing dead-plates that my invention has its greatest utility. \* \* \* These tuyère openings, instead of communicating with tuyère boxes through which air is conveyed under pressure, as was

heretofore the case, communicate directly with the inclosed space beneath the fire box, to which inclosed space air is supplied under pressure, which by coming in contact with the dividing walls or parts between the fire box and the space beneath the same is heated somewhat before it is passed through the tuyère openings, whereby the combustion is promoted to a greater extent than where the cold air is forced through tuyère boxes whose walls were not subjected to the heat from the fire box above. \* \* \* In a furnace constructed in accordance with my invention, the undersides of the dead-plates are constantly exposed to the incoming air, which counteracts the heat from above. I thus avoid the necessity of so frequent renewal of the dead-plates, and by dispensing with the tuyère boxes as heretofore used there is secured a saving in complication and expense. The air, being admitted first to the space beneath the fire box, becomes heated before it is driven into the fire box. This results in a better and more complete combustion than is obtained when the air is introduced to the retort at a lower temperature."

The claims of Garden's patent, it must be remembered, are combination claims. Each of them has for its object the very limited one set forth in the specification of the patent. The defendants do not employ the same combination of elements, and they secure a result not dreamed of by Garden. To quote a passage from the brief for the appellees, "the essence of Daley's invention lies in these features—dispensing with the Jones tuyère pipes, and the use of the ash pit as an air chamber through which the air is supplied to the fire." For Garden's purpose, the ash pit could be solidly built up with fire brick, for he makes no use of it. While the dead-plates are an element in the Garden combination and also in the combination of the defendants, the combinations are, by reason of other varying elements, widely different, and they have totally different purposes and secure totally different results.

But the complainant contends that the defendants, by their answer, have admitted infringement. We do not think the answer should be so construed. In the fifteenth paragraph infringement is expressly denied. The fourteenth paragraph, in which the complainant insists the admission of infringement is to be found, is inartistically drawn. The former part of it contains statements from which, if they be read without reference to the latter part, one would be obliged to infer admission of infringement; but, when the paragraph is read as a whole, it seems that the former part is intended to lay the ground for the charge of laches in the latter part. At all events, it is clear that the defendants did not intend to make an unqualified admission of infringement, and the record of the case furnishes abundant proof that the complainant has not understood that such an admission was intended to be made, and that it has been in no way misled or embarrassed in the prosecution of its case by the badly drawn paragraph.

Nor do we think the history of the Daley patent, while it was pending in the Patent Office, discloses any infirmity in that patent or requires it to be construed as a mere improvement of the Garden patent. It is true that Daley, in the specification of his patent, expressly disclaims the invention described in claim 3 of the Garden patent; but that does not mean that Daley may not use a combination of elements different from the combination described in claim 3 of Garden. The basic conceptions of Garden and Daley differ so materially that it is

impossible to sustain Garden's claim to the Daley combination. We are quite in accord with what the learned judge of the Circuit Court has said on this subject, and we think, with him, that the complainant has failed to show infringement. This conclusion renders it unnecessary for us to express any opinion on the question of the validity of the Garden patent.

The decree of the Circuit Court will be affirmed, with costs.

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LUDINGTON CIGARETTE MACH. CO., Inc., v. ANARGYROS et al.

(Circuit Court of Appeals, Second Circuit. June 26, 1911.)

No. 284.

**PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—MACHINE AND PROCESS FOR MAKING CIGARETTES.**

The Ludington patents, No. 711,986 for a machine, and No. 711,987 for a process, for making cigarettes from continuous cigarette rods, were not anticipated, and disclose patentable invention. Claim 1 of the machine patent and claim 3 of the process patent *held* infringed by the machine and process of the Lawless patents, Nos. 779,430 and 779,431.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Ludington Cigarette Machine Company, Incorporated, against S. Anargyros and the American Tobacco Company. Decree for complainant, and defendants appeal. Modified and affirmed.

Following is the opinion of the Circuit Court by Hazel, District Judge:

The complainant is the owner by assignment of patents numbered 711,986 and 711,987, both dated October 28, 1902, and issued to Frank J. Ludington, inventor. The defendants, S. Anargyros and the American Tobacco Company, the former, as alleged in the bill, being under the control of the latter, are jointly charged with conjoint infringement of said patents, which respectively relate to the machinery and the process of making cigarettes of oval shape from so-called continuous cigarette rods. To make cigarettes automatically by continuous filler machines, in which machines the tobacco is drawn through a smoother by an endless tape, upon which the filler rests, was an old art at the date of the invention in suit, and the patentee does not claim to be a pioneer in this field of invention. Indeed, he himself, as had others before him, had invented and previously secured patents for cigarette machines of this type. Originally, in cigarette machines the cigarette rod was made from ribbon paper as it unrolled from a spool; one edge of the paper passing over a paste wheel and traveling along into a trough, from whence it was gradually drawn into a tube corresponding to the curvature of the trough, and there formed into a filler. The edges of the wrapping paper, having curved upward in its movements, were brought together and pasted, and the filler upon leaving the trough was cut into cigarettes. *Bonsack Machine Co. v. Elliott*, 69 Fed. 335, 16 C. C. A. 250. The earlier machines were not commercially successful, for the reason that the wrapping paper was drawn through the trough and tubular metal by a nipper device, and was strained and torn through frictional contact. Afterwards, in 1879, a patent was issued to Emery (No. 216,164) which was designed to overcome the difficulties in the pioneer invention. In his machine the tobacco after leaving the feed-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing device was formed into a filler rod, and smoothed and pressed by concave wheels and rollers, and the edges of the wrapper were pasted; the paste being applied by suitable apparatus. The instrumentalities for making the filler rod were contained at one part of the machine, and by a separate device it was laid upon the wrapping paper at another part thereof. After the cigarette rod was formed, the filler rod belt passed under the table, and reappeared, to act as a carrier of the filler after the wrapping paper was wound around it. As the wrapping paper gradually enveloped the rod in its movements through the metallic tube, corresponding in diameter to the thickness of the filler rod, it was pasted and pressed to form the cigarette. Other patents to Emery and other patentees were subsequently granted for improvements, and at the date of the patents in suit cigarettes having broad seams and a round shape were made automatically by machines in large quantities. The Bonsack machine was a marked improvement of the Emery patent for making round cigarettes, as distinguished from flattened or oval-shaped cigarettes. In the year 1900 Turkish cigarettes of oval shape came into extensive use. In this class of cigarettes the corners and seams were narrow, the paper wrappers were finely finished, the fillers smooth and regular, and, as they were made by hand, they obtained a reputation for superiority of style and workmanship. None of the continuous cigarette making machines known to the art were adapted to successfully make the Turkish cigarette of approved symmetry. There were in existence, it is true, machines which made cigarettes in imitation of Turkish handmade cigarettes, but the patentee claims that such machines were defective, and did not embody his central idea of a smoother combined with the folders and heating cap. In the Ludington, as in prior machines, the tobacco is shredded, and runs from a hopper to a feeding device by means of pulleys and belts, and then onto a traveling surface, where the filler is formed, and the underlying wrapping paper is wound around the filler as it travels on a feed guide. In the Ludington machine the filler is continuously drawn through a smoothing device of trough shape by an endless tape, and in its progress the filler and wrapper encounters a folder, which turns up one edge of the paper over the tape of the filler, and paste is immediately applied by a paste wheel to the other edge, and thereupon both edges are brought to adhere by a second folder, and the seam is pressed down tight by the tube part of the metal channel as the filler moves onward in its path. The upper part of the channel, which is constructed in one piece, has an extension, which forms the heating cap. The novelty of the invention is claimed to reside in the application of the smoother to the filler and pressure of a curved heated metal part directly upon the pasted seam, which has the double function of simultaneously drying and smoothing it before it reaches the knife for cutting into proper size. The patentee dispensed with the familiar concave wheels and rollers which were used to smooth and press the filler, and substituted conspicuously new instrumentalities, i. e., a smoothing device in combination with folders and a heating cap, positioned in the path of the filler, for heating the open seam of the cigarette rod. To impart the desired effect of the heater directly on the seam, it was necessary to expose the seam, and this was accomplished by the action of the tape, which, owing to the expansion of the filler, drops back, leaving the seam open for ironing. The specification, speaking of objections and defects in prior machines that prevented giving the filler the desired symmetry, says: "In the machines referred to in making Turkish cigarettes with narrow lap it has been found that the mechanical pasting of the seam wrinkled the paper along the line of the seam, and the filler, not having been smoothed before wrapping, left indentations or pits on the surface of the finished cigarette, and that such wrinkled seam and indented or pitted surface plainly betrayed the machine make of the article. To produce such a seam of absolutely perfect character, I provide in the present invention a heated ironing device, which presses upon the seam for a considerable length of time after it is pasted, and operates to simultaneously dry and smooth the seam, and to remove all wrinkles in the surface of the wrapper." The said objection was attributed by the patentee to the concave wheels, between which the tobacco moved too rapidly, and which interfered with properly or permanently compressing it, together with the failure of such prior machines to properly smooth and dry the filler after

the edges of the wrapper were pasted together. The evidence supports the claim of the indicated inefficiencies of the prior machines for manufacturing Turkish cigarettes. The improvement in suit, which came into the market in 1902, was generally approved by the trade, and recognized as satisfactorily fulfilling the requirements and overcoming the objections and defects hereinbefore mentioned. The claims alleged to be infringed in patent No. 711,986 are 1, 2, 3, 12, 13, 18, 19, 21, and 22. Claim 1 reads as follows: "(1) In a continuous cigarette machine, the combination, with means for forming and propelling a continuous cigarette with seamed paper wrapper, of a trough-shaped guide to support the cigarette, a cap arranged and operated to press upon the seam of the wrapper, and means for heating the cap to smooth and iron the seam, substantially as herein set forth." Claim 1 broadly includes the means for forming and propelling a cigarette with seamed paper wrapper. Such claim, however, cannot be given its literal import, and must be narrowed to include the specific combination. Claim 2 is limited to forming an oval cigarette in machines of the style in controversy. Claim 3 is for a combination with means for feeding the tobacco to the wrapper. Claim 12 emphasizes the "endless tape adapted to carry a paper wrapper." Claim 13 details the means for heating the heater cap. Claim 18 specifies the smoother, *f*, for equalizing the tobacco and the feature of the first folder. Claim 19 specifies the heater cap attached removably to the guide and heating means. Claims 21 and 22 cover the combination of the smoothing tongue with the folding surfaces and the guides arranged to permit the tobacco to expand as it passes from one to another.

The defendants, to anticipate the claims, or, at least, to limit them, contend that the feature of simultaneous heating and pressure is found in the prior art. None of the prior patents, however, embody the central idea of complainant's invention. Means for drying a continuous cigarette and imparting to it a finish, it is true, is suggested in the Emery patent, No. 216,164, but it certainly does not disclose how a heated iron may be directly applied on a moist seam to smooth and iron it. Bonsack, who improved the Emery machine, as a result of which it achieved commercial success, was apparently unaware of its heating jacket mentioned in the specification, for he never used it to perform simultaneous heating and smoothing. The Emery patent does not describe the jacket, nor how it was heated, and if in this respect it was of any practical use the evidence does not show it. Nor is the Chappell patent, No. 542,974, entitled to material weight, for in the structure therein described the tube inclosing the heating jacket was designed to dry the cigarette after pasting the seam. His drier had no pressing or smoothing action, and therefore does not anticipate the patent of complainant. There was much evidence given on both sides in relation to the Chappell patent; it being claimed by the defendants that the diameter of the drier was such as to impart to the cigarette while being dried a smoothing action. The drawing of the drier accompanying the specification, however, in connection with Mr. Dorsey's testimony, shows that the patentee never contemplated that his drier would also act as a smoothing or pressing device, and, aside from this, I do not think there was a disclosure in said patent of the heating means in suit or as constructed that it was capable of drying and pressing the seam by simultaneous application of the tube or channel. The Ludington appliance patent possesses merit, and the application of the doctrine of a fair range of equivalents is thought justified. Again it is claimed that the essence of the invention simply consisted in dispensing with the wheels and rollers for pressing the tobacco filler. There is a wide difference of opinion between counsel as to the construction of the claims and as to the manner in which the defendants' machines operate. As the specification and claims emphasize the means by which the oval form of the cigarette is attained—*i. e.*, the concave smoother, the expansion of the tobacco as it travels to the heating cap, the exposure of the seam for ironing, drying, etc.—the patent is entitled, I think, to a broader construction than contended by defendants. It certainly is not limited to the substituted means of a feed and barrel guide, and it was shown that the invention was entitled to cover machines which retain rotary agencies for compressing the tobacco. The controversy, therefore, more directly concerns the particular appliances and the process which follow or come after

the feeding device. The defendants have endeavored to evade the merits of the invention by introducing into their machine various alterations and changes of form, such alterations being described in letters patent to Lawless, Nos. 779,430 and 779,431, an employé of the defendant the American Tobacco Company; but I am satisfied that such alterations and changes of form do not vary the principle of complainant's combination. The changes and modifications made by the patentee in machines of this type were not obvious, and as he was the first to make them, the claims must be given a reasonable construction and such range as will preserve to him the fruits of his discovery.

The defendants use in their factories two forms of machines, and it is fairly deducible from the evidence that they embody the combinations in suit. Omitting mention of the hopper and rollers for the delivery of the tobacco and the smoothing tongue, the so-called Jordan and Anargyros machines employ the usual endless tape, which carries the filler and wrapping paper through the filler device and thence to a smoothing device, which presses directly on the filler. One edge of the wrapper is turned down while the other is pasted, and then also turned down over the other edge. The cigarette rod in defendants' machines travels under a so-called "setting channel," and from thence under a heated iron rib, which is constructed to press directly on the moist seam, closing it, and to smooth and dry it. The distinction between the heating cap and the ironing rib is that the heating cap is molded to embrace the cigarette, and to iron it on all sides as it moves in the channel, while the ironing rib or bar of defendants' structure presses against the wrapper and seam as the cigarette rod emerges from the setting channel. Such channel is thought to perform the same function as the groove or guide in the Ludington heater cap. Both forms operate to heat or dry and smooth the cigarette rod. Moreover, there is some merit in the suggestion of Mr. Crane, expert for complainant, that the defendants' cigarette rod while in contact with the ironing rib is slightly compressed at the top of the pulley, which is used at the Anargyros factory, and which apparently supports the cigarette rod at that point. Nor is there anything in the feature of the spring pressure contained in defendants' machine to cause the court to believe that the essential elements of complainant's invention has been departed from. This was also an alteration of form injected into the machine to escape, if possible, the charge of infringement. Such changes and alterations were the equivalents for the concave smoother, fillers, and heating cap of the complainant's machine. The defendants cannot be permitted to avoid infringement by leaving out one element of the combination and substituting another, which substantially assists to attain the precise results of the claims in suit. There is, of course, no restriction on their using the old elements of the Ludington combination, but to use such elements in combination with those that are new renders them liable for appropriation. In view of the scope to which I think the claims in controversy are entitled, it is unnecessary to discuss them with more particularity, or to point out at greater length the infringing details of defendants' machines.

#### The Process Patent.

It will be sufficient to set forth claim 3 of patent No. 711,987, which describes and specifies the steps of the process. It reads: "(3) The process of making and finishing a continuous cigarette rod, which consists in forming a continuous filler, securing a wrapper thereon with a pasted seam, continuously propelling the cigarette rod thus formed, and simultaneously applying heat and a smoothing pressure to the seam upon the moving cigarette, to dry and smooth the same." Claims 1 and 2 are substantially the same as claim 3, save that in the first it is stated that the pressing iron is to permanently set the cigarette rod, and in the second to permanently set the continuous filler and wrapper into desired shape. Claims 4 and 5 include the additional feature of gradually increasing the pressure on the cigarette rod. It is shown that the increasing pressure comes from the expansion of the cigarette rod after the wrapping paper has been pasted, and as the filler moves under the tapered heating cap, where it contacts with the heated surface. The essence of the invention consists of the required steps to propel the cigarette rod continuously, and to simultaneously smooth, press, and set the seam by the heat-

ing and pressing instrumentalities. By following the process the seam of the cigarette rod becomes permanent and without wrinkles therein. This was the accomplishment of a new and useful result. The law is well settled that, even though the elements of the process claim were not new, if the combination was new, and a new and useful result was produced, the patentee is entitled to the protection of his process. *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139. *Expanded Metal Co. v. Bradford*, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034. It will be understood from what has heretofore been said in connection with the appliance patent that in complainant's preferred method a heating channel surrounds the cigarette, while the defendants use a heated rib or bar, which, in my judgment, is the equivalent of complainant's heating cap for drying and smoothing the moist seam. The claims are entitled to a construction of sufficient scope as to include as an essential step in the process the specific means adapted to simultaneously iron and press the seam. The patents to Denny and to White, upon which defendants lay stress to anticipate or limit the claims, relate to devices in a different art from that under consideration; but, even with such structures before him, I think the patentee made a step forward, and solved the problem of simultaneously heating and pressing a damp seam on the cigarette rod, as a result of which the appearance of the cigarette was improved and the seam securely sealed. While in the light of the Ludington disclosures the skilled mechanic might now be able to modify and make changes in the prior art to successfully make oval cigarettes and permanently set the seam, yet at this stage of the art it cannot be claimed that the invention is devoid of patentable invention, for the prior patents are only entitled to consideration for what they actually made known to the public. *Badische Anilin & Soda Fabrik v. Kalle & Co.* 104 Fed. 802, 44 C. C. A. 201. In view of the construction herein given the claims, no question of infringement arises.

In my judgment Ludington made a substantial mechanical improvement in the continuous cigarette making art, and, his patent for achieving the result being valid, it follows that the complainant is entitled to a decree, with costs, as prayed for in the bill.

Appeal from a decree of the Circuit Court, Southern District of New York, in favor of the complainant in a suit to restrain the alleged infringement of two patents. The first patent (the machine patent) is No. 711,986, and was granted on October 28, 1902, to Frank J. Ludington, assignor of the complainant, for an improvement in Cigarette forming, wrapping, and ironing appliances. The second patent (the process patent) is No. 711,987, and was granted upon the same day to the same inventor for an improvement in the process of making cigarettes from continuous cigarette rods. Claims 1, 2, 3, 12, 13, 18, 19, 21, and 22 of the machine patent (No. 711,986) were in suit, and were held by the Circuit Court to be valid and infringed. All of the claims of the process patent (No. 711,987) were in issue, and were likewise held valid and infringed. Claim 1 is the broadest claim in the machine patent. All the other claims contain elements not to be found in that claim. In respect of the defendants' process, claim 3 is the broadest claim in the process patent. Claims 4 and 5 of that patent require an additional step, and claims 1 and 2 specify a different purpose.

J. Q. Rice, for appellants.

D. W. Brown, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The opinion of Judge Hazel is especially directed toward the validity and infringement of the broadest claims of the two patents, viz., claim 1 of the machine patent and claim 3 of the process patent, and, upon that opinion we affirm the decree appealed from so far as it relates to such claims. Upon careful consideration, however, we are not entirely satisfied that the defendants infringe the other claims in issue, and consequently the scope of the decree must be curtailed.



The decree of the Circuit Court is modified by limiting its application to claim 1 of patent No. 711,986 and to claim 3 of patent No. 711,987, and as so modified is affirmed, with costs.

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STANDARD MACH. CO. v. RAMBO & REGAR, Inc.

(Circuit Court of Appeals, Third Circuit. June 27, 1911.)

No. 47 (1,427).

1. PATENTS (§ 328\*)—INFRINGEMENT—CIRCULAR KNITTING MACHINE.

The Houseman patent, No. 774,473, for a circular knitting machine, claim 22, conceding its validity because of the peculiar construction of the cam-roller, is limited to such construction. As so limited, *held* not infringed.

2. PATENTS (§ 328\*)—INFRINGEMENT—CIRCULAR KNITTING MACHINE.

The Wilcomb patent, No. 645,676, for a circular knitting machine, claims 4 and 8, conceding their validity, are limited by the prior art to a construction in which the thread-engaging device is substantially of the form described. As so limited, *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Suit in equity by the Standard Machine Company against Rambo & Regar, Incorporated. Decree (181 Fed. 157) for defendant, and complainant appeals. Affirmed.

Frank S. Busser and George J. Harding, for appellant.

Wilmarth H. Thurston, for appellee.

Before GRAY and LANNING, Circuit Judges, and McPHERSON, District Judge.

LANNING, Circuit Judge. This appeal brings before us the decree of the Circuit Court dismissing the bill of the Standard Machine Company, the complainant below and the appellant here. The decree is silent as to the cause of the dismissal, but by the opinion on which it was entered (see [C. C.] 181 Fed. 158) we learn that the Circuit Court considered claims 4 and 8 of the Frank Wilcomb patent No. 645,676, of March 20, 1900, and claim 22 of the Harry A. Houseman patent, No. 774,473, of November 8, 1904, which are the only claims involved in this suit invalid. Each of the patents is declared to be for improvements in circular knitting machines.

[1] The opinion of the Circuit Court was to the effect that the prior art disclosed especially by Coburn, No. 395,314, of January 31, 1889, Stewart, No. 529,508 of November 20, 1894, Hemphill, No. 629,503, of July 25, 1899, and Jones, No. 284,860, dating back as far as 1883, limited the patentable invention of Houseman within narrower compass than that set forth in claim 22 of his patent. Comparing claim 22 with the prior art and with claim 23 of the patent, the conclusion was reached that the latter claim, which is narrower than claim 22, affords complete protection for the only invention disclosed

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by either of those claims. Accordingly, it was decided that claim 22 is invalid. The nature of the two claims and the difference between them is shown by the following quotation, where by omitting the portion within the brackets we have claim 22 and by including what is within the brackets we have claim 23:

"In a circular knitting machine, in combination, a needle-cylinder, supported so as to be vertically movable, a roller having a portion thereof cut away, a piece inserted therein eccentric with the remainder of the roller and adjustable thereon [in a line at right angles to a line from the juncture of the inserted piece and main portion of the roller at the periphery of the center], means to rotate said roller and connection between said roller and the needle-cylinder support."

We do not find it necessary to declare that claim 22 is invalid. It may be that it possesses substantial merits not found either in the prior art or in claim 23. Whatever may be the correct conclusion on that point, we are satisfied that, even if valid, the prior art does compel so narrow a construction of claim 22 that there is no infringement by the defendant. The prior art discloses combinations in which there are vertically movable needle-cylinders, rotary cam-rollers, and connections between the cam-rollers and the supports of the needle-cylinders. The prior patents above mentioned show such combinations. But the prior art does not show a cam-roller with a portion thereof cut away and a piece inserted therein eccentric with the remainder of the roller and adjustable thereon. The greater portion of the periphery of the cam-roller of claim 22 is concentric with its axis. It is the inserted piece that makes the remaining part of the periphery eccentric. The concentric portion of the periphery secures uniformity in the length of the stitches and in the diameter of a stocking leg. The eccentric portion secures a gradual lengthening of the stitches and a gradual increase in the diameter of a stocking leg from the ankle to the calf of the leg. For the purposes of this case, we may assume that claim 22 is valid because its combined concentric and eccentric features are secured by cutting away a portion of the face of the cam-roller and inserting in the recess thus created an adjustable piece having a surface eccentric to the circular periphery of the roller itself. If the claim is valid at all, it is so because of the peculiar construction above mentioned. When so limited, the defendant does not infringe, for the combination it uses does not contain a cam-roller "having a portion thereof cut away" and "a piece inserted therein eccentric with the remainder of the roller and adjustable thereon."

[2] Claims 4 and 8 of the Wilcomb patent are as follows:

"4. In combination with a circular knitting machine having multiple feed devices, a thread-engaging device inside the needle row to guide and hold the inactive floating threads extending from the fabric to the feed out of engagement with the needles and adapted to release the thread when it is introduced to the needles again, substantially as described."

"8. In a circular knitting machine, in combination, a plurality of thread-carriers, and means to move one or more of said thread-carriers in and out of operative position, and a device within the needle-cylinder adapted to catch and retain the thread to the carrier out of operative position."

The Circuit Court concluded that these claims, too, are anticipated in the prior art, and that, for that reason, they are invalid. Apple-

ton's patent, No. 425,362 of April 8, 1890, is mentioned in the opinion as an anticipatory patent. There are clear differences between the improvement described in Wilcomb's patent and that described in Appleton or in any of the other patents of the prior art to which our attention has been drawn. But the question is, Do the differences disclose such an advance in the art by Wilcomb that claims 4 and 8 should give to the complainant, the present owner of the patent, a property right in anything that the defendant is making or using? While the policy of our law is to encourage inventions, we should in this age of rapid and marvelous improvements in mechanical appliances, when dealing with patents, be careful to distinguish between those improvements which do and those which do not involve real inventive genius. The mechanical art should not be burdened with patents for those improvements which involve only the skill of the mechanic.

The opinion of the Circuit Court contains quotations from the specification of the Wilcomb patent showing its object, its construction, and its method of operation. We shall not repeat those quotations here. Taken with the claims, they make it clear that Wilcomb's conception is embodied in the thread-engaging device of claims 4 and 8. As to claim 8, we agree with the defendant's expert, Mr. Livermore, that it may be as well read upon the British patent of August 12, 1874, No. 2,774, granted to Thomas James Smith, as upon the construction shown and described in the Wilcomb patent.

The element of the combination of claim 4 described as "a thread-engaging device inside the needle row to guide and hold the inactive floating threads extending from the fabric to the feed out of engagement with the needles," and the element of the combination of claim 8 described as "a device within the needle-cylinder adapted to catch and retain the thread to the carrier out of operative position," are the same. Claim 4 mentions a function of this device not mentioned in claim 8, saying that, besides holding the inactive threads out of engagement with the needles, it is "adapted to release the thread when it is introduced to the needles again." We understand that none of the thread-engaging devices of the prior art possesses this latter functional capacity. But, whatever may be the value of the combinations described in these two claims, and assuming their validity, we think that here, too, the prior art has such a limiting effect that the defendant's device is not covered by them. The combination in a circular knitting machine of multiple feed devices, or a plurality of thread carriers, with a thread-engaging device inside the needle row or needle-cylinder, was not new with Wilcomb. To sustain his claims 4 and 8, it is necessary to limit them in construction to a combination in which the thread-engaging device is substantially of the form described in his patent. When so limited, the defendant does not infringe.

We do not deem it necessary to discuss in detail the patents of the prior art. They have been carefully considered, and we are satisfied that they compel such a restricted construction of each of the patents in suit that it is impossible to hold the defendant an infringer. We

therefore affirm the decree of the Circuit Court, not because the claims are invalid, for on that question we express no opinion, but because the defendant does not infringe.

The decree is affirmed, with costs.

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VICTOR TALKING MACH. CO. et al. v. HOSCHKE et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1911.)

No. 257.

1. APPEAL AND ERROR (§ 1145\*)—SCOPE OF DECISION—AFFIRMANCE WITHOUT OPINION—"ON THE OPINION BELOW"—"AFFIRMED."

Where a Circuit Court of Appeals affirms a decision "on the opinion below," it approves the reasoning, adopts the findings, and concurs in the conclusions of the court below; but, where the decision below is merely "affirmed," such approval and concurrence are not to be inferred, but, on the contrary, it is to be understood that for some reason the appellate court prefers not to adopt the opinion below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4444-4657; Dec. Dig. § 1145.\*

For other definitions, see Words and Phrases, vol. 1, pp. 247, 248.]

2. PATENTS (§ 328\*)—TERM—LIMITATION TO TERM OF PRIOR FOREIGN PATENT—IDENTITY OF INVENTION—GRAMOPHONE.

The Suess Canadian patent, No. 41,901, for a talking machine, is not for the same invention as that covered by the United States patent to Berliner, No. 534,543, claims 5 and 35, and the life of the Berliner patent is not dependent on the term of the Suess patent.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Victor Talking Machine Company and another against William H. Hoschke and the Sonora Phonograph Company. Decree for defendants (188 Fed. 330), and complainants appeal. Reversed.

This cause comes here upon appeal from a decree of the Circuit Court dismissing the bill in a suit for infringement of United States patent No. 534,543, issued February 19, 1895, to Emil Berliner, for a gramophone.

Horace Pettit, for appellants.

Waldo G. Morse (Frank Cochrane and Emery, Booth, Janney & Varney, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The patent in question is the well-known Berliner patent, which has been frequently before the courts. Its two claims, Nos. 5 and 35, are basic, and have been held valid by the Supreme Court. *Leeds & Catlin v. Victor Talking Machine Company*, 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805; *Talk-O-Phone Company v. Same*, 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816.

The single defense in this suit is that the Berliner patent expired

with the expiration of the original term of a Canadian patent granted to Werner Suess, assignor to Emil Berliner, the term of which Canadian patent expired on February 11, 1911. The normal life of the Berliner patent, if not curtailed by the expiration of some foreign patent, would extend until February 19, 1912. Suess was an employé of Berliner at the time the patents were taken out.

The two claims of Berliner read as follows:

"5. The method of reproducing sound from a record of the same which consists in vibrating a stylus and propelling the same along the record by and in accordance with the said record, substantially as described."

"35. In a sound reproducing apparatus consisting of a traveling tablet having a sound record formed thereon and a reproducing stylus shaped for engagement with said record and free to be vibrated and propelled by the same, substantially as described."

The three claims of the Suess Canadian patent to which defendants refer as indicating identity of invention are as follows:

"5. In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consisting of a sound conveying tube and a diaphragm and stylus mounted at one end of the tube, of a freely swinging supporting frame for the said reproducer mechanism, substantially as described."

"7. In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consisting of a sound conveyer, and a diaphragm and stylus mounted at one end thereof, of a supporting frame for the said reproducer, loosely pivoted to swing freely both laterally and vertically, substantially as described."

"11. In an apparatus for reproducing sounds from a rotating record tablet, a reproducing stylus mounted to have a free movement over the surface of the record tablet, substantially as described."

The following review of the history of litigation in this circuit on the Berliner patent is essential to an understanding of the questions now presented:

In September, 1905, the validity of these two claims was sustained by Judge Hazel and infringement found in Victor Talking Machine Company v. American Graphophone Co. (C. C.) 140 Fed. 860. That decision was affirmed by this court for reasons stated in April, 1906. 145 Fed. 350, 76 C. C. A. 180. In the same month, April, 1906, and in a suit against other defendants, application was made to Judge Townsend upon affidavits for a preliminary injunction against alleged infringement of these same claims. In opposition to that application it was contended that the Suess Canadian patent covered the invention claimed by Berliner; that by reason of a failure to pay certain fees on the Canadian patent its normal term was shortened, and it expired February 11, 1899; and that the Berliner United States patent expired on the same day, seven years before the application for the injunction. Victor Talking Machine Company v. Leeds & Catlin (C. C.) 146 Fed. 534. Judge Townsend, after disposing of several other questions which arose in the case, held that the Canadian patent described and claimed the broad generic invention of Berliner, covered by his United States patent, and further held that the latter patent was not limited by any lapse of the Canadian patent occurring prior to the expiration of the original term of such Canadian patent. He granted a preliminary injunction.

Appeal was taken from Judge Townsend's order to this court, which, without writing any opinion, affirmed such order in open court. 148 Fed. 1022, 79 C. C. A. 536. A certiorari to review this decision was issued by the Supreme Court, and the decree was affirmed (213 U. S. 301, 325, 29 Sup. Ct. 495, 503, 53 L. Ed. 805, 816); the court holding that the duration of a United States patent is not limited by any lapsing or forfeiture of any portion of the term of a foreign patent for the same invention by means of the operation of a condition subsequent. In a suit brought against the Sonora Phonograph Company a decree for injunction during the lifetime of the Berliner patent was entered December 15, 1910. An application was subsequently (February, 1911) made to Judge Hough to limit said injunction, so as not to extend beyond February 11, 1911, upon the ground that the full term of the Canadian patent expired on that day. He held that the identity of the two patents was already determined in prior litigations, and modified the decree as prayed. *Victor Talking Machine Company v. Sonora Company*, 188 Fed. 330.

The case at bar came on for hearing before Judge Hazel; much testimony having been taken as to the issuance of the two patents and bearing upon the construction hereof. Judge Hazel concurred in Judge Hough's opinion and entered a decree dismissing the bill March 1, 1911. It is from such decree that the pending appeal is taken. It is argued here that the only question in the case has been disposed of by former decisions and that the decree of dismissal should be affirmed.

We find no constraining decision. Judge Townsend, at circuit, had before him some affidavits and documents, and the question was presented to him whether or not the inventions were identical. He need not have answered it; but he chose to do so, and made findings and expressed a conclusion thereon. When the same question subsequently comes before another judge at circuit on substantially the same evidence, it is to be expected that he will follow Judge Townsend's findings and conclusion. But, if the evidence is materially different, so that he feels convinced that upon the new record Judge Townsend would have decided differently, we do not understand that he is so constrained.

[1] As to *this* court, when an order is "affirmed on the opinion of the court below," it approves the reasoning, adopts the findings, and concurs in the conclusions of the court below. When, itself writing nothing, making no record of its findings as a court of appeals, it merely announces, "Order affirmed," it is to be understood that for some reason it prefers not to adopt the opinion of the court below, either that it has reached the conclusion by a totally different process of reasoning, or that, while in the main approving the opinion, there is something in it which the appellate court does not wish to approve.

In the case at bar all that this court has done has been to affirm Judge Townsend's conclusion that by reason of the nonpayment of dues on the *Suess* Canadian patent, the United States *Berliner* did *not* expire 12 years ago; and that decision, on the record then presented, did not necessarily involve a finding as to the identity of the

inventions claimed in the two patents. The syllogism submitted to Judge Townsend was:

Major premise: When an invention which is protected by a United States patent has also been protected by a Canadian patent, and before the expiration of its normal term the Canadian patent lapses because of nonpayment of dues, the United States patent will expire at the same time.

Minor premise: The invention protected by the Berliner United States patent was also protected by the Sues Canadian patent.

This court and the Supreme Court both held that the major premise was unsound, and therefore inquired no further.

[2] The question whether or not the two patents cover the same invention has been argued by both sides at great length. It is much simplified if we bear in mind the object of the statute, which was to provide that when an inventor had secured a monopoly in a foreign country by taking out a patent therein, in addition to the monopoly he had secured here, and the monopoly abroad terminated by expiration of the patent there, the people of this country should also be free to make and sell the patented invention. It is apparent that the real question to be considered is, not what information is given to the world by specifications, but what is the invention which the claims protect and of which they secure the monopoly. In other words, what is the correct construction of the claims of the two patents; the language in which they are expressed not being identical. Claims 5 and 35 of the Berliner United States patent have been repeatedly construed by the courts in this country and found to cover a broad, basic invention. The three claims of the Sues Canadian patent have not been construed by the courts of that country, so we do not know authoritatively what invention it was which those claims secured to the patentee in Canada. But the Sues application expressly states that his invention has reference only "to improvements in the reproducing apparatus adapted for use in the method of recording and reproducing sounds heretofore invented and published by Emil Berliner."

Subsequently to its issue the Canadian Patent Office granted a patent to Berliner himself undoubtedly covering his broad invention and containing the very claims 5 and 35 of his United States patent. In view of these circumstances, we have no doubt that if, at any time during its lifetime, the Sues patent had come before the Canadian courts to be construed, it would have been found not to protect the broad invention of Berliner, but only the specific and detailed form of improvement which Sues contributed to the art. This being so, it is immaterial whether or not, in the specifications of the Canadian patent, there is contained sufficient information to indicate what the broad invention was. We are satisfied that the inventions covered by the claims of the two patents are not identical, and that the life of the Berliner United States patent is not dependent on the term of the Sues Canadian patent.

The decree is reversed, with costs, and cause remanded, with instructions to decree in conformity with the views expressed in this opinion.

## VICTOR TALKING MACH. CO. et al. v. SONORA PHONOGRAPH CO.

(Circuit Court, S. D. New York. February 25, 1911.)

## PATENTS (§ 327\*)—PATENT SUITS—EFFECT OF PRIOR DECISIONS.

Where a Circuit Court on pleadings properly raising the issue has determined that the invention of a United States patent and of a prior foreign patent were identical, and that the United States patent would therefore expire by force of Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), with the term of the foreign patent, although such determination was not essential to the decision of the matter before it, and such decision has been affirmed by the Circuit Court of Appeals, it will be followed by another Circuit Court in the same circuit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.\*]

In Equity. Suit by the Victor Talking Machine Company and another against the Sonora Phonograph Company. On motion to modify injunction. Motion granted.

Upon a final hearing in this cause decree was entered the 15th day of December, 1910, 183 Fed. 849. The suit is upon Berliner patent, No. 534,543, which by its terms expires on the 19th of February, 1912. The injunction aforesaid being in force, a motion is made to limit or modify the same upon the ground that it appears from the records of this court that the invention of the patent in suit has been adjudicated to be the same as that secured in the Dominion of Canada by letters patent No. 41,901, issued to the same Berliner (as assignee of Suess) on February 11, 1893, and therefore expiring under Canadian law on February 11, 1911. Motion heard upon the entire record herein, upon affidavits and exhibits filed for the motion, and reference was also had to the original records of the various causes resulting in decisions hereinafter referred to.

Horace Pettit, for complainant.

Waldo G. Morse, for defendant.

Emery, Booth, Janney & Varney, amici curiæ.

HOUGH, District Judge (after stating the facts as above). The only contention of defendant needing consideration is that, so far as the claims of the Berliner patent here relied upon are concerned (Nos. 5 and 35), it is in the courts of this circuit, if not in all the courts of the United States, *res adjudicata* that the patent in suit expires by force of section 4887, Rev. Stat. (U. S. Comp. St. 1901, p. 3382), with the Suess Canadian patent above mentioned.

The inquiry whether the matter is *res adjudicata* will be made without any expression of opinion on my part as to the merits of the question as originally presented in previous litigations.

The point has been stated in the language of counsel, though it is certainly true that, even if defendant's contention be correct, the status of the Berliner patent in respect to the Suess patent is not and cannot be *res adjudicata* in the sense in which that phrase is often used (as by Lamar, J., in *Lyon v. Perin Mfg. Co.*, 125 U. S. 700, 8 Sup. Ct. 1024, 31 L. Ed. 839), because the person and parties in and to this action are not identical with those of the litigations on which defendant relies.

Yet the rule invoked is stronger than that of *stare decisis*, for, "where questions affect titles (to land), it is of great importance to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



the public that, when they are once decided, they should no longer be considered open—such decisions become rules of property and many titles may be injuriously affected by their change." *Minnesota Co. v. National Co.*, 3 Wall. 334 (18 L. Ed. 42). The duration of a patent being the limit set to a lawful monopoly, certainty concerning it is quite as important as the title to land, and is indeed a species of title, for that which the patentee has not shown a clear right to is the property of the public.

The real proposition of defendant is that, since "a judgment is conclusive upon a matter legitimately within the issue and necessarily involved in the decision" (*McCall v. Carpenter*, 18 How. at 302, 15 L. Ed. 389), it has been settled and solemnly decreed in an action brought by this complainant against another defendant that the patent right which was the basis of the former suit and is the basis of this terminated on February 11, 1911, and that this result was declared in a litigation wherein the issue was presented by the pleadings, and was in the opinion of the courts of this circuit necessary to the judgment then made and still in full force and effect.

If these assertions be true, the question is not an open one in this court. *Florida Central R. R. Co. v. Schutte*, 103 U. S. 118, 26 L. Ed. 327; *Union Pacific R. R. Co. v. Mason City & Ft. Dodge R. R. Co.*, 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134.

The Berliner patent was first adjudicated and the rights of these complainants therein first declared in *Victor Talking Mach. Co. v. American Graphophone Co.* (C. C.) 140 Fed. 860, and the decree there directed was affirmed in 145 Fed. 350, 76 C. C. A. 180. The Appellate Court said that they did not "find it necessary to add anything to the careful and exhaustive discussion of the issues" made by the court below, with one exception. That exception bears no relation to this controversy, so that in effect the opinion of the trial court became that of the higher court.

An examination of the record shows that the Suess Canadian patent was not pleaded nor was any allusion to it made in that cause. The defendants, however, did plead the Suess American patent 427,279, and introduced the same in evidence, and of this patent Hazel, J., said that the specification thereof stated that:

"The invention related to improvements in the reproducing apparatus of Berliner and that the construction and mounting of the stylus formed no part of the invention."

Wherefore it was held that "the improvement of Suess is not anticipation."

This finding being based on appropriate pleadings and evidence, and having been adopted by the Circuit Court of Appeals, amounts to a decree of that court that the Suess American patent was not for the same invention as that contained in the Berliner patent.

If the two Suess patents (Canadian and American) be compared, it is so obvious as to need no discussion that the specifications and diagrams reveal the same invention. The diagrams are identical and the specifications identical in every material point. When the claims, however, of the two patents are compared, they are quite different.

Those of the American patent are appropriate to the invention that Suess had in mind, namely, a particular form of swinging arm; but the claims of the Canadian patent, and especially claims 5, 7, and 11, are much broader, and undoubtedly raise the questions whether (1) they are or are not the equivalents of the claims of Berliner as stated in the patent in suit and supported by the decisions above referred to, and (2) whether the claims so stated (if construed as equivalent to Berliner's claims 5 and 35 or either of them) are supported by the revelations of the specification and diagrams.

This question was squarely raised in the next case brought on the Berliner patent and heard on motion for preliminary injunction by Townsend, J., in *Victor Talking Mach. Co. v. Talk-o-phone Co.* (C. C.) 146 Fed. 534. An examination of the record therein shows that the Suess Canadian patent was distinctly pleaded, not only as a reference, but specifically as a bar under section 4887, Rev. Stat., on the ground that it had been granted on February 11, 1893, for a term of six years only and had therefore expired before answer filed. Two questions relating to this Canadian patent were therefore presented, and necessarily presented for the decision of the court in that case: (1) Did the Canadian patent cover the identical invention of Berliner? (2) Had the Canadian patent expired with the end of the six-year term? Obviously both these inquiries had to be answered in the affirmative in order to benefit defendants—a negative answer to either was enough for the complainants.

I see nothing in the pleadings or the logic of the matter compelling the court to answer one question before the other, or preventing it from considering both. Both were in issue, and both presented justiciable matter. Townsend, J., chose to answer both, and definitely found, as he had a right to, that "the Canadian patent in terms describes and claims the broad generic invention of Berliner covered by the claims here in suit (5 and 35)," and added that "if this (Canadian) patent expired as claimed in 1899 the patent in suit expired at the same time."

Having thus answered the first query, he was bound to respond to the second, and that he answered in the negative, finding that the life of the Canadian patent for purposes of section 4887 was the 18-year period which the defendants in this case rely upon.

An appeal having been taken, the defendants assigned for error so much of the holding of the court below as was against them, saying that the court erred "in not holding (that this patent) expired February 11, 1899, with the expiration of the term of six years for which the prior Canadian patent No. 41,901 of February 11, 1893, was granted." Record, p. 536.

In the higher court this matter was elaborately considered by counsel (page 130 et seq. of brief contained in record of Circuit Court of Appeals), and it was specifically urged that:

"This Canadian patent was not intended for any broader invention than the Suess (American) patent, and did not describe any broader invention than that patent."

The language of the earlier case as to the Suess American patent was quoted, and the point urged that:

"Townsend, J., in the court below was right in granting the preliminary injunction, though he was apparently mistaken in his conclusion where he stated that the Canadian patent in terms describes and claims the broad generic invention of Berliner covered by the claims here in suit." *Id.*, pp. 134, 135.

On such a record and such arguments the decision of Townsend, J., was affirmed in open court (*Victor Talking Mach. Co. v. Leeds & Catlin Co.*, 148 Fed. 1022, 79 C. C. A. 536), and, when brought up on certiorari to the Supreme Court, again affirmed in 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805.

I think it apparent from the foregoing résumé that the only proposition left for argument on defendant's part is that Townsend, J., erred in holding on a point plainly pleaded that the Canadian patent covered the same invention as the patent in suit; and complainants' counsel with his usual frankness has admitted as much. But, if such error was committed, both appellate tribunals also erred in failing to correct a wrong finding on an issuable fact. It is, of course, possible (and complainant has done it) to point out that the Circuit Court need not have answered the query as to identity of invention, and the decisions on appeal do not specifically approve the finding so made. This species of hair splitting may be left to appellate tribunals which find themselves embarrassed by their own decisions. This court can only follow the apparent effect of previous authoritative rulings.

It is not overlooked that complainant has introduced on this motion considerable testimony tending to show that in the opinion of experts, and of Messrs. Berliner and Suess, the Canadian Suess patent is for the same invention as that described in the Suess American patent; and it is claimed that had Townsend, J., had before him what is now before the court he would not have held as he did. But his decision was that, admitting similarity in specifications and drawings, the claims being different, the broader claims were justified by the antecedent description.

Perhaps this was wrong, but, if so, it was error not arising from lack of evidence, or misleading evidence, but from an erroneous inference drawn from a comparison of two documents both in evidence before him and before me. The documents have not changed, and no amount of evidence can change their language or the meaning thereof.

It is five years since Judge Townsend's decision, it has become widely known, and investments have been made on faith of it; in short, a better instance could not be found of the importance of not lightly disturbing a matter once authoritatively settled.

The motion is granted, order to be settled in accordance with the practice indicated by *De Florez v. Reynolds* (C. C.) 8 Fed. 434, and *Westinghouse v. Carpenter* (C. C.) 43 Fed. 894.

This order was not appealed from; but *Victor Talking Machine Co. v. Hoschke*, *infra*, shortly came on for final hearing before Hazel, District Judge, and, the same point being involved, the foregoing opinion was followed, and injunction refused. From the decree so entered an appeal was taken by complainant.

## UNION CARBIDE CO. v. AMERICAN CARBOLITE CO.

(Circuit Court, N. D. Illinois, E. D. March 8, 1911.)

No. 29,320.

## 1. PATENTS (§ 328\*)—CONSTRUCTION AND INFRINGEMENT—"CRYSTALLINE CALCIUM CARBIDE."

The Willson patent, No. 541,138, for "crystalline calcium carbide, existing as masses of aggregate crystals," *held*, on a motion for preliminary injunction, to cover calcium carbide existing as a mass of crystal grains, devoid of their characteristic forms and closely packed together, termed a "crystalline aggregate," if not crystalline calcium carbide in any form, and an injunction granted.

## 2. WORDS AND PHRASES—"AMORPHOUS."

Calcium carbide in an "amorphous" condition is without definite form, or uncrystallized.

In Equity. Suit by the Union Carbide Company against the American Carbolite Company. On motion for preliminary injunction. Motion granted.

Offield, Towle & Linthicum and Sears, Meagher & Whitney (James F. Meagher and Charles K. Offield, of counsel), for complainant.

Robert H. Parkinson, for defendant.

KOHLSAAT, Circuit Judge. This suit was brought to restrain defendant from infringing product patent No. 541,138, granted to Thomas L. Willson on June 18, 1895, for crystalline calcium carbide, existing as masses of aggregated crystals. Subsequently, by supplemental bill complainant seeks to restrain infringement of patent No. 708,921, granted to Roberts on September 9, 1902. The cause is now before the court on motion for preliminary injunction upon the bill, supplemental bill, and affidavits of complainant and the answers and reply affidavits of defendant. The original patent was sustained by the United States Circuit Court of Appeals for the Second Circuit in *Union Carbide Company v. American Carbide Company*, 181 Fed. 104-110, and an accounting ordered. Under the facts hereof and the rule of law prevailing in such a case, the adjudication in the second circuit must be accepted as final upon the question of validity for the purposes of this hearing. *Electric Mfg. Co. v. Edison Electric Co.*, 61 Fed. 834, 10 C. C. A. 106. The one claim of the patent reads, as above stated, viz.:

"As a new product, crystalline calcium carbide existing as masses of aggregate crystals, substantially as described."

The court for the second circuit states in its opinion that the presence of crystals in defendant's carbide was admitted. Here its existence in defendant's carbolite is denied. Whether or not the two products, i. e. that of the second circuit court and this, are identical, is a matter of dispute here. The defenses raised on this motion, so far as it is deemed necessary to consider them, may be summarized as follows, viz.: (1) That complainant has been guilty of laches in bringing suit. (2) The defendant does not infringe the patent when prop-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erly construed. (3) That the validity of letters patent No. 708,921 has never been adjudicated.

It appears from the record that defendant and its predecessor have been manufacturing and marketing their article of carbolite for about seven years with the full knowledge of complainant; that on about June, 1906, complainant brought suit in the Circuit Court of the United States for the Northern District of New York against the Nichols Gas Company, a gas company located in a small New York town, a customer of defendant's predecessor, for infringement of the complainant's patent. Defendant's predecessor conducted the defense of this suit in order to protect itself. An answer was filed, a large amount of evidence was taken at great expense and effort, covering the period from June, 1906, to May, 1909, when defendant had rested its defense and was awaiting the close of rebuttal testimony, on which latter date complainant dismissed its said suit over defendant's protest, and thereupon proceeded to press the American Carbide Company Case, above cited, the decision in which is relied on as establishing the validity of the patent herein. It appears that defendant in that case was not in any way connected with this defendant, nor did this defendant participate in that defense. Afterwards, defendant unsuccessfully solicited complainant to bring a new suit against it, offering to enter its appearance in the proper district, admit the manufacture of the alleged infringing product, stipulate the evidence of the dismissed suit into the record, and have the court settle the whole matter on the merits, which offer was rejected.

From the foregoing facts, it is apparent that complainant must have discovered the necessity for relief in limine quite recently.

[1] With regard to the scope of the patent, it appears from the file wrapper and contents in evidence that on March 4, 1895, the patentee herein filed his application in the patent office for the allowance of a claim reading:

"(1) As a new product, crystalline calcium carbide, having a bluish iridescence, substantially as described."

The examiner rejected the claim, citing patent No. 492,377, granted February 21, 1893, to the same patentee as in the patent in suit, and certain publications described as "Comptes rendus, vol. 119, p. 16, July 2, 1894," and "Roscoe & Schorlemmer's Treatise on Chemistry, vol. III, part II," in the former of which publications calcium carbide is referred to as "crystalline."

Complainant thereupon amended said claim 1 by inserting after the word "carbide" the words, "existing as masses of aggregated crystals," and added a second claim, reading identically with the claim in suit. Being then advised by the examiner that there was no patentable difference between the two, and that he must elect which one he would rely upon, he selected claim 2, the present only claim of the patent in suit, whereby the existence of masses of aggregated crystals in the product claimed became the essential distinguishing feature of the patent in suit. No form of crystalline calcium carbide which does not exist as masses of aggregate crystals would come within the claim.

Whether or not crystalline calcium carbide as a new product, hav-

ing a bluish iridescence, substantially as described in the specification, is the product of the patent in suit is beside the mark. Undoubtedly, the further language of the claim, viz., "existing as masses of aggregated crystals, substantially as described," was added in order to satisfy the examiner and avoid the prior art, which the patent says was limited to an amorphous product. If it does avoid the prior art, it must appear that it contains or exists as masses of aggregated crystals. It must, defendant insists, be more than mere crystalline calcium carbide. That product, it is contended, complainant has abandoned to the public. It can hardly be urged, so far as appears from the present record, that every crystalline calcium carbide of necessity exists as masses of aggregated crystals. The objection of the examiner did not consist in mere matter of description, but went to the substance itself. According to Williams' *Elements of Crystallography*, p. 16:

"The union of two or more crystal individuals produces a crystal aggregate, while a mass of crystal grains, devoid of their characteristic forms and closely packed together, may be termed a 'crystalline aggregate.'"

In the *American Carbide Co. Case*, supra, the court says:

"It is said that the phrase 'masses of aggregated crystals' has a specific and limited meaning, i. e., it means 'crystal aggregate,' which is a union of two or more fully developed crystals, as distinguished from 'crystalline aggregate,' which is a mass of crystal grains devoid of their characteristic forms and closely packed together."

This distinction the court deemed unwarranted in that case, especially in view of the specification, and held that the claim in suit "covers crystalline carbide when the crystals are aggregated in masses, whether such crystals be perfect or imperfect," and adds, "and, as it is admitted that there are crystals in the defendant's carbide, and as those crystals are so aggregated, we think that the product of the defendant infringes," and thereupon reversed the Circuit Court.

As above said, defendant herein denies that its product exists as a mass of aggregated crystals, whether the crystals be described as perfect or imperfect, and contends that there are no crystals in its carbide; and that "what are termed crystalline grains or crystalline cleavage faces are not crystals, and do not respond to the definition of crystals, whether perfect or imperfect." Thus it will be seen that the issues here involved differ from that stated by the court in the *American Carbide Company's Case*, supra. Undoubtedly, the term "masses of aggregated crystals," as applied to calcium carbide, would include imperfect crystals. But does it cover the mass of crystal grains, devoid of their characteristic forms and closely packed together, termed a crystalline aggregate? Is the term "mass of crystal grains" as above qualified comprehended within the language, "masses of aggregated crystals?"

[2] Defendant's expert, Walker, testifies he has produced masses of crystals of calcium carbide as distinguished from a crystalline mass; that these have no practical or commercial value, and that their formation depends upon slow cooling of large masses. The specification was not changed at the time the original claims were amended.

It calls for a new product, existing in the form of crystalline calcium carbide. "Calcium carbide," says Willson (specification, line 11, p. 1) "has existed in an amorphous condition, due either to the method of its preparation or to the impurities contained in it." By "amorphous" he meant without definite form, or uncrystallized, having mainly in mind the calcium carbide disclosed by Woehler in Liebig's *Annalen der Chemie und Pharmacie*, vol. 124, p. 220, published in 1862. Several expert chemists, testifying for defendant, depose that they have made calcium carbide according to Woehler's formula, and that the result has been a hard compact crystalline mass. If this be so, it was not amorphous. Woehler's calcium carbide was, so far as appears here, the result of a laboratory experiment, and was never brought out as an article of commerce. At the time it was announced, there was no adequate method of producing it so as to make it such, quantity, quality, and cost considered. Only by the use of electricity has it become at all available. Indeed, this ally was not enlisted in its production until some considerable time after the methods employed in its manufacture had become generally known in the reduction of refractory compounds. Calcium carbide is the basis of acetylene gas, an article which is largely in demand for purposes of illumination. It is a matter of common knowledge that this industry has developed greatly within the last 20 years. It undoubtedly gave an impetus to the appropriation of the Woehler disclosure. Owing to the use of electricity cheaply attained, it became possible to make it purer and in great quantities. As said by the court in the American Calcium Carbide Company Case:

"A new article of commerce is not necessarily a new article patentable as such. But patentable novelty in a case like the present may be founded upon superior efficiency; upon superior durability, including the ability to retain a permanent form when exposed to the atmosphere; upon a lesser tendency to breakage and loss; upon purity; and, in connection with other things, upon comparative cheapness. So, as supplementing other considerations, commercial success may properly be compared with mere laboratory experiments."

In *Kuehmsted v. Farbenfabriken of Eberfeld Company*, 179 Fed. 701, 103 C. C. A. 243, it is said:

"And it makes no difference, so far as patentability is concerned, that the medicine thus produced is lifted out of a mass that contained chemically the compound; for, though the difference between Hoffman & Kraut be one of purification only, strictly marking the line, however, where one is therapeutically unavailable, patentability would follow. In the one case the mass is made to yield something to the useful arts; in the other case what is yielded is chiefly interesting as a fact in chemical learning."

Therefore, unless complainant's grantor surrendered crystalline calcium carbide to the public, the injunction should issue in limine, since there is no doubt of defendant's infringement of that article. As above noted, there is a wide and irreconcilable divergence between the witnesses as to what complainant surrendered, if anything. The New York court granted an injunction against the manufacture of crystalline calcium carbide. In the judgment of the court upon the present record the complainant's product is nothing more than crys-

talline calcium carbide. If the course pursued by it worked a fraud upon the examiner, that must be shown beyond doubt. Had Willson stood his ground and abided by his first claim, there is little doubt, as the matter now stands, he would have been entitled to its allowance. Was he justified in putting some disguises upon it in order to overcome the Patent Office objections? I think it quite probable as the evidence stands that the mass of crystal grains, devoid of their characteristic forms and closely packed together, which constitute a crystalline aggregate, would come within the language of the claim. This opinion may be changed on final hearing. I feel, however, that I shall be doing substantial justice in so holding now. The preliminary injunction may go as to patent No. 541,138. As to the other patent (No. 708,921), it never having been adjudicated, no relief is granted. In view, however, of the condition of the record and the delay of complainant in commencing suit, as well as in consideration of the damage which may result to defendant should the court not sustain the patent or infringement thereof on final hearing, the injunctive order will stand suspended upon the deposit by the defendant with the clerk of this court as tendered at the hearing of the sum of \$50,000 until the final disposition of the case, or until the further order of the court.

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**MOTION PICTURE PATENTS CO. v. YANKEE FILM CO.**

**SAME v. STEINER.**

(Circuit Court, S. D. New York. June 13, 1911.)

**PATENTS (§ 326\*)—VIOLATION OF INJUNCTION—PUNISHMENT.**

A motion to punish defendants for contempt for delay in delivering cameras, impounded as infringements of complainant's patent, denied.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.\*]

In Equity. Suits by the Motion Picture Patents Company against the Yankee Film Company and against William Steiner. On motion to punish defendants for contempt. Motion denied.

See, also, 187 Fed. 1007.

Philip Farnsworth (J. Edgar Bull, of counsel), for complainant.  
Seward Davis, for defendant.

LACOMBE, Circuit Judge. Under the recent decision of the Supreme Court in the Gompers Case, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. —, the motion to punish for a contempt in delaying the delivery of cameras to be impounded must be denied. But on the record as it stands there should be further inquiry.

The defendants, or some of them, on the motion for injunction, undoubtedly gave testimony calculated to give the court the impression that, as to two designated cameras, they could not state positively what was the internal construction, because such cameras were op-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



erated by their owners, who refused to allow defendants to see the interior of the box containing them. It is now admitted as to one of them that the operator was not the owner, but that defendants had obtained it from an outside party, and apparently had every opportunity to see how it was constructed. It would be improper to refer now to the details of the testimony. The court remembers distinctly that the effect produced by the case presented by defendants was that practically the real question presented was whether defendants were justified in having pictures taken by a man who owned a camera, and assured them, without exhibiting his camera, that it was noninfringing. This man has now testified, and, if he is to be believed, the court was imposed upon.

It may be that we have here a case of contempt, not by the disobedience of an order, but by misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice. Section 725, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 583). In order that the question may be tried out in an orderly manner, plaintiffs should lay all the facts before the United States Attorney for this district, who will, if a prima facie case is made out, institute proceedings on the criminal side of the court for such alleged contempt.

The suggestion by one of defendant's counsel that, before taking further action, the court should be advised of some matters outside the record, need not be considered, because there is nothing in the record which affects counsel in any way, nothing which would indicate that he was not fully justified in accepting his client's statement as truthful—as, indeed, the event may prove it to be—and acting on that assumption

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In re NEW YORK CITY RY. CO. et al.

In re METROPOLITAN EXPRESS CO.

(Circuit Court, S. D. New York. June 27, 1911.)

CORPORATIONS (§ 565\*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVABLE.

Where an executory contract made by a corporation is terminated by its receivers on its insolvency, a claim by the other party for damages for loss of expected future profits is not provable against the insolvent estate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2282; Dec. Dig. § 565.\*]

In the matter of the receivership of the New York City Railway Company and the Metropolitan Street Railway Company. On exceptions to report of special master, disallowing claim of the Metropolitan Express Company. Report confirmed.

This cause comes here upon exception to report of the special master disallowing a claim of the Metropolitan Express Company against the Metropolitan Street Railway Company for damages resulting from the failure to carry out a contract, which the receivers repudiated. The damages sought to be proved were expected future profits.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

The following is the report of Special Master W. L. Turner:

On the 4th of March, 1901, the express company entered into a contract with the Metropolitan Street Railway Company by which the latter gave the former the exclusive right of moving express matter over its tracks in the boroughs of Manhattan and the Bronx for a period of 20 years from the date named, agreeing among other things to furnish the necessary cars for that purpose, in consideration of which the express company was to pay on the 20th of each month during the term 20 per cent. of the gross receipts as defined in the agreement for the previous calendar month.

On February 14, 1902, the railway company leased all its property, including this contract, to the New York City Railway Company, and thereafter, on July 15, 1904, the express company assigned the said contract to the American Express Company; its provisions being faithfully carried out by lessee and assignee, respectively, until receivers were appointed on September 23, 1907, of the property of the New York City Company. Thereafter, and on October 1, 1907, the same receivers were appointed of the Metropolitan Street Railway Company, and the contract with the express company was continued until February 28, 1908, when the receivers by a letter of that date, headed "New York City Railway Company, Lessee Metropolitan Street Railway System," addressed to the American Express Company and signed by them as receivers, without further words of description, notified the American Express Company that this contract of March 4, 1901, to which they as receivers and the company addressed had succeeded as parties in interest, was not one for the advantage of the receivership to continue, as it showed little or no profit to the receivership, and interfered with the proper handling of passenger traffic, and named March 15, 1908, as the date when they would discontinue the operation of express cars. Thereupon the American Company terminated the contract of assignment to it, as by its terms it had the right to do, and the claimant filed its claim for the speculative damages which it insists are results of the breach.

Up to the receipt of this letter there had been no breach of the contract by either express company, and none by either railway company, unless, as is now contended, the fact that both these latter admitted the charge of insolvency contained in the creditors' bill of complaint in the suits in equity begun in this court in which these receivers were appointed constituted such a breach. The receivers were, of course, well within their rights in taking the very reasonable time that they did take before refusing to adopt the contract, and did not by that refusal in any way subject the estate or property of either company to a claim for damages as for a breach. *U. S. Trust Co. v. Wabash Railway Co.*, 150 U. S. 299, 14 Sup. Ct. 86, 37 L. Ed. 1085; *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599.

It is clear that both on September 23, and October 1, 1907, the dates of the appointments of the receivers, the contract for breach of the provisions of which this claim is filed was executory on both sides, and I think, notwithstanding the confusion respecting the matter in which the mind is left after reading the decisions in the reports, federal and state, that the weight of authority supports the rule that, where there has been no breach of an executory contract up to the date of an involuntary adjudication of insolvency, damages resulting from that fact, or from any later breach, cannot be proven as against other creditors whose claims are then absolute, and that, quite independent of any express statutory provision, such as the bankruptcy act, this rule applies to the administration in equity of the property and estate of an insolvent corporation. *Fidelity Safe Deposit Co. v. Armstrong* (C. C.) 35 Fed. 567; *Malcomson v. Wappoo Mills* (C. C.) 88 Fed. 680; *Gay Mfg. Co. v. Gittings*, 53 Fed. 45, 3 C. C. A. 422; *N. Y. Sec. & Trust Co. v. Lombard Ins. Co.* (C. C.) 73 Fed. 537; *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599; *People v. Globe Mutual L. Ins. Co.*, 91 N. Y. 174; *Matter of Hevenor*, 144 N. Y. 272, 39 N. E. 393; *Deane v. Caldwell*, 127 Mass. 242.

The cases cited are varied, do not arise under the bankruptcy acts, and suggest claims for rent not accrued, for damages for subsequent breaches of outstanding contracts, both for the sale and the purchase of goods, for claims on guaranties which had not ripened into fixed liabilities at the date

of the adjudication of insolvency, and for claims arising out of contracts for personal services. They do not include cases either in the Supreme Court or in the Circuit Court of Appeals in this circuit, and I have been referred to none; but the principle is, I think, distinctly recognized in decisions of both tribunals under the recent bankruptcy act as a general doctrine of equity, and applicable, not only generally, but even under statutes so broad in their terms as to authorize the allowance of contingent claims. *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084; *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649. In the latter case it is pointed out that under the bankruptcy acts of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440) and 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), which expressly permitted the proof of contingent claims, claims were held not provable for rent unaccrued at the time of filing the petition, because both the existence and amount were then contingent upon uncertain events; and in the former case it was said that under the present act permitting claims to be proved, absolutely owing at such time, even if unliquidated, when liquidated pursuant to the direction of the court, it was not "intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove."

So in a case just decided by the Supreme Court, holding that secured creditors, selling their securities after the filing of the petition in bankruptcy and finding the proceeds not enough to pay the whole amount of their claim, cannot have the proceeds applied, first to interest, and then to principal, leaving the balance to be proved, but must have such proceeds applied to principal, thus preventing them from practically securing an allowance of interest after the petition is filed, Judge Holmes says: "For more than a century and a half the theory of the English bankruptcy system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. \* \* \* The rule was not laid down *because of the words of the statute, but as a fundamental principle*. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state." *Sexton as Trustee v. Dreyfus*, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. —. The principle asserted is, I think, among the fundamental principles thus adopted in the administration of estates of insolvents, individual or corporate, in the absence of express statutory command or prohibition, and the cases cited, with others that the books contain, federal and state, not necessary to refer to, are illustrations of its application.

Counsel for the claimants, in the brief filed, urges that, apart from the cases referred to under the bankruptcy act, which he rejects as inapplicable, but which have, I think, the relevancy indicated, the contention of the receivers is based solely on the authority of *People v. Globe Mutual Insurance Co.*, supra, since the single federal case not arising under bankruptcy acts cited by them (*Malcomson v. Wappoo Mills*, supra) rested on that case, and that that case is clearly distinguishable from the claim under examination. The only ground of distinction that need be noticed is suggested by the fact that the railway company admitted its insolvency in the creditors' suit in which receivers were appointed, from which it is argued that, having by its own acts put it out of its power to perform, a breach resulted which justifies the contention that on the appointment of the receivers the liability was fixed and subsisting, leaving only the damages, if any, to be liquidated. It is, of course, an established principle of law that, where one of the parties to an executory contract does that which puts it out of his power to perform, the other may sue without waiting for a definite breach; but I do not think that such a right results from the single fact of the insolvency of such party. Certainly neither the cases cited above nor the *Globe Case* hold this, for they would then have been decided otherwise, and the *Globe Case*, as I read the opinion, meeting just this contention, holds that there can be no presumption, from the mere fact of insolvency in the absence of other evidence—and there is none here—that such condition resulted from definite acts or omissions of the party which put performance out of question; the

presumption, if any, being that it was due to causes over which such party had no control.

The claimant further insists that the facts of *People v. National Trust Co.*, 82 N. Y. 283, which is cited with approval and distinguished in the *Globe Insurance Case*, are so nearly on all fours with those of the claim here involved as to require its liquidation and allowance as an open and subsisting engagement of the corporation at the time of the appointment of receivers, in accordance with the principle there applied. There a lessor insisted on a right to have a claim for rent enforced by peremptory order for the full amount, without regard to the claims of the other creditors, out of assets of a corporation in receiver's hands, which were more than sufficient to meet the outstanding corporate engagements of every character, and to leave a surplus of \$900,000 for distribution among the stockholders. His claim was for rent accruing in fixed amounts for the remainder of a term of five years. One year and seven months, during which the quarterly rent reserved had been paid, had elapsed when the receiver was appointed, and he occupied for thirteen months more, when he vacated, tendering a surrender, which was refused, but paying all rent then due, and the claim urged was for the next quarter of the remainder of the term. The sole answer was that, as in an action for ouster by the state a judgment of dissolution had been entered, the corporate life had been terminated and with it the lease and obligation thereunder, and it was on this question that the court passed, refusing as unnecessary to consider the question of priority, and holding, as the Court of Appeals in this circuit in *Roth & Appel*, supra, has recently held under the bankruptcy act, that where the receiver does not elect to adopt the lease, the *lessee's* obligation to pay rent in the future is not discharged and that *his* liability survives, but allowing its proof with those of other creditors, doubtless because there were sufficient funds. It is obvious that in this case, unlike the case at bar, or any of the cases I have cited, the controversy was, not between a creditor claimant and other creditors, but between the creditor claiming and a receiver representing the stockholders, whose surplus would have been diminished, had the claim been allowed. I do not regard it as determining that the law of this state is conclusive against receivers representing general creditors who are protesting, as here, against the allowance on an equality with such creditors of a claim contingent at the date of their appointment for damages likewise contingent and uncertain, since that question was not there present.

Treating the contract in the claim at bar, as claimant insists it should be treated, as a lease, the lessee, not the lessor, as in this *National Trust Co. Case*, claims, not for fixed sums accruing at intervals under an outstanding lease, as there, but for contingent damages in the nature of speculative profits flowing and to flow as from an eviction subsequent to the receivers' appointment, insisting that the amount of such profits, if any, when determined, is provable on an equality with the claims of general creditors based on absolute liabilities calling at the date of the receivership for the payment of sums, ascertained or capable of ascertainment, matured or to mature against a fund, not, as in the *National Trust Co. Case*, sufficient to meet all outstanding claims contingent and absolute, but insufficient to meet even these latter. I do not think that the *National Trust Co. Case* establishes that the rule for New York state is that such a claim may be thus proved: but, if it do, it would be at variance, not only with later decisions of the same court (see *People v. St. Nicholas Bank*, 151 N. Y. 597, 45 N. E. 1129, and *Matter of Hevenor*, 144 N. Y. 271, 39 N. E. 393), but with the rule followed in this as well as other federal jurisdictions, and in other states as well, which rule, I assume, controls here.

As originally filed, the claimant's demand was for \$129,704.32, being at the rate of \$10,000 per annum for the unexpired 12 years and odd of the term of 20 years; such annual sum being the amount promised it for the privilege for that period by its assignee, the American Express Company. Acquiescing in the contention that this did not furnish the proper measure of damages, it sought to establish such damages by proof of what the American Express had accomplished while operating, coupled with some opinion evidence as to the probability of claimant's accomplishing similar results

in the future. The evidence adduced is attacked as wholly insufficient to base a finding on; but it is unnecessary to pass on the objection, as I conclude that it is not provable against general creditors.

The receivers have until March 15, 1911, to file with me and serve a proposed report containing findings and conclusions in accordance with the foregoing; the claimant to have five days thereafter to file its objections.

Page, Crawford & Tuska (G. H. Crawford, of counsel), for claimant.

Masten & Nichols (William M. Chadbourne, of counsel), for receivers of Metropolitan St. Ry. Co.

O'Brien, Boardman & Platt (George N. Hamlin, of counsel), for contract creditors' committee.

Charles Benner (Benjamin S. Catchings, of counsel), for tort creditors' committee.

Geller, Rolston & Horan (Charles T. Payne, of counsel), for Farmers' Loan & Trust Co., as trustee, successor of Morton Trust Co., as trustee.

LACOMBE, Circuit Judge. While fully concurring in the opinion of the special master as to the nature of this claim, and in his reasons for disallowing it, I am also clearly of the opinion that there was not sufficient evidence before him to determine whether the claimant would have made any profits at all, had it taken over the contract itself and undertaken to carry it out.

The exceptions are overruled, and report of special master confirmed.

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PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

In re NATIONAL CONDUIT & CABLE CO.

(Circuit Court, S. D. New York. June 27, 1911.)

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and another. In the matter of claim of the National Conduit & Cable Company. On exceptions to report of special master. Report confirmed.

The following is the report of Special Master W. L. Turner:

On May 10, 1907, the claimant proposed to defendant named to manufacture and deliver certain transmission cables at prices stated. On May 11, 1907, the proposal was accepted, with modifications assented to on May 13, 1907, which were that the railway company reserved the right to specify between May 11, 1907, and July 1, 1908, the length of cable it desired to have manufactured, and the point of installation, and that deliveries might be deferred accordingly, if it so elected. No payment was to be made for cable not delivered under such circumstances, and it agreed to pay 90 per cent. of the contract price for all cable delivered in accordance with instructions within 30 days after delivery.

Receivers were appointed of the railway company on September 24, 1907. The copper and lead required in the manufacture of the cable was purchased by claimant prior to such appointment; but it is conceded by the claimant that there was no breach of the contract until the appointment of the receivers. These elected on January 17, 1908, not to adopt it, and refused to specify in accordance with its terms. The parties agreed that on the market price of cable specified in the contract the claimant would have sustained on Sep-

tember 24, 1907, a loss of \$44,232.20, and on January 17, 1908, based on the then market price, damage would be \$64,974.20.

This is the case of an executory contract not broken at the date of the appointment of the receivers, and, as it is not to be distinguished from the claim of the Metropolitan Express Company against the Metropolitan receivership (188 Fed. 339), to the memorandum as to which counsel is referred, the same disposition will be made of it. As he has cited a case not relied upon therein, it may be proper to point out that in that case (*In re Stern*, 116 Fed. 604, 54 C. C. A. 60), as the opinion of Judge Townsend shows, the executory contracts there involved had been broken before the petition had been filed, and that their breach furnished the reason that the creditors had for forcing the debtor into bankruptcy.

The receiver may file and serve a proposed report on March 15, 1911, embodying findings and conclusions accordingly; the claimant to have five days thereafter to file its objections thereto.

Johnson & Galston (Clarence Galston, of counsel), for claimant.

Dexter, Osborn & Fleming (Matthew C. Fleming, of counsel), for receiver of New York City Ry. Co.

Charles Benner (Benjamin S. Catchings, of counsel), for tort creditors' committee.

O'Brien, Boardman & Platt (George N. Hamlin, of counsel), for contract creditors' committee.

Geller, Rolston & Horan (Charles T. Payne, of counsel), for Farmers' Loan & Trust Co., as trustee, successor of Morton Trust Co., as trustee.

LACOMBE, Circuit Judge. I concur in the conclusion of the special master that this claim is not to be distinguished from that of the Metropolitan Express, 188 Fed. 339, in which opinion is filed to-day.

The exceptions are overruled, and special master's report is confirmed.

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### Ex parte ZENTNER.

(District Court, D. Massachusetts. May 12, 1910.)

No. 298.

#### 1. EXTRADITION (§ 11\*)—INTERNATIONAL—COMPLAINT—FORGERY.

Where a complaint in proceedings to extradite accused for forgery set forth the offense with sufficient particularity to advise him of the offense wherewith he was charged, it was not defective for failure to set forth copies of the instrument alleged to have been forged; the particularity of an indictment not being required in such a complaint if a crime within the extradition treaty is substantially charged.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 12; Dec. Dig. § 11.\*]

#### 2. EXTRADITION (§ 14\*)—DEPOSITIONS—TRANSLATION.

Where certain depositions attached to extradition papers were in the German language, and the translator testified before the commissioner that he had dictated the translation to a typewriter, that he had examined and compared it as written out, and that the translation was correct, there being no claim by petitioner that the translation was in any respect inaccurate, it was no objection to the translation that the typewriter did not also testify with reference thereto.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 16; Dec. Dig. § 14.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. EXTRADITION (§ 10\*)—PROCEEDINGS—DEMAND BY FOREIGN GOVERNMENT.**

No prior demand by a foreign government is necessary before the arrest of a fugitive from the justice of such government in extradition proceedings.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 11; Dec. Dig. § 10.\*]

**4. HABEAS CORPUS (§ 92\*) — SCOPE OF INQUIRY — EXTRADITION — EVIDENCE — SUFFICIENCY.**

A fugitive from the justice of a foreign government is not entitled to his discharge from arrest in extradition proceedings on habeas corpus for insufficiency of evidence, if the commissioner before whom he was examined had before him competent legal evidence on which to exercise his judgment, whether the facts shown sufficiently establish petitioner's criminality, for purposes of extradition.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.\*]

**5. EXTRADITION (§ 14\*)—EVIDENCE—FORGERY.**

Evidence offered before a commissioner in extradition proceedings for forgery alleged to have been committed in a foreign country *held* sufficient to justify petitioner's return.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 16; Dec. Dig. § 14.\*]

**6. EXTRADITION (§ 11\*)—VARIANCE—MATERIALITY.**

In proceedings to extradite petitioner for forgery alleged to have been committed in a foreign country, a variance between the complaint and the evidence as to the dates of the instruments alleged to have been forged was immaterial.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 12; Dec. Dig. § 11.\*]

**7. EXTRADITION (§ 14\*)—FORGERY—FRAUDULENT INTENT.**

Where in proceedings to extradite petitioner for forgery, there was evidence that he raised two acceptances beyond the amounts named in figures on them at the time they were given him, and then put them in circulation without the acceptor's knowledge or consent, such proof was sufficient evidence of a fraudulent intent for purposes of extradition.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 16; Dec. Dig. § 14.\*]

**8. HABEAS CORPUS (§ 85\*)—EVIDENCE—EXTRADITION.**

In habeas corpus proceedings to secure petitioner's release from arrest in extradition for alleged forgery committed in a foreign country, evidence that, by reason of business relations between petitioner and the persons claimed to have been defrauded, they were not entitled to claim that petitioner's act amounted to more than a breach of trust, was immaterial.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

**9. EXTRADITION (§ 14\*)—NATURE OF PROCEEDINGS—ATTITUDE OF COMPLAINANTS.**

Where extradition proceedings for forgery were in the name of the German government under treaty with the United States, the attitude or motives of the persons alleged to have been defrauded were immaterial.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 15; Dec. Dig. § 14.\*]

**10. EXTRADITION (§ 5\*)—TREATY—OFFENSE—FORGERY.**

Treaty with Bavaria, Sept. 12, 1853, art. 1, 10 Stat. 1022, authorizing extradition of persons charged with forgery or utterance of forged papers, was applicable where it appeared that written instruments had been falsely uttered by accused for fraud and deceit, and that the instruments

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were of such a description that they might defraud or deceive if issued with such intent.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 6; Dec. Dig. § 5.\*]

Petition by Heinrich Zentner for habeas corpus to obtain his discharge from custody and extradition proceedings. Denied.

Eyges, Wyner & Freedman, for petitioner.

E. Mark Sullivan, Asst. U. S. Atty., for U. S. Marshal.

Theodore H. Tyndale, for German Consul.

DODGE, District Judge. On May 4, 1910, a warrant for the commitment of this petitioner, under Rev. St. § 5270 (U. S. Comp. St. 1901, p. 3591), was issued by William A. Hayes 2d, a United States commissioner duly authorized by this court to issue warrants for the arrest of fugitives from justice of foreign governments between which and the United States there are treaties and conventions of extradition. The petitioner is in the custody of the United States marshal under that warrant. Upon the present petition, filed May 4, 1910, the marshal was ordered to show cause why a writ of habeas corpus should not issue. The petition, besides praying for the issuance of the writ of habeas corpus, asked that a writ of certiorari might issue to the commissioner, directing him "to certify to the court the record by which the cause of your petitioner's commitment may be examined and its legality investigated." A writ of certiorari was issued accordingly, and the record of the proceedings before the commissioner, submitted by him as directed, was before the court at the hearing upon the order to show cause, and has been duly considered.

A treaty for extradition between the United States of America and the King of Bavaria was concluded September 12, 1853, ratified November 1, 1854, and proclaimed November 18, 1854. Bavaria has since become a part of the German Empire. The treaty is now in force. 10 Stat. 1022. By article 1 of the treaty both governments agreed to deliver up upon requisition all persons who being charged, among other crimes specified, with the crime of forgery or the utterance of forged papers, committed within the jurisdiction of either, should seek an asylum or be found within the territory of the other. Article 1 further provides that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. There is no dispute as to these facts. The commissioner's record in the case shows that on March 31, 1910, there was filed before him a complaint, sworn to by the Imperial German Consul at Boston, wherein were set forth charges against Heinrich Zentner, the present petitioner, which may be summarized as follows: That he (1) on October 10, 1907, forged a draft accepted by C. H. Arnold, the drawee, by increasing the amount thereof from 2,184 marks 79 d. to 12,184 marks 79 d.; (2) on October 10, 1907, forged a draft accepted by said Arnold by increasing its amount from 2,973 marks 73 d. to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



12,973 marks 73 d.; and (3) on October 30, 1907, being authorized by the firm of J. F. Meier to issue four drafts accepted by them for 20,000 marks in all, forged said four drafts by increasing their amounts to the total amount of 30,229 marks 1 d. It further appears by the commissioner's record that he issued his warrant for Zentner's apprehension, that Zentner was apprehended and brought before him, and that evidence of Zentner's criminality was by him thereupon heard and considered. It also appears that he deemed the evidence sufficient to sustain the charge under the provisions of the treaty or convention referred to, that he has accordingly issued his warrant for Zentner's commitment to the proper jail to await the action of the executive department, and that this is the warrant under which Zentner is now held. Upon it the marshal relies, as justifying him in holding Zentner, and as cause why the writ should not issue. In his present petition for habeas corpus Zentner alleges that his detention is illegal, upon grounds which are hereinafter separately considered.

[1] 1. It is claimed that the complaint is defective because it does not set forth copies of the instruments alleged to have been forged. The commissioner ruled, and with his ruling I agree, that the complaint, which appears in full in his record, sets forth the offense with sufficient particularity to advise the accused of the offense wherewith he is charged. The amounts of the drafts are stated in it, and they are alleged to have been accepted by the drawees before the alterations charged were made. The particularity of an indictment is not required if a crime within the treaty is substantially charged. *U. S. v. Herskovitz* (D. C.) 136 Fed. 713; *Grin v. Shine*, 187 U. S., 181, 23 Sup. Ct. 98, 47 L. Ed. 130; *Yordi v. Nolte*, 215 U. S. 227, 30 Sup. Ct. 90, 54 L. Ed. 170.

[2] 2. Certain depositions accompanied by papers or copies of papers therein referred to, all in the German language, purporting to be properly and legally authenticated, so as to entitle them to be received by the German tribunals as evidence of Zentner's criminality, were introduced before the commissioner. They form part of his record, as does also what purports to be an English translation of them. The authentication of the papers themselves is not questioned. The translation was typewritten. The translator testified before the commissioner that he had dictated the translation to a typewriter, that he had examined and compared it as written out by her, and that it is correct. The petitioner objects that the typewriter did not also testify with reference to it. But he has not claimed that the translation is in any respect inaccurate, although the German original, as the commissioner has certified, was read to him in open court. I agree with the commissioner's ruling that he was warranted in accepting the translation as correct without any evidence from the typewriter.

[3] 3. The petitioner objects that no demand by the foreign government for his return has been shown prior to the institution of the proceedings before the commissioner. The commissioner ruled that no such demand need be shown. With this ruling I agree. No such prior demand is now held to be necessary to the validity of

proceedings like these. *Benson v. McMahon*, 127 U. S. 457, 460, 8 Sup. Ct. 1240, 32 L. Ed. 234; *Grin v. Shine*, 187 U. S. 181, 193-195, 23 Sup. Ct. 98, 47 L. Ed. 30; *Re Schlippenbach* (D. C.) 164 Fed. 783.

[4] 4. The remaining objections urged dispute the sufficiency of the evidence before the commissioner to sustain the charges made in the complaint. If the commissioner had before him competent legal evidence on which to exercise his judgment whether the facts shown sufficiently establish Zentner's criminality for the purposes of extradition, the court cannot review his decision on habeas corpus. *Re Luis Oteiza*, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464; *Ornelas v. Ruiz*, 161 U. S. 502, 16 Sup. Ct. 689, 40 L. Ed. 787; *Terlinden v. Ames*, 184 U. S. 270, 22 Sup. Ct. 484, 46 L. Ed. 534. I am only to inquire, therefore, whether or not there was any competent evidence tending to support the charges made in the complaint, before the commissioner. If there was, it is not open to the petitioner to argue that a different conclusion ought to have been reached on the evidence as a whole. This consideration is important in the present case, because the petitioner testified in his own behalf before the commissioner, and gave evidence tending to contradict or explain the written evidence relied on by the foreign government.

[5] The petitioner himself, however, admitted before the commissioner that, having received from Dietenhofer, who does business under the name of C. H. Arnold, the draft referred to in the foreign evidence as "Exhibit 1," bearing when he received it Arnold's acceptance, the amount 2,184 in figures, and the due date, he inserted the figure 1 before the figures 2,184 and wrote in everything else which now appears on the draft, making it thereby appear to be an accepted draft for 12,184 marks 79 d., and signed it. He further admitted that, having received from Arnold the draft marked "Exhibit 2," bearing Arnold's acceptance, the figures 2,973, and the due date, he inserted the figure 1 before 2,973, filled in everything else now appearing on the draft and signed it, so as to make it appear to be an accepted draft for 12,973 marks 73 d. It was also his own testimony that, having received four drafts accepted in blank by J. F. Meier, being Exhibits 5, 6, 7, and 8, he filled in the blanks above the acceptances, or caused them to be filled, so as to make the drafts read as the exhibits now show, that is, as accepted drafts for 30,229 marks 1 d. in all. His testimony also was, it is true, that nothing had been said between Meier and himself as to the amounts to be filled into the four acceptances last mentioned, and that Meier never objected when he learned the amounts which had been filled in. But on this point there is a conflict between him and Meier, whose evidence in the depositions transmitted is, that 20,000 marks had been expressly agreed as to the total amount for which the four drafts should be made out, and that he not only remonstrated but demanded the return of 10,000 marks as soon as he learned that Zentner had filled them out for more than 30,000 marks. Dietenhofer's evidence, also in the transmitted depositions, is expressly to the effect that the filling out of the Arnold acceptances (Exhibits 1 and 2) for 10,000 marks more than the sum originally indicated by the figures on each

was wholly without his knowledge, and that he not only remonstrated but threatened Zentner with legal proceedings unless the altered acceptances were returned. As to these two acceptances, at least, there was, therefore, uncontradicted evidence of fraudulent alteration. There was uncontradicted evidence to show that Zentner negotiated the drafts filled out as above, obtained the proceeds, and soon after fled from Germany to this country, having been declared bankrupt. If his own evidence and the other evidence above summarized had been all the evidence before the commissioner, I think it would have been competent legal evidence sufficient to warrant him in finding Zentner's criminality established for the purposes of extradition. The commissioner, however, had also before him a considerable amount of other evidence tending strongly to confirm that which I have cited.

It was urged on the petitioner's behalf that the depositions transmitted contain much of what is called with us "hearsay" or "opinion" evidence. It seems to me, however, that, if every statement in the foreign depositions fairly open to this objection be disregarded, the effect of what remains will be substantially as indicated above.

[6] It was urged that the evidence shows the Arnold drafts to have been filled in on October 17, 1907, instead of on October 10th, as the complaint alleges; also that the evidence fails to show the date on which the Meier drafts were filled in, the complaint alleging October 30, 1907, as the date. The Arnold drafts are dated October 10th. The Meier drafts bear the dates September 25th and October 5th, but Meier's evidence is that he gave them in blank to Zentner at the end of October. If there can be said to be a variance between the complaint and the evidence in the matter of dates, I agree with the commissioner that it is immaterial.

[7] It was urged that the evidence showed no fraudulent purpose on Zentner's part. It tended to show, however, as cannot be denied, that Zentner at least raised the two Arnold acceptances beyond the amount named in figures upon them when given him, and then put them in circulation, without the acceptor's knowledge or consent. This, as the commissioner rightly ruled and found, was sufficient evidence of a fraudulent purpose on Zentner's part for the purpose of the proceedings before him.

[8] It was urged that previous commercial relations and dealings in regard to acceptances between Dietenhofer and Zentner or between Meier and Zentner appear from the evidence, and that authority given Zentner to fill in the Meier drafts also appears, such as prevents Zentner's dealings with any of the acceptances from being regarded as criminal, and required them to be treated as amounting to breaches of trust at the most. However strong an argument might be made elsewhere to this effect upon all the evidence, it is not an argument entitled to any weight for the purposes of this decision, it not having prevailed with the commissioner, who had before him at least some competent evidence of the commission of the criminal acts charged.

[9] It was urged that Meier and Dietenhofer do not appear by the evidence to have taken any steps to restrain the circulation of the

drafts after learning the amounts for which Zentner filled them out; that they do appear by the evidence to have compromised and settled claims made against them, as acceptors of the drafts, by paying part of the total amounts thereof as filled out, whereas if the drafts were forged they were under no liability; that there is no evidence of any criminal prosecution against Zentner in the German courts before January, 1910, and none that Zentner's whereabouts has been unknown since November, 1907; and that there is thus indicated want of good faith in the institution of the present proceedings, and the conclusion warranted that they have been taken "in pursuance of civil remedy." But the fact that the proceedings are in the name of the German government under the treaty obviously excludes any inquiry into the attitude or motives of Meier or Dietenhofer.

[10] It was urged that no offense under the German penal code is set forth in the complaint or appears from the evidence, and that there is nothing in either to show any acts on Zentner's part amounting to forgery as understood by the laws of the United States. The commissioner ruled that the treaty provisions were applicable if it appeared that written instruments had been falsely altered by Zentner for the purpose of fraud or deceit, and that the drafts referred to were instruments of such a description that they might defraud or deceive if issued with that intent. I am unable to doubt that these rulings were right, or that there was a sufficient charge of forgery within the meaning of the treaty and competent evidence in support of the charge.

This result requires me to decline to issue the writ, and would require me to do so even if I saw reason to doubt, as I do not, that the commissioner was right in holding that the evidence as a whole was sufficient to sustain the charge.

The petition is denied.

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In re JEM YUEN.

(District Court, D. Massachusetts. July 2, 1910. On Motion to Admit to Bail, August 9, 1910.)

No. 322.

1. HABEAS CORPUS (§ 76\*)—RETURN—CHINESE DEPORTATION.

A commissioner's return to a writ of habeas corpus to determine the legality of the arrest of a Chinese person in deportation proceedings, averring that such person was detained for deportation as a Chinese person not entitled to enter the United States, by virtue of an order of the Secretary of Commerce and Labor made July 11, 1910, which was set forth, and which purported to affirm an excluding decision of the commissioner, and directed the person's deportation, showed a sufficient justification for his detention.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 67; Dec. Dig. § 76.\*]

2. ALIENS (§ 32\*)—CHINESE—DEPORTATION PROCEEDINGS—HABEAS CORPUS.

Where the detention of a Chinese person in deportation proceedings under a warrant was claimed to be illegal, on habeas corpus, because

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such person was the minor son of petitioner, who was a Chinese merchant lawfully within the country, such question of fact was for the determination of the Immigration Commissioner, whose decision was not reviewable on habeas corpus provided the hearing before the commissioner, however summary, was in good faith and not arbitrary.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93-95; Dec. Dig. § 32.\*]

**3. ALIENS (§ 32\*)—DEPORTATION OF CHINESE—HABEAS CORPUS.**

Denial of a fair hearing before immigration authorities prior to the rendition of a deportation warrant is the only foundation for jurisdiction of a federal court to review the proceedings on habeas corpus.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.\*]

**4. ALIENS (§ 32\*)—DEPORTATION PROCEEDINGS—EVIDENCE.**

Immigration officers in deportation proceedings are not bound by the rules of criminal procedure or by the rules of evidence applied in court, nor is it enough for review of their decision on habeas corpus, that there was no sworn testimony taken or no record of the testimony or of the decision; no formal complaint or pleadings being required.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.\*]

**5. ALIENS (§ 32\*)—IMMIGRATION PROCEEDINGS—EVIDENCE—RECORDS.**

In deportation proceedings, the immigration authorities properly considered a record of similar proceedings previously conducted purporting to show that the immigrant had then attempted to enter the country and was excluded after a hearing and the exclusion affirmed on appeal.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.\*]

**6. ALIENS (§ 32\*)—DEPORTATION PROCEEDINGS—APPEAL—RECORD.**

Where an appeal was taken to the Secretary of Commerce and Labor from a deportation order, the fact that a "memorandum for the acting secretary," signed by the Commissioner General, was added to the record before it was acted on, and contained remarks on the evidence and a recommendation that the decision be affirmed, was immaterial, and did not indicate that the officer whose duty it was to determine the appeal did not do so himself.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.\*]

**7. ALIENS (§ 32\*)—DEPORTATION—APPEAL—HEARING.**

Where an appeal from a deportation order was heard and decided by the acting Secretary of Commerce and Labor, it would be presumed, the contrary not appearing, that the acting secretary was at the time, lawfully exercising the secretary's powers, as he was authorized to do by Rev. St. §§ 177, 178 (U. S. Comp. St. 1901, p. 90).

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.\*]

**On Motion to Admit to Bail.**

**8. ALIENS (§ 32\*)—CHINESE—DEPORTATION PROCEEDINGS—APPEAL—BAIL.**

Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 7 (U. S. Comp. St. 1901, p. 1322) declares that pending the execution of an order for the deportation of certain Chinese persons they shall not be admitted to bail. Act May 5, 1892, c. 60, § 5, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320) provides that on an application to any judge or court of the United States "in the first instance" for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed. *Held*, that the words "in the first instance" in section 5 did not render the prohibition against bail any less applicable after the court had made its decision than before, and hence where a Chinese person had been ordered deported and writ of habeas corpus dismissed, the alien was not entitled to bail pending appeal.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.\*]

Habeas corpus on petition of Chin Ying Don to obtain the release of his alleged minor son, Jem Yuen, from custody under deportation warrant. Denied.

Warren O. Kyle, for petitioner and Jem Yuen.  
William H. Garland, Asst. U. S. Atty.

DODGE, District Judge. The petitioner complains that his minor son, Jem Yuen, is unlawfully detained by George B. Billings, United States Commissioner of Immigration at this port.

[1] The commissioner's return on the writ avers that Jem Yuen is detained for deportation as an alien Chinese person, not entitled to enter the United States, by virtue of an order of the Secretary of Commerce and Labor on July 11, 1910, which is set forth. The order purports to affirm an excluding decision of the commissioner in Jem Yuen's case, and to direct that he be deported. The petitioner has filed an answer to the return, in which all the averments thereof are denied, and it is also denied that any such order has been issued, or that Jem Yuen is detained by virtue of any order of the Secretary of Commerce and Labor. The answer further sets up that Jem Yuen was denied a fair hearing and was denied appeal to the secretary, and that the pretended hearing on appeal was before an officer not authorized to act, and not upon a proper record; that Jem Yuen is not an alien belonging to any excluded class, and is the minor son of a domiciled Chinese merchant. At the hearing a motion was filed to discharge Jem Yuen from custody, because the return upon the writ showed no sufficient justification for holding him. This motion I overruled. The commissioner then offered, in proof of the averments in his return, a record of the proceedings in the case to which the alleged order of the secretary refers, duly certified, which is marked "A," and may be referred to in connection herewith. There is no dispute that Jem Yuen is an alien and a Chinese person. The record shows that he sought to enter the country in April last, coming by steamer from Halifax to the port of Boston. His claim of right to enter was based on allegations that he was the petitioner's minor son and that the petitioner was a Chinese merchant lawfully within the country. Whether these allegations were true or not was to be decided in the first instance by the immigration commissioner here. That the petitioner is a Chinese merchant lawfully within the country was finally, though not at first, conceded by the authorities. The allegations that Jem Yuen was his son and a minor were held not to have been sustained, and admission was therefore refused. The hearing before the immigration authorities here was on May 6, 1910, the decision on May 28th. The petitioner was duly notified of the decision and his right to appeal therefrom. Appeal was claimed May 28th, and the time for preparing it extended, at the petitioner's request, from time to time until June 25th. Under date of June 29th the record on appeal was transmitted by the commissioner here to the Immigration Bureau of the Department of Commerce and Labor at Washington. Under date of July 11th the commissioner here was notified by the bureau that his decision was affirmed, in the form set forth in the return to this writ.

[2] The petitioner then offered to show before me that Jem Yuen is a minor son of a Chinese merchant, and is not otherwise excluded under the laws and regulations relating to immigration. I excluded the proof offered, on the ground that the questions raised appear by the record to have been determined by the proper authorities and not to be reviewable by the court. There was no further evidence offered by either side. Upon the questions whether Jem Yuen was the petitioner's son and whether he was a minor, the courts have no jurisdiction to review decisions made by the immigration authorities, provided the hearing before them, however summary its form, has been in good faith and their action not merely arbitrary. This is true even when the applicant claims to be a citizen, as Jem Yuen does not.

[3] The denial of a fair hearing is the only foundation for any jurisdiction in the court to interfere on habeas corpus. *Chin Yow v. U. S.*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. "If a fair, full hearing was given and had, full opportunity to present evidence, and a question of fact was presented and decided, and the action taken was not arbitrary, then the decision of the inspector, affirmed by the department, is final." *Ex parte Lung Foot*, 174 Fed. 70. Whether there was a fair hearing or not in the present case must be determined by the record, and the record, according to the petitioner's contention, shows that a fair hearing has been denied. The hearing at Boston is said to have been unfair because inadmissible evidence was considered. The hearing on appeal is said to have been unfair because of alleged improper additions made to the record submitted at Washington, and because the Secretary of Commerce and Labor does not appear to have himself considered or decided it. As to the hearing at Boston there is no complaint that the applicant was in any way hindered in submitting such evidence as he desired, or of any refusal to hear what was submitted. The complaint is that a record of proceedings of similar character at Richford, Vt., in October, 1908, and before the department on appeal, was considered. This record purported to show that Jem Yuen then and there attempted to enter the country, was excluded after a hearing, and the exclusion was affirmed on appeal. Whether such a record was admissible or not according to the rules of evidence observed elsewhere is immaterial.

[4] It is well settled that officers of the government, to whom the determination of questions of this kind is entrusted under statutes like those governing these proceedings, are not bound by the rules of criminal procedure, nor by rules of evidence applied in courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony, or no record of the testimony or of the decision. No formal complaint or pleadings are required. The alien's opportunity to be heard need not be upon any regular set occasion, nor according to the forms of judicial procedure; it may be such as will secure the prompt, vigorous action contemplated by Congress and appropriate to the nature of the case. See *Nishimura Ekiu v. United States*, 142 U. S. 651, 663, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37

L. Ed. 905; *The Japanese Immigrant Case*, 189 U. S. 86, 101, 23 Sup. Ct. 611, 47 L. Ed. 721.

[5] I am unable to believe that the duty of the officers to give a fair hearing required them to shut their eyes to the contents of this former record, or to do so without formal or independent proof of its contents. The same considerations apply to a letter considered at the hearing from the Commissioner of Immigration at San Francisco, giving the result of a search of the records of departure and arrival at that port kept in his office.

[6] As to the hearing on appeal, one complaint is that a "memorandum for the acting secretary," dated July 7, 1910, and signed "Daniel J. Keefe, Commissioner General," was added to the papers from Boston before they were acted upon at Washington. The memorandum contains remarks upon the evidence, and a recommendation that the Boston decision be affirmed. So far as its contents relate to the questions presented for decision, they are to the same effect as what is said in the letter dated June 29th from the acting commissioner at Boston, transmitting the record. I do not see how it can be contended that anything material to the decision, and not previously presented and discussed at the hearing, was brought into the case for the first time either by the memorandum or by the letter referred to. Nor do I think that the memorandum can be considered as indicating in any way that the officer whose duty it was to hear and determine the appeal did not hear and determine it himself. It cannot be said that the head or the acting head of a department, charged with such a duty, is forbidden to have a subordinate make a preliminary report on it for his guidance.

[7] Lastly it is complained that the Secretary of Commerce and Labor is not shown by the record to have heard and decided the appeal. I must regard the record as sufficiently showing, in the absence of any evidence to the contrary, that the appeal was heard and decided by the acting secretary. That being the case, I am justified in assuming, until the contrary appears, that the acting secretary was at the time lawfully exercising the secretary's powers. Rev. St. §§ 177, 178, (U. S. Comp. St. 1901, p. 90); *Keyser v. Hitz*, 133 U. S. 138, 145, 10 Sup. Ct. 290, 33 L. Ed. 531.

The case appears to me to have been fully and fairly heard, considered, and decided by the proper officials. No arbitrary action or abuse of discretion on their part in regard to it is in my opinion shown. The writ must therefore be discharged, and Jem Yuen remanded to the custody of Commissioner Billings.

#### On Motion to Admit to Bail.

The writ prayed for by the petitioner having issued, and due hearing having been had thereon, the court held on July 21, 1910, that Jem Yuen, an alien and a Chinese person seeking to enter the country, to whom the immigration authorities had refused admittance and whom the commissioner of immigration was holding under an order of deportation, was lawfully detained by the commissioner for that purpose. The writ was therefore discharged, and Jem Yuen remanded to the commissioner's custody.



[8] On August 4, 1910, the petitioner and Jem Yuen filed a motion that "pending the appeal from the decision of this court discharging the writ, Jem Yuen may be enlarged upon recognizance with surety for appearance to answer the judgment of this court upon mandate from the Supreme Court of the United States." This motion was opposed by the commissioner. After due hearing upon the motion, I am unable to believe that the court has the power to grant it. Section 2 of the act of November 3, 1893, c. 14, 28 Stat. 7 (U. S. Comp. St. 1901, p. 1322), provides as to orders for the deportation of certain Chinese persons to be executed by the United States marshal, that, pending the execution of such order, such Chinese persons shall remain in the custody of the marshal and shall not be admitted to bail. This section was considered in November, 1903, in this court, by Judge Lowell, who held that the court had inherent power to admit an alien to bail pending an appeal to this court from the order of a United States commissioner that he be deported. *In re Ah Tai*, 125 Fed. 795. It was said that the prohibition against admitting to bail applied only where the order of deportation was final, and was inapplicable while an appeal from the decision of the commissioner was pending. In the present case the order of deportation is final so far as this court is concerned, and no appeal to this court is pending. The prohibition referred to, enacted in 1893, appears from its context to apply only in cases where a Chinese laborer within the limits of the United States is adjudged to be unlawfully in the country, or perhaps also to cases where a Chinese alien applies for admission on the ground that he was formerly in business in this country as a merchant. It does not appear to cover a case like this. *Ah Tai's Case* was a case of the kind first mentioned. The present case belongs to neither of the kinds mentioned. Jem Yuen's application to enter is on the ground that he is the son of a Chinese merchant lawfully within the country. To it section 5 of the act of May 5, 1892, c. 60, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320) is applicable. This section provides that:

"On an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed."

This section was considered by the Circuit Court in the Southern District of New York in December, 1894, in *Re Chin Yuen Sing*, 65 Fed. 788. Judge Lacombe said that it was unnecessary to decide whether or not the court was expressly forbidden by the section to allow bail pending appeal from its decision dismissing a writ of habeas corpus, because it would be a singular exercise of discretion to allow bail after the court had decided that the alien should not be permitted to enter the country, when there was no dispute that the statute prohibits his release on bail before the court has so decided, and while there is still a possibility that its decision might admit him. The fact that in a case like this it is impossible for the court to allow bail, without thereby admitting into the country a person whose admission it holds to be prohibited by law, forbids me to believe that the words "in the first instance," as used in section 5 of the act of

1892, are intended to render the prohibition against allowing bail any less applicable after the court has made its decision than before. There is no doubt, however, that the practice has not been uniform in cases which have involved this section and section 2 of the act of 1893. See *U. S. v. Fah Chung*, 132 Fed. 109. See, also, the argument of the Solicitor General in *Ah How v. U. S.*, 193 U. S. 65, 74, 24 Sup. Ct. 357, 48 L. Ed. 619, to which Judge Speer refers in deciding *U. S. v. Fah Chung*. A certified copy of a recent order by the district court in Vermont, admitting to bail a Chinese alien debarred from entry by the immigration officers, pending final determination by the court upon a writ of habeas corpus sued out by him, has been shown me. The order recites that the admission to bail was by the consent of all parties concerned. In *Ah How v. U. S.*, above cited, the Supreme Court was asked to express its opinion as to the right of Chinese aliens, arrested for deportation within the country, to give bail pending their appeal. It declined to do so, considering the question a moot point only as then presented. 193 U. S. 78, 24 Sup. Ct. 359 (48 L. Ed. 619). *U. S. v. Fah Chung* was, like the case before the Supreme Court just referred to, a case in which the deportation of an alien Chinese had been ordered because he was found within the country contrary to law. In such cases, as Judge Speer held (132 Fed. 110), the order of deportation "is not made in an ordinary justiciable case, and does not deal with legal rights as that expression is generally understood." This applies with still greater force, as it seems to me, when the question is whether or not the alien Chinese is a person allowed by our laws to enter the country at all. As to such cases I am unable to doubt that Congress intended to forbid admission to the country upon bail. Judge Speer refused to allow bail in the case before him, but while holding that the alien in such cases is not entitled to bail as a matter of right, thought he might nevertheless be admitted to bail, under special circumstances, in the sound discretion of the court. He relied upon an ancient jurisdiction in the court, independently of statute, existing by the rules of the common law. 132 Fed. 112, 113. There are in the present case no special circumstances of the kind indicated by the learned judge in his opinion. I should not consider myself justified in granting this application, even if satisfied that I have the power to grant it by an exercise of discretion. The application is denied.

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#### NORTON v. WHITESIDE et al.

(Circuit Court, D. Minnesota. February 24, 1911.)

#### 1. STATES (§ 12\*)—BOUNDARIES—RIVERS—CHANGE OF CHANNEL.

Where the channel of a navigable river constitutes the boundary between two states, such boundary shifts with the shifting of the channel, whether by natural or artificial causes.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 6-11; Dec. Dig. § 12.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. NAVIGABLE WATERS (§ 42\*)—ISLANDS—RIGHT TO USE.**

The right or title to use or occupy an island in a navigable stream arises from the right or title to use or occupy the submerged land on which it is formed; the character and extent of the title remaining the same.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 253-255; Dec. Dig. § 42.\*]

**3. NAVIGABLE WATERS (§ 42\*)—SUBMERGED LAND—ISLANDS—TITLE.**

While the right either to submerged land or to an island formed thereon in a navigable river is a property right, and may be severed from the shore land by the owner thereof, it is a right arising out of and existing by virtue of riparian proprietorship, and its nature continues the same whether severed from the riparian proprietorship or not.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 253-255; Dec. Dig. § 42.\*]

**4. NAVIGABLE WATERS (§ 37\*)—RIVERS—SOIL UNDER WATER—RIGHT OF RIPARIAN PROPRIETOR.**

A grantee from the government of lands bounded by a navigable stream takes an absolute title in fee to the water's edge, and the state acquires a right or title to the soil or land under the water between the edge of the stream and the middle thread of the main navigable channel, in trust to preserve and improve the public right of navigation. Such right or title of the state, though paramount, is not proprietary, the riparian owner having a proprietary, though limited, title or ownership of such soil or bed to the thread of the navigable channel subject to the public navigation right.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 37.\*]

**5. NAVIGABLE WATERS (§ 42\*)—ISLANDS—OWNERSHIP—CHANGE OF CHANNEL.**

Where the government, in the exercise of its right to improve the navigation of a river, changed the channel to the opposite side of an island formed on and rising from the bed of the stream, such change transferred title to the island to the opposite riparian proprietor.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 253-255; Dec. Dig. § 42.\*]

**6. QUIETING TITLE (§ 49\*)—RELIEF—RIGHTS OF THIRD PERSON.**

In a suit between riparian proprietors to quiet title to an island in a navigable stream the court was without jurisdiction in equity to determine the rights of a third person in actual possession of the island, which rights could only be determined by an action at law.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 49.\*]

In Equity. Suit by George W. Norton, as executor and trustee of the estate of George W. Norton, deceased, against Robert W. Whiteside and others. Decree for complainant as against defendants Whiteside and E. P. Alexander, and dismissed as to defendant Andrew J. Tallas.

Complainant alleged: "That defendant Andrew J. Tallas, some time since, without authority of law and without any right whatsoever so to do, entered upon the said low marshy island, and has pretended to occupy the same in some manner, and has placed thereon a small shack or cabin under the belief, as this plaintiff has been informed and believes, that such island was government land, and with the intent and expectation, as plaintiff is informed and believes, that by so doing he could obtain some rights to the same, or to enter and secure the same from the government of the United States or from the state of Minnesota or the state of Wisconsin, but your orator avers that the said defendant Tallas has not now nor has he ever had any right, title, or interest or valid claim whatsoever in the said island or

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any part thereof, or in or to any part of the bed of such waters. That in the making of such improvements the government of the United States has deposited material from its dredging work near to the said so-called island, and has filled up the shallow waters therewith, and that by reason thereof and of the action of the waters in connection therewith, and by reason of the said improvement, that part of the original deep water channel through the said waters in front of plaintiff's lands has become filled up and is no longer navigable, and by reason thereof there is now more land appearing above the water in the locality of the said low marshy island than appeared formerly, and that part of said island is larger than it formerly was, and the said defendant Tallas has so placed his said cabin that by reason thereof, and of the matters and things hereinbefore set forth, he now intervenes between the said improved navigable and navigated channel of the said waters and the shore of the plaintiff's said lands, and between the said established harbor or dock line on the Minnesota side in front of plaintiff's lands and the shore of said lands, and therefore is infringing upon the riparian rights and privileges of your orator, which are incidental and appurtenant to his said lands and estate, and which, therefore, if persisted in, may operate to destroy valuable property rights of the plaintiff."

J. L. Washburn, for complainant.

L. C. Harris and Jacques & Hudson, for defendant Whiteside.

Daniel Cash and J. B. Richards, for defendant Tallas.

MORRIS, District Judge (orally, after stating the facts as above). After the careful, able, and exhaustive arguments of counsel in this case, and the complete threshing out and sifting of the questions here involved in nearly eight days of discussion by counsel, and between court and counsel, and of the cases bearing thereon, it seems to me that I am now able to form as correct a judgment on those questions, and to decide them correctly, as I can ever be. I do not think, therefore, that it will be necessary for me to take this case under advisement, but that I had better decide it now, and put you gentlemen at once upon the road to the Court of Appeals, to which court I apprehend it must go, no matter what may be my decision. I shall not attempt to review in detail the cases which have been so ably discussed by counsel, but shall only state the conclusions to which I have come as a result of the discussion.

Mr. Washburn in his argument has expressed a desire that I make a finding on the question of fact as to whether or not the waters here involved, lying between the shore line of the plaintiff on the one side and of the defendants Whiteside and Alexander on the other, are waters of a bay or arm of Lake Superior, that is, waters of Lake Superior, or waters of the St. Louis river. I do not think it necessary to do this, because in my view the result must be the same in either case. But I will say that it seems to me that the river certainly extends to a point below the waters here involved. And indeed, although these waters are designated on the maps of the government surveys as "St. Louis Bay," yet, in view of the language used in the enabling act (section 1) as to the northerly and northwesterly boundary of the state of Wisconsin, and in view of the map therein referred to (Nicollet's map), a copy of which is here in evidence, I would feel obliged to find that the St. Louis river extends to what is commonly known as the "Wisconsin entry," between Minnesota Point and Wisconsin Point, and

that its mouth is there. But, as I have before said, I do not think for the purposes of this case a finding on that question is necessary, because the result, as I view it, must be the same whether these waters are river waters or waters of an arm of Lake Superior. Whatever the character of these waters, the boundary line between Wisconsin and Minnesota as defined by this enabling act would, in my opinion, under the decisions read and commented upon by Mr. Harris, follow the main navigable channel between Big Island and the Minnesota shore; that is, between the shore line of the plaintiff on the one side and the shore line of the defendants Whiteside and Alexander on the other.

The first question arising here is the question of the jurisdiction of this court to entertain this suit as between the plaintiff and the defendant Whiteside (as I understand it, it has been stipulated by counsel for Alexander that the decision as to Whiteside shall be binding as to Alexander), and that question depends upon whether or not the locus in quo here involved—that is, the land under water and the island formed thereon, opposite Norton's shore line, lying between the improved or government channel and what was formerly the natural channel—is now in the state of Wisconsin or in the state of Minnesota. I have no doubt that prior to the making of this improved or government channel this land was in Wisconsin, and the question is, Has it by the construction of this improved or government channel, under the paramount authority of the general government to control these waters and to improve the same (of which there can be no doubt) been transferred from the state of Wisconsin to the state of Minnesota?

[1] I think there can be no doubt, under the decisions, that if the original or natural channel had been shifted or changed by natural causes so that this land would now lie on the Minnesota side of said natural channel, such change or shifting of the channel would have transferred it to the state of Minnesota, and it seems to me that the principles underlying those decisions and their reasoning, so far as it is logical and correct, would cause the same result to follow from the government improvement. It should always be remembered that this channel made by the government is an improvement of the natural channel, under the paramount authority of the government to protect, preserve, and improve the navigation of all these waters. A glance at the maps will show that while portions of the natural channel remain, and that such portions are still navigable by boats of heavy draught, still this channel no longer exists as a continuous channel, and such portions are mere offshoots, or spurs, or pockets, diverging from the improved channel; as, for instance, the portion of the former natural channel now lying behind the island at the locus in quo and between it and the Minnesota shore. In other words, the improved or government channel has been made in lieu of or as a substitute for the natural channel, and for the purpose of improving the navigation of that channel. The old or natural channel has been in effect straightened and rendered more suitable for the purposes of navigation by craft of all descriptions and sizes, and thus the improvement comes fairly and justly within the power of the government. I can see no valid or just reason why the same result as to the boundary between the states

should not follow from the making of this improved channel as would have followed if the change had been brought about by natural causes. So that I think this question of jurisdiction must be answered in the affirmative.

That being determined, the next question is, To whom does the right to use, occupy, and improve the locus in quo belong—to the plaintiff Norton, or to the defendant Whiteside? The answer to this question must, in my opinion, be the same as to this island which has been formed as it would have been if the land had remained under water, as it was at the time of the government survey.

[2] The right or title to use and occupy the island arises from the right or title to use and occupy the submerged land on which it is formed, and the character and extent of that right or title always remains the same. As to this right, I think the decisions in Minnesota and Wisconsin are in practical effect the same.

[3] While this right, either as to the submerged land or an island formed thereon, is a property right, a valuable right, and a right which can be severed from the shore land by the owner thereof and deeded away to others, yet it is a right arising out of and existing by virtue of the riparian proprietorship, and its nature always continues the same, whether severed from the riparian proprietorship or not. In the brief of Mr. Washburn a case is cited, *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126, in which Mr. Justice Harlan, speaking of the rule in Michigan, uses the following language:

"But it is equally well settled in that state that the rights of the riparian owner are subject to the public easement or servitude of navigation [citing cases]. So that whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to the fast land, which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

This is clear language, and, while it is now settled that grants of public lands bounded by streams or other waters must be construed as to their effect according to the decisions of the state in which the lands lie, it throws, to my mind, light upon all the state decisions. The confusion in these decisions, where any confusion or doubt may seem to exist, arises, I think, from what Judge Jaques has aptly called the terminology of the decisions. I do not know but that I may thus have caused some confusion or doubt in the decision in *Hobart v. Hall* (C. C.) 174 Fed. 433. Judge Jaques, as I understood him, claimed in his argument that the decisions in Minnesota and Wisconsin were in practical accord on the questions here involved, and I think in this he

was correct. I think the result of those decisions may fairly be summarized as follows:

[4] That a grantee from the government of lands bounded by a stream navigable in fact takes the absolute title in fee to the water's edge; that the state has title to the soil or land under the water between the edge of the stream and the middle thread of the main navigable channel thereof in its sovereign capacity, in trust for the purpose of protecting, preserving, and improving the public right of navigation; that such right, title, or ownership, whatever we may call it, of the state is paramount, but not proprietary, or one under which it can alienate or convey any portion of said soil or land under water to a stranger, but, while paramount, is a limited title or ownership, limited to that purpose, and extending no further; that the riparian owner has also a right or title to such soil or land under water opposite his shore land, between the edge of the stream and the middle thread of the main navigable channel thereof, which, though subject and subordinate to this title of the state, is proprietary, and exclusive as to all others than the state or the general government, and even as to the state or general government exclusive, except as they may act by their properly constituted authorities in protecting, preserving, or improving the public right, and which he can convey to another either in whole or in part; that the limit to this private right, so long as it exists, is imposed by the public right and by that only, and the private right, so long as it exists, exists to the extent beyond which it would be inconsistent with the public right and with that only; that under this right, title, or ownership, whatever we may call it, the riparian owner or his grantee has the exclusive right to reclaim, occupy, and use for any purpose not inconsistent with the public right such soil or land under water or any part thereof out to the main navigable channel, subject only to such paramount right of the state or of the general government; and that the same right or title would exist as to any island between the shore line of the riparian proprietor and the main navigable channel of the stream, whether such island exists at the time of the survey and is omitted therefrom in good faith and without palpable mistake as a negligible fraction, or is afterwards formed by the gradual action of the waters. But, as said by Mr. Justice Harlan, this is a qualified right or title, if we may call it a title. It is not an indefeasible right or title.

It is one which, while it may be granted to another, and which, while it exists, is exclusive and will support an action of ejectment, may yet be terminated and defeated even against the will of the riparian proprietor or his grantee. It may be defeated by a change in the channel of the river either from natural causes or by the action of the state in the exercise of its paramount authority. And over and above, and paramount to, this right or title of the state and this right or title of the riparian proprietor is the right of the general government on interstate waters, such as those here in question, to protect, preserve, and improve the navigation of those waters.

[5] I think there can be no doubt that prior to the construction of this improved channel by the government Whiteside had this right on the south side and up to the natural navigable channel, which would

include the locus in quo, and that Norton's right extended only to this natural navigable channel on the north side. But I think that under the principles of the decisions and the reasoning thereof, if this natural navigable channel had been changed or shifted by natural causes so as to throw the locus in quo to the north side of said channel, that Whiteside's right would have ceased or been defeated, and that then this right would have belonged to Norton by virtue of his riparian proprietorship on the north or Minnesota side. In other words, that by the shifting of the channel the right or title, call it what you may, would have shifted; and this whether the locus in quo still remained land under water or had become in whole or in part an island. I think, too, that under the principles and reasoning of the adjudicated cases the same result would follow from the change in the channel by the government improvement thereof, made, as it was, under the paramount authority of the government. The holder of this right, arising from and existing by virtue of riparian proprietorship, holds it always with knowledge and notice of this paramount authority in the government; and whatever he may do, or whatever improvement he may make, will be done in the face of this knowledge and notice, and, having this knowledge and notice, he has no just right to complain.

A different question might arise, and the principle of estoppel might be invoked against the state or general government, if prior to the making of an improvement by the shore owner or his grantee, in the exercise of this right of use and occupancy, a harbor or dock line had been established by proper governmental authority. But that question does not arise here.

It seems to me that the foregoing conclusions solve equitably and without substantial injustice to any one the questions here involved, and will solve all similar questions which may arise on these waters, and will prevent innumerable complications which might otherwise exist. I think they are fully and fairly supported by the principles laid down in the decisions and the reasoning thereof, and if in doubt I would so hold in the absence of direct and controlling judicial authority. It seems to me, therefore, that the relief asked for in the bill by the complainant as against the defendants Whiteside and Alexander should be granted.

[6] As to the defendant Tallas, it appearing by the evidence that he is in the actual possession of the locus in quo or a part of it, it seems to me that, under the decisions cited and read by Mr. Richards, the court is without jurisdiction to determine those rights in this suit, but that they must be determined in an action at law. As to him, therefore, it seems to me that the bill will have to be dismissed.

Counsel for complainant will prepare a decree in accordance with the foregoing views, and the terms of that decree can be hereafter settled by the court, upon notice to all the counsel.



OREGON-WASHINGTON R. & NAVIGATION CO. v. WILKINSON et al.  
(SPOKANE, P. & S. RY. CO., Intervener).

(Circuit Court, E. D. Washington, E. D. May 6, 1911.)

No. 1,379.

**1. EMINENT DOMAIN (§ 194\*)—PETITION—REQUISITES.**

Under Rem. & Bal. Code Wash. § 921, providing that a condemnation petition shall set forth, among other things, the object for which the land is sought to be appropriated, failure of the petition to sufficiently allege such object is not a jurisdictional defect, but is curable by amendment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 523; Dec. Dig. § 194.\*]

**2. EMINENT DOMAIN (§ 178½\*)—ABATEMENT OF PROCEEDINGS—TRANSFER OF INTEREST.**

Under Rem. & Bal. Code Wash. § 193, providing that no action shall abate by the death or disability of a party or by a transfer of any interest in the action if the cause of action survives, a transfer of the property of a railroad company to another did not abate condemnation proceedings instituted by the transferring company.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 486; Dec. Dig. § 178½.\*]

**3. EMINENT DOMAIN (§ 185\*)—APPEARANCE—JURISDICTION.**

Where intervener appeared in condemnation proceedings and invoked the jurisdiction of the court in a district other than that in which it resided, he could not thereafter object to the court's jurisdiction because there had been a change in the name of the petitioner without otherwise impairing or affecting the court's jurisdiction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 499; Dec. Dig. § 185.\*]

**4. MONOPOLIES (§ 21\*)—RIGHTS AND LIABILITIES—CONDEMNATION OF LAND.**

The state having reserved to itself the right to determine when and under what circumstances a consolidation between railroads shall be permitted by Laws Wash. 1909, c. 196, it was no defense to proceedings to condemn land for a railroad right of way that petitioner was an illegal consolidation of two other railroads in violation of section 1 of that act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. § 21.\*]

**5. EMINENT DOMAIN (§ 56\*)—RAILROAD RIGHT OF WAY—CONDEMNATION—NECESSITY.**

Where a railroad company authorized to condemn land seeks to condemn particular property for a right of way for terminal facilities, it was no answer, in the absence of fraud or bad faith, that there was no necessity for condemning the particular property because some other location might be made or some other property obtained by agreement which would answer petitioner's purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.\*]

**6. EMINENT DOMAIN (§ 55\*)—RIGHT OF WAY—LOCATION.**

A railroad's right to condemn land for terminal facilities dates from the location and adoption of the land by the railroad company for that purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 135; Dec. Dig. § 55.\*]

**7. EMINENT DOMAIN (§ 55\*)—RIGHT OF WAY—TERMINAL FACILITIES—USE OF LAND.**

Where, at the time petitioner's predecessor located and adopted certain land in controversy for terminal facilities, the land was the private prop-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

erty of another railroad company, but was not then devoted to any public use and had not been during 10 or 12 years preceding, and there was nothing to indicate that the company owning the land intended to use it for public purposes at any time in the immediate future, if at all, the land was subject to petitioner's right to condemn as against the rights of another corporation attaching more than a year thereafter.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 135; Dec. Dig. § 55.\*]

Condemnation proceedings on petition of the Oregon-Washington Railroad & Navigation Company, substituted for the North Coast Railroad Company, against Randolph A. Wilkinson, the St. Paul, Minneapolis & Manitoba Railway Company, the Great Northern Railway Company, and the Spokane, Portland & Seattle Railway Company, intervener. Decree for petitioner.

Danson & Williams and Hamblen & Gilbert, for petitioner.

F. V. Brown and Edward J. Cannon, for respondents.

Carey & Kerr, for intervener.

RUDKIN, District Judge. This is a proceeding to condemn certain real property for railroad purposes. The tract sought to be condemned lies immediately south of Ide avenue, in the city of Spokane, is approximately 1,100 feet in length, east and west, by 400 feet in width, north and south, and contains  $11\frac{83}{100}$  acres. Ide avenue is a public street of the city, 50 feet in width, running south of and parallel with the tracks of the Great Northern Railway Company and about 100 feet distant therefrom, with a tier of lots used principally for warehouse purposes intervening. This tract, together with other lands, was acquired by the Great Northern Railway Company, or for its use and benefit, in the year 1896 or 1897; the date of the conveyance or the description of the other lands acquired not appearing in the record. It appears from the testimony, in a general way, that the land was originally acquired for Great Northern terminals in the city of Spokane; but, from the date of its acquisition until conveyed to the Spokane, Portland & Seattle Railway Company 11 or 12 years later, it was never used by the Great Northern Company for any public purpose, nor is there any testimony tending to show that that company intended to so use it within any reasonable period in the future, if at all.

In the year 1905 the Great Northern Railway Company and the Northern Pacific Railway Company organized the Spokane, Portland & Seattle Railway Company to construct a line of railway from the city of Spokane to the city of Portland by way of the Columbia river, for the purpose of relieving the congestion of traffic on the two old lines over the Cascade Mountains between Eastern and Western Washington. One-half of the stock in the new company is owned by each of the old companies, and the new company since its organization has been, and is now, under the joint management and control of the two parent companies. The new line to Portland was opened in the fall of 1908, and on or about the 11th day of November of that year the president of the Great Northern Railway Company and the president of the Northern Pacific Railway Company took up the ques-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of acquiring terminals for the new company in the city of Spokane. It was at that time agreed that the land in controversy should be conveyed by the Great Northern Railway Company, or its then holder, to the Spokane, Portland & Seattle Railway Company, for terminal purposes in the city of Spokane; but the consideration was not agreed upon until later, and the deed was not executed until the 17th day of November following.

In the early part of the year 1906, the North Coast Railroad Company was incorporated for the purpose of constructing a line of railroad between the cities of Spokane and Seattle, as well as branch lines between other points in the state of Washington. Some time prior to the 23d day of May, 1907, the tract in controversy was surveyed by the North Coast Railroad Company as a part of its terminals in the city of Spokane, and on the last-named date this survey was adopted by the board of trustees, and the proper officers of the company were authorized to acquire the land by purchase or condemnation. On the 24th day of September, 1907, the president of the North Coast Railroad Company informed the president of the Great Northern Railway Company of the selection of this tract, by letter, and took up with him the question of its purchase. On December 20, 1907, the president of the Great Northern Railway Company replied as follows:

"On September twenty-fourth last you wrote me a letter regarding some property in Spokane. I held your letter until I could make an effort to ascertain something definite as to the North Coast Railroad. Having been west and not having satisfied myself as to what interests you represent, I do not care to enter into any negotiations regarding any property. I always like to know what interests I am dealing with."

On the 24th day of September, 1908, the president of the North Coast Railroad Company again informed the president of the Great Northern Railway Company that his company was ready to take up the question of the purchase of this property, and asked him to fix the price at an early day. He was informed by the president of the Great Northern Railway Company in reply, under date of October 1, 1908, that the matter had been referred to Mr. Gilman, one of the company's attorneys at Seattle. The matter was then taken up with Mr. Gilman, but nothing was accomplished through these negotiations. The present proceeding was thereupon commenced in the superior court of Spokane county on the 14th day of November, 1908, by the filing of a petition and a notice of lis pendens. On the 19th day of December, 1908, the proceeding was removed to this court on the petition of the defendants, because of a diversity of citizenship. On the 8th day of March, 1909, the Spokane, Portland & Seattle Railway Company filed its petition in intervention in this court as the successor in interest to the Great Northern Railway Company, and asserted its right to retain the property by reason of its purchase from the Great Northern Railway Company and its subsequent adoption for railroad terminals in the city of Spokane.

Testimony was taken before Judge Whitson during April and May of 1909, and before the master in chancery during August of 1909; but no further steps seem to have been taken in the proceeding until

February of this year. In the meantime the North Coast Railroad Company and the Oregon Railroad & Navigation Company consolidated their lines and proposed lines in the state of Washington, under the name of Oregon-Washington Railroad & Navigation Company. The two consolidating companies conveyed all their property and property rights to the new company, and the new company was authorized by its board of directors to prosecute to final judgment all pending condemnation suits. Since the consolidation the old Oregon Railroad & Navigation Company lines have been known as the "First Division" and the old North Coast lines as the "Third Division" of the Oregon-Washington Railroad & Navigation Company. As soon as these conveyances became a matter of record, the intervener moved to dismiss the condemnation proceeding, on the ground that the petitioning company had parted with all interest in its former holdings, for want of prosecution, and on the further ground that the intervener had its principal place of business at Vancouver, in the Western district of Washington, and not at Spokane, in the Eastern district. On the other hand, the Oregon-Washington Railroad & Navigation Company moved that it be substituted as petitioner for and in the place of the original petitioner and as its successor in interest. The motion to dismiss was denied, leave to substitute was granted, and further testimony was taken on the questions of public use and public necessity. The case is now before the court for final determination on these preliminary questions.

Before taking up the merits of the case, however, I will advert briefly to some of the preliminary motions and objections interposed and to the rulings thereon.

[1] At the inception of the hearing before Judge Whitson an objection was interposed to the petition on the ground that it did not allege or show that the property was sought to be taken for a public use. This objection was sustained; but the petitioner was granted leave to amend, and the amendment was accordingly made. There was no error in this ruling.

Section 921, Rem. & Bal. Code, provides that any corporation authorized by law to appropriate land, real estate, premises, or other property, for right of way or any other corporate purposes, may present its petition to the superior court of the proper county, in which the land, real estate premises, or other property sought to be appropriated shall be described with reasonable certainty, setting forth the names of each and every owner, incumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money. The petition in this case alleged that the petitioner was authorized by law to appropriate lands, real estate premises, and other property, for corporate purposes, described the land sought to be taken with reasonable certainty, set forth the names of the owners and parties in interest as required, and the object for which the land was sought to be appropriated. If it be conceded that the statement of the object for

which the land was sought to be appropriated was deficient, the defect was not jurisdictional and was curable by amendment. Rem. & Bal. Code, § 303; State ex rel. Merriam v. Superior Court, 55 Wash. 64, 104 Pac. 148.

[2] Nor did the action abate by reason of the transfer made by the original petitioner to the Oregon-Washington Railroad & Navigation Company while the action was pending. Section 193, Rem. & Bal. Code, provides that:

"No action shall abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest."

This section has been construed to extend to and include condemnation proceedings. California Central R. R. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599; Bradley v. Northern Pac. Ry. Co., 38 Minn. 234, 36 N. W. 345.

[3] The motion to dismiss for want of prosecution was not urged in argument, and the motion based on the residence or place of business of the intervener is not well taken. The intervener appeared in the Eastern district and invoked the jurisdiction of the court, and is now in no position to object to that jurisdiction simply because there has been a change in the name of the petitioner without otherwise impairing or affecting the jurisdiction of the federal court.

[4] On the final argument of the case it was urged that the consolidation of the properties of the Oregon Railroad & Navigation Company, and the North Coast Railroad Company, violates section 16 of article 12 of the state Constitution, which declares that "no railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a competing line," and section 1 of the act of March 18, 1909 (Laws of Washington 1909, p. 698), which contains a similar prohibition. I doubt very much whether these two companies owned competing lines, within the meaning of these provisions; but upon that question I express no opinion, for I am satisfied that the question of their violation cannot be raised by a private property owner in a condemnation proceeding. The section of the act of 1909, above cited, provides, among other things, that "any such consolidation shall be approved by the State Railroad Commission." The state thus reserved to itself the right to determine when and under what circumstances a consolidation should be permitted, and did not leave the question of the enforcement of the Constitution or the statute to private individuals or rival corporations. Leavenworth County v. Chicago, etc., Co., 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064; Rogers v. Nashville, etc., Co., 91 Fed. 299, 33 C. C. A. 517; Jones v. Missouri, etc., Co. (C. C.) 135 Fed. 153; Weed v. Gainesville, etc., Co., 119 Ga. 576, 46 S. E. 885; Phinizz v. Augusta, etc., Co. (C. C.) 62 Fed. 678; Bell v. Pennsylvania, etc., R. Co. (N. J.) 10 Atl. 741.

In Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950, Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed.

837, *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, and *East St. Louis Connecting Ry. Co. v. Jarvis*, 92 Fed. 735, 34 C. C. A. 639, cited by the intervener, the actions were brought on written contracts or leases, the consideration for which was a void or illegal transfer or lease, and of course it was open to the defendants to challenge the legality or validity of the contract in suit. These cases are no authority for the broad proposition that a stranger to such a contract may raise the objection in a collateral proceeding.

[5] The final question in the case is: Is the petitioning company entitled to appropriate this land at all, and, if so, is it so entitled against the claims of the intervener. The testimony on this branch of the case covers a wide range, and I have neither the time nor the disposition to review it at length. As I view the law, much of it relates to matters which are not proper subjects for judicial cognizance—at least, in the absence of fraud or bad faith. Whether there is need for another railroad in the territory traversed by the old North Coast lines; whether a railroad company should maintain its make-up and break-up yards within or without the city limits; whether it should have one or two freight terminals or freight yards; and whether its terminals and freight yards should be connected or disconnected—are all questions which the company must ordinarily determine for itself, for, if a private individual or another railroad corporation whose property is sought to be taken be permitted to determine these questions for it, nothing but confusion can follow, and railroad construction will become well-nigh impossible.

"It may be objected that there is no necessity for condemning the particular property, because some other location might be made or some other property obtained by agreement. But this objection is unavailing. Except as specially restricted by the Legislature, those invested with the power of eminent domain for a public purpose can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts." 1 Lewis on Eminent Domain, § 393.

This rule prevails in this state, notwithstanding the fact that the question of necessity is submitted to and determined by the courts under the state statutes. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 600, 73 Pac. 670; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 520, 90 Pac. 663; *State ex rel. Milwaukee Terminal Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175.

I will say in conclusion that I find from the testimony that there is reasonable necessity for the condemnation and appropriation of this property on the part of the petitioning company, and that the property is not exempt from condemnation by reason of anything contained in the petition in intervention or in the proofs offered in its support.

[6] The North Coast Railroad Company located and adopted the land for terminal purposes in May, 1907, and its claim or right relates back to that date. *Nicomien Boom Co. v. North Shore, etc., Co.*, 40 Wash. 315, 82 Pac. 412; *Columbia Valley R. R. Co. v. Portland & Seattle R. Co.*, 49 Wash. 88, 92, 94 Pac. 918; *State ex rel. Kettle*

Falls, etc., Co., v. Superior Court, 46 Wash. 500, 506, 90 Pac. 650; State ex rel. Cascade, etc., Corp. v. Superior Court, 53 Wash. 321, 101 Pac. 1094; Mills, Eminent Domain (2d Ed.) § 4.

[7] At that time the property sought to be taken was the private property of the Great Northern Railway Company. It was not then devoted to any public use, had not been during the 10 or 12 years preceding, and, as heretofore stated, there is nothing in the testimony to indicate that that company intended to use it for public purposes at any time in the immediate or near future, if at all. In fact, the testimony indicates rather the contrary. The rights of the intervening company did not attach until as late as November 11, 1908. The property cannot be used by both corporations for the same purpose. There is no controlling necessity which would warrant the court in taking the property from the company having the prior right and awarding it to the other. And the prayer of the petition should therefore be granted.

Let an order be entered accordingly.

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SLADE v. MASSACHUSETTS COAL & POWER CO.

(Circuit Court, D. Massachusetts. May 4, 1911.)

No. 800.

1. RECEIVERS (§ 174\*)—ACTION AGAINST—LEAVE OF COURT—FORECLOSURE.

Where a receiver had been appointed for a corporation mortgagor, the mortgagee could not take any step towards foreclosing the mortgage after default while the receivership continued, without obtaining permission of the court in which the receivership proceedings are pending.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-343; Dec. Dig. § 174.\*]

2. CORPORATIONS (§ 481\*)—MORTGAGE FORECLOSURE—INJUNCTION.

Where mortgagees with notice of receivership proceedings against the corporation mortgagor instituted foreclosure proceedings without permission of the court in which the proceedings were instituted, such proceedings will be enjoined.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 481.\*]

3. CORPORATIONS (§ 481\*)—INSOLVENCY—RECEIVERS—MORTGAGE FORECLOSURE.

Where a corporation purchased property having an assessed value of \$1,720 for \$4,200, paying its grantor \$3,200 in cash, and giving a purchase money mortgage for the remaining \$1,000, and at the time of insolvency only the principal and six months interest remained due, it being probable that the corporation had a valuable equity in the property, and the receiver having applied for leave to sell all the property, the mortgagee would not be permitted to sell on foreclosure pending a receiver's sale; there being nothing to justify apprehension of loss to the mortgagee by such delay.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 481.\*]

In Equity. Suit by Edward Slade against the Massachusetts Coal & Power Company. Application by a receiver for an injunction restraining Harmon Carlson and another from selling certain land belonging to defendant company under mortgage foreclosure. Granted.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 188 F.—24

C. A. Barnes for mortgagee.  
Warren, Garfield, Whiteside & Lamson, for receivers.

DODGE, District Judge. The bill in this case, filed October 24, 1910, is brought by a creditor of the defendant company on behalf of himself and all other creditors and stockholders. It represents that the defendant owns lands of considerable extent in the town of Mansfield, supposed to contain coal and to be valuable for the purpose of mining the coal. It further represents that some of the real estate is subject to mortgages, a list of which is given, with the names of the mortgagees or holders and the amounts secured, amounting in all to almost \$17,000. It goes on to state that the company owes upward of \$18,000 in addition to the amounts secured by mortgage. It then alleges that the company has no money or assets readily convertible into money with which to meet its obligations and operating expenses, but that the true value of its assets is believed to be in excess of all its debts; that legal proceedings and foreclosures are threatened, which will result in a loss to the unsecured creditors of any equity which may exist in the mortgaged premises, and in waste, depreciation, and loss of so much of the company's assets as is **not** subject to mortgage. The bill prays in the usual way for the appointment of a receiver vested with the usual powers, the administration by the court of the company's assets, the enforcement of the liens and rights of all creditors as finally ascertained, and for a sale of the assets and distribution of the proceeds whenever this can be accomplished without undue sacrifice. The defendant company having answered the bill and raising no objection, a receiver was appointed October 25, 1910. From a preliminary report filed by him November 3d it appears that the company owns about 1,700 acres of land in all, about one-third thereof being subject to the mortgages referred to above, which have cost the company about \$70,000 in all. Among the mortgages on the company's property specified in the bill appears a mortgage for \$1,000 upon 35 acres of land to Harmon Carlson of Mansfield. The company acquired this 35 acres, as is not disputed, from said Carlson for the agreed price of \$4,200, paying him \$3,200 at the time of purchase, and giving this mortgage for the remaining \$1,000. The mortgage is dated August 27, 1909, bears interest at 5 per cent., payable semiannually, and became due February 27, 1911, upon which date the amount of the mortgage, with six months' interest thereon, was due, all previous interest having been paid. The mortgagee has failed to pay the taxes levied upon the property for the year 1910, which amount to \$29. On December 31, 1910, the court ordered all creditors of the company to make proof of their claims before the receiver on or before January 28, 1911, or to be forever barred from asserting the same. Due notice was given of the order, and in compliance with it Harmon Carlson presented to the receiver a proof of claim, sworn to before him January 10, 1911, setting forth that the company owed him \$1,000, the consideration being the outstanding mortgage given him August 27, 1909. The receiver had previously (November 3, 1910) written Carlson referring to his recent appointment, assuring him that nothing was in-



tended which would affect the lien of the mortgage, asking for particulars of the dates when interest would be due and of the payments on account to date, and stating that for the present it would be impossible to meet promptly the interest as it accrued. Carlson communicated the particulars requested in a letter dated November 7, 1910, acknowledged by the receiver November 15, 1910. Six months' interest on the Carlson mortgage became due February 28, 1911. All previous interest had been paid. It is not disputed that shortly after February 28, 1911, Carlson published an advertisement of a foreclosure sale to take place under the mortgage April 3, 1911. There has been, however, as yet no entry to foreclose. On March 29, 1911, the receiver filed the present petition, in which he set forth that the Carlsons as mortgagees were intending to foreclose and sell; that they had advertised the sale as above; that the mortgaged property was assessed for \$1,720; that though the defendant had not paid taxes on the property for 1910, amounting to \$20, there would be no tax sale for several months; that unsecured claims had been proved to the amount of \$19,617.31; and that the Carlsons as secured creditors had proved a claim for \$1,000, and that they had no authority from the court to foreclose or advertise sale. The receiver prayed that they be restrained from selling or taking possession. After summons to show cause why the prayer of this petition should not be granted, the Carlsons filed an answer, which sets forth that the receiver had been notified that principal and interest would be insisted upon when they became due February 28, 1911; that the decree entered October 25, 1910, though it appointed a receiver and forbade every one to interfere with the performance of his duties, was made upon a representation that the property was to be operated and developed, whereas there had been no development and development work had been entirely stopped, so that the occasion for the order had passed. The answer further sets up that as farm property, in the present state of the market, the mortgaged premises are not worth more than the face of the mortgage, with taxes and costs of foreclosure.

[1] The mortgagees admit that they have published notice of sale as alleged by the receiver. They cannot be allowed to take any step toward a foreclosure of their mortgage while the receivership continues, without first obtaining the permission of the court. This is too well settled to admit of any doubt. *Wiswall v. Sampson*, 14 How. 52, 66, 14 L. Ed. 322; *In re Tyler*, 149 U. S. 164, 181, 13 Sup. Ct. 785, 37 L. Ed. 689; *Hitz v. Jenks*, 185 U. S. 155, 166-169, 22 Sup. Ct. 598, 46 L. Ed. 851. Therefore, the restraining order now in force was properly issued, and the mortgagees must be enjoined, as prayed for by the receiver, from selling the mortgaged property or interfering in any way with his possession of it until they have obtained the court's permission. If the publication of their notice was in any sense in violation of the decree appointing the receiver, it is unnecessary to take further notice of the fact; no attempt having been made to proceed with their proposed sale.

[2] In the mortgagees' answer to the receiver's petition alleged facts are set up which might be relied on for the purpose of inducing

the court to allow them to realize on their security after having properly appeared for that purpose in the receivership suit. The answer concludes with a prayer for permission to "continue foreclosure proceedings as speedily as possible." If foreclosure proceedings have been begun, they have been begun without right. These mortgagees would be in any case chargeable with notice of the decree establishing the receivership, and, having appeared as secured creditors in the suit, they cannot deny actual notice. No continuance of proceedings already commenced can be allowed.

[3] Disregarding all informalities, however, is the case one in which the court is bound to permit these mortgagees to realize on their security without further delay, under the circumstances presented? While the custody of the property is at present in the court, and not to be disturbed except by order of the court, it is retained for the benefit of all parties interested in the property according to their respective interests. These mortgagees have a vested contract lien, which the court will not disturb. No such exceptional circumstances appear as might justify the court in refusing it priority over all other claims which might reduce the amount of the mortgagees' security. If the property is insufficient or not more than sufficient to cover the claims secured, no delay in allowing the mortgagees to deal with it according to the terms of their mortgage can be justified. They are in that case the only parties whose interest in this parcel of the company's land has any claim to consideration, and this is none the less true because of the fact, which appears from affidavits and a plan submitted by the receiver, that the mortgaged parcel of land, by reason of its situation near one of the defendant company's shafts and surrounded by its other land, is peculiarly important to any future continuance of its mining enterprise as a whole. The unsecured creditors and stockholders cannot ask upon these grounds that the mortgagees' interest be sacrificed for their benefit. *Gay v. Hudson River, etc., Co.* (C. C. A.) 184 Fed. 689. But there is strong reason to believe that a substantial and valuable equity exists in the parcel referred to over and above the \$1,000, with interest from February 27, 1911, which the mortgage secures. Although the mortgagees' answer states that "as farm property, in the present state of the market for farms in Mansfield, said property is not worth more than the face of said mortgage, taxes, and costs of foreclosure," they produce no disinterested evidence to that effect, while on the other hand the affidavit of Hall, a person experienced in Mansfield land values, estimates the value at \$2,500 at least, the tax collector's affidavit shows its assessed value to be \$1,720, and, as has been stated, the mortgagees received \$3,200 for it from the defendant company in addition to the \$1,000 secured upon it. To the extent of the excess of value above the mortgagees' claim, there is an interest available to other parties in the proceedings which it is part of the court's duty to protect, so far as this may be done without unjustly disregarding the mortgagees' rights. The extent to which the court can go in this direction is obviously limited, but I am satisfied that it is not bound at all events to let the mortgagees sell at once, regardless of the effect upon the value of the equity in the property.

These proceedings have for their object the liquidation of the company's affairs and the distribution of the proceeds of its property among its creditors. That they cannot all be paid in full appears to be the probable result. The receiver, after an attempt to arrange for the further development of the mining operations undertaken by the company, has now asked for leave to sell all its property, and notice of the hearing upon this application has been given for May 8, 1911. The further proceedings to be taken in the case will therefore be analogous in their nature to bankruptcy proceedings. This court, or the bankruptcy court exercising its powers as a court of equity, might, for the purposes of such proceedings, sell this parcel or any of the company's land freed from incumbrances, transferring the mortgagees' lien to the proceeds, as declared by the Court of Appeals for this circuit in *Re New England Piano Co.*, 122 Fed. 937, 59 C. C. A. 461. In doing this, though it would afford the mortgagees' prior rights every possible protection, it would not be bound to sell at the time insisted on by the mortgagees. It may, therefore—and the bankruptcy court not infrequently does—restrain a mortgagee for a reasonable time from commencing foreclosure proceedings. *Re Pittelkow* (D. C.) 92 Fed. 901, 904. When this is done, it is done for the purpose of preventing a sacrifice of the value of the equity, but avoiding at the same time any real detriment to the mortgagee. If this parcel of land is sold at once, it will have to be sold apart from the other lands and property of the company, in connection with which there is reason to believe that it possesses a value lost when it is disconnected from them. The receiver, in the present situation, cannot be expected to protect the value of the company's interest at such a sale. At the receiver's sale of this parcel, subject to the mortgage, made in connection with his sale, under the court's order, of all the other lands and property belonging to the company, it seems to me reasonable to expect that a materially higher value may be obtained for the company's interest. The additional interest which will accrue upon the mortgage before the sale can take place will be inconsiderable in amount. There is nothing before me to justify the apprehension of loss to the mortgagees by merely delaying their foreclosure until after the receiver's sale. The time for that sale will be fixed within a few days, and in fixing it the interests of all parties will have to be considered and will prevent any long postponement. Under all the circumstances, I think I am justified in declining to allow any application for an immediate foreclosure.

The restraining order now in force, enjoining the mortgagees, as prayed for by the receiver, is to continue in force until the further order of the court.

## ST. LOUIS SOUTHWESTERN RY. CO. v. STUTTGART &amp; R. B. R. CO. et al.

(Circuit Court, E. D. Arkansas, W. D. May 4, 1911.)

No. 1,733.

## 1. EMINENT DOMAIN (§ 275\*)—RAILROAD CROSSING—ADEQUATE REMEDY AT LAW.

Complainant had no complete and adequate remedy at law which would preclude an injunction restraining defendant from constructing a railroad crossing over complainant's line at a specified point, where, in accordance with the proceedings taken for such crossing, it would be completed and the injury done before a hearing could be had in defendant's proceedings to condemn a right to cross.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 769-773; Dec. Dig. § 275.\*]

## 2. INJUNCTION (§ 16\*)—ADEQUATE REMEDY AT LAW.

To prevent a court of equity from interfering by injunction it is not sufficient that there is a remedy at law, but such remedy must be plain and adequate, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. § 16.\*]

## 3. EMINENT DOMAIN (§ 76\*)—CROSSING OVER RAILROADS—RIGHT TO CROSS—DETERMINATION—JURISDICTION.

Kirby's Dig. Ark. §§ 2955, 2956, provides that, where the determination of the questions in controversy in condemnation proceedings is likely to retard the progress of the work of the petitioning railroad, the court or judge in vacation shall designate an amount of money to be deposited by the company subject to the order of the court, and, on the deposit being made, may order that it shall be lawful for the company to enter on the lands and proceed with its work prior to the assessment and payment of damages for the use and right to be determined. Section 2962 authorizes one railroad to cross the tracks of another, and section 2963 provides that, if the corporations cannot agree upon the amount of compensation to be made or the points or manner of crossing, the same shall be ascertained and determined by a "court of competent jurisdiction" in the same manner as provided for the ascertainment of damages for a right of way for railroads. *Held* that, where the points or manner of crossing by one railroad over the tracks of another are in dispute, such dispute can only be determined after trial to a jury; and hence the court in vacation had no jurisdiction to authorize the petitioning company to cross complainant's railroad at a disputed point on depositing a specified sum for the payment of damages, to be subsequently ascertained.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 200-203; Dec. Dig. § 76.\*]

**In Equity.** Suit by the St. Louis Southwestern Railway Company against the Stuttgart & Rice Belt Railroad Company and others, to restrain defendant railroad company from crossing complainant's railroad at a specified point until there could be a hearing on said defendant's petition for condemnation of a right to cross at such place. On motion to dissolve a temporary injunction. Denied.

On January 27, 1911, the defendant, a railway corporation existing under the laws of the state of Arkansas, filed its petition in the state circuit court of Arkansas county for condemnation of a right to cross the railroad of the complainants herein near the city of Stuttgart, in this state. The writ was made returnable to the first succeeding term of that court, which was April 3, 1911. The court not being in session, the defendant on January 28, 1911, applied to the judge of the court in vacation for an order authorizing it to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cross the tracks of the complainant company with its tracks at the place set out in the petition. The judge on the same day made an order in conformity with the prayer of the petition granting the defendant the right to cross complainant's railroad at the place designated in the petition, and required it to deposit the sum of \$500 for the purpose of making compensation therefor. On February 16, 1911, the complainant filed with the clerk of the circuit court of Arkansas county, the court being still in vacation, its petition and bond for removal of the cause to this court, upon the ground that there was a diversity of citizenship, and that the amount in controversy exceeded in value the sum of \$2,000. The petition and bond are in proper form, but, the court not being in session, the order of removal was not made until the first day of the April term of said court, when the court made an order for removal, and thereupon the transcript was lodged in this court in due time. On February 17th, after the petition for removal had been filed in the state court, complainant filed its bill of complaint in this court, and asked for a temporary injunction until there could be a hearing had on the petition of the defendant for the condemnation of the right to cross complainant's tracks at the place designated. A hearing on the petition for the temporary injunction was had on February 23, 1911, when the parties consented that a temporary restraining order as prayed in the bill might be granted, with leave to defendant to move to dissolve it upon notice. Defendant now moves for such a dissolution upon the ground that the court is without jurisdiction, that there is no equity in the bill, and that the remedy at law is complete and adequate. The grounds upon which the aid of this court is invoked by complainant, after setting out the great injury complainant will suffer by reason of this crossing at the place authorized, are that the hearing of the condemnation petition and that for removal to this court could not be had until the meeting of the state circuit court in April; that in the meantime the defendants would cross the road and practically prevent complainant from doing the switching of its freight trains without cutting them in two; that the place of the contemplated crossing is practically within the yard limits of complainant in the city of Stuttgart, a town of several thousand inhabitants, and to have the crossing there would be very dangerous to human life if permitted on grade, and without an interlocking plant or some other safety device; that the water tank of complainant is near that place, and freight trains taking water at this tank are necessarily compelled to have a part of their cars on that part of the track where defendant seeks to cross; that to protect the lives of its employes and passengers, and also to protect its property, it will be necessary to install an interlocking plant there at great expense, and maintain and operate it at great expense; that by changing its line 1,000 feet east of the proposed track all of this could be avoided to a great extent. It is also charged that the act of the judge in making the order in vacation was without authority of law, and therefore it is wholly void. They being remediless at law, there being no court which could act on the condemnation petition or the petition to remove until April, the intervention of this court as a court of equity is necessary to prevent irreparable injury.

Bridges & Wooldridge, for complainant.

Thomas S. Buzbee, for defendants.

TRIEBER, District Judge (after stating the facts as above). [1] That there is no complete and adequate remedy at law is too clear for argument, for before a hearing can be had in the condemnation proceeding the crossing will have been completed and the mischief done. That courts of equity have power to grant at least temporary relief until there can be a determination of the right of the defendant to cross is undoubted. *Montana C. Ry. Co. v. H. & R. M. Ry. Co.*, 6 Mont. 416, 12 Pac. 916; *Railway Co. v. Railway Co.*, 91 Iowa, 16, 58 N. W. 918; *Atchison Street R. R. Co. v. Missouri Pacific Ry. Co.*, 31 Kan. 66, 3 Pac. 284; *National Docks, etc., Ry. Co. v. State*, 53 N.

J. Law, 217, 21 Atl. 570, 26 Am. St. Rep. 421; 3 Elliott on Railroads (2d Ed.) § 1125. As stated in Colorado, etc., *R. Co. v. Chicago, etc.*, Ry. Co., 141 Fed. 898, 73 C. C. A. 132:

"The aid of such a bill is recognized in courts of equity, and at times is highly remedial and proper to maintain the status quo and stay the hand of the alleged wrongful intruder from doing further acts upon the invaded premises, which if not wholly irreparable would likely produce complications, and inflict injuries difficult to remedy."

That injunction may lie in cases of this nature has been expressly determined by the Supreme Court of Arkansas in *Niemeyer & Daragh v. Little Rock Junction Ry. Co.*, 43 Ark. 111, and *Mountain Park Terminal Co. v. Field*, 76 Ark. 239, 88 S. W. 897.

[2] To prevent a court of equity from interfering it is not sufficient that there is a remedy at law. It must be plain and adequate, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Watson v. Sutherland*, 5 Wall. 74, 78, 18 L. Ed. 580; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *Twin City Power Co. v. Barrett*, 126 Fed. 302, 61 C. C. A. 288; *Castle Creek Water Co. v. Aspen*, 146 Fed. 8, 76 C. C. A. 516; *Butler Brothers Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167.

Without determining all the questions raised during the argument, there is one matter which in the opinion of the court is conclusive. By the act of the Legislature of the state approved April 28, 1873, provision was made for the exercise of the right of eminent domain by railroads. The act is digested in Kirby's Digest of the Statutes of Arkansas as sections 2947 to 2958. Sections 2955 and 2956 provide:

"Sec. 2955. Where the determination of questions in controversy in such proceedings is likely to retard the progress of work or the business of such railroad company, the court, or judge in vacation, shall designate an amount of money to be deposited by such company, subject to the order of the court, and for the purpose of making such compensation when the amount thereof shall have been assessed as aforesaid, and said judge shall designate the place of such deposit.

"Sec. 2956. Whenever such deposit shall have been made in compliance with the order of the court or judge, it shall be lawful for such company to enter upon such land and proceed with their work through and over the lands in controversy prior to the assessment and payment of damages for the use and right to be determined as aforesaid."

By an act approved March 20, 1883, digested as sections 2962 and 2963 of Kirby's Digest, provision was made for one railroad to obtain the right to cross the tracks of another railroad. These sections are as follows:

"Sec. 2962. Every railroad corporation created and organized under the laws of this state, or created or organized under the laws of any other state or the United States, and operating a railroad in this state, shall have the power to cross, intersect, join or unite its railroad with any other railroad now constructed, or that may hereafter be constructed, at any point on its route and upon the grounds and right of way of such other railroad company, with the necessary turn-outs, sidings and switches and other conveniences in furtherance of the object of its construction. And every railroad company

whose railroad is or shall be crossed, joined or intersected by any new railroad shall unite with the owners and corporation of such new railroad in forming such crossing, intersection and connection, and shall grant to such railroads so crossing, intersecting or uniting all the necessary facilities for that purpose as aforesaid.

"Sec. 2963. If the two corporations cannot agree upon the amount of compensation to be made for the purposes set forth in the foregoing section, or the points or manner of such crossing, junctions or intersections, the same shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right of way for railroads."

It will be noticed that while section 2955 expressly authorizes a judge in vacation to make an order authorizing a railroad to enter upon lands required for the right of way, section 2963 only confers the power to make an order to cross another railroad on "courts of competent jurisdiction." The order under section 2955 can be made by a judge in vacation, as all he is required to do is to designate the amount of money to be deposited, but that determination is not final, but must be ascertained upon final hearing by the court and a jury. The constitutionality of that section was upheld by the Supreme Court solely upon the ground that it is but an interlocutory order, and the final assessment has to be made by a jury, as prescribed by the Constitution. *Reynolds, Ex parte*, 52 Ark. 330, 12 S. W. 570.

[3] But if it is attempted to cross the tracks of another railroad under section 2963, if the points or manner of such crossing are in dispute, the statute provides that the same shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for rights of way of railroads. Under the latter section a very important matter has to be determined in addition to the compensation. The court must determine the point and manner of such crossing. Besides, a power in a judge to act in vacation in a matter of this nature is not only in derogation of the common law, but may prove very detrimental to the rights of the senior railway, and for this reason such a statute should be strictly construed; and, unless it clearly appears to have been the intention of the Legislature as expressed in the act to grant that power to the judges in vacation, judges would not be justified to assume it by implication. The determination of the place and manner of such crossing is of great importance, and, having been once granted and exercised by the railway company, that question would be disposed of, and the only question left for determination at the final trial by the jury would be that of compensation.

In *Denver & Rio Grande Ry. Co. v. Denver Railway Co.* (C. C.) 17 Fed. 867, 869, it was contended, as in the case at bar, that it is competent for the court to allow the defendant to go on constructing its road subject to such disposition as may be held proper at the final hearing. But the court overruled this contention, saying:

"It would be manifestly unjust to the defendant itself to countenance the building of the road now, when it may be that the court will afterwards change its mind in respect to this matter, and require the road to be removed and built somewhere else. What would be said if we should now and here give the defendant permission to go on and build its road as it shall choose, and

in six months from this time, on final hearing, declare all of it to be wrong, a mistake from the first, and that it would be the duty of the defendant to take up its track and put it somewhere else. I do not think that any court can go on in that way. This is a matter for final decision and determination, and as such there are questions which can only be considered upon final hearing."

In the opinion of the court a judge in vacation under the statutes of this state possesses no such power, and the order made authorizing the defendant to cross complainant's tracks at the place designated is therefore coram non judice and absolutely void. To maintain the status quo it is proper that the temporary injunction should remain, but, in order that no injustice may be done, the hearing on the petition pending on the law side of this court to cross will be speeded and set down for trial on May 15, 1911.

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UNITED STATES, for Benefit of O'BRIEN, v. SONDHEIM et al.

(District Court, D. Massachusetts. Aug. 8, 1910.)

No. 249.

1. DISMISSAL AND NONSUIT (§ 53\*)—MOTION—CONTENTS—GROUNDS.

A motion to dismiss should be based on grounds appearing from the writ and declaration, and cannot in strictness set up additional facts of record in the court.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 107; Dec. Dig. § 53.\*]

2. BANKRUPTCY (§ 387\*)—COMPOSITION—CONFIRMATION—EFFECT—"DISMISSED."

Bankruptcy Act July 1, 1898, c. 541, § 12e, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) declares that on confirmation of a composition the consideration shall be distributed as the judge shall direct and the case dismissed. *Held*, that "dismissed" as so used meant only that the court should proceed no further with the administration of the estate under the bankruptcy act, and not that no further proceedings in the case should be taken to terminate the same, and hence did not deprive the referee of jurisdiction conferred by section 22a(1) to thereafter pass on the accounts of the trustee, and, after allowing the same, direct that the trustee be discharged and the estate closed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 616; Dec. Dig. § 387.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2104, 2105.]

3. BANKRUPTCY (§ 373\*)—DISCHARGE OF TRUSTEE—EFFECT—LIABILITY ON BOND.

Where after confirmation of a bankrupt's composition, the referee entertained an application to settle and allow the trustee's account, and allowed the same and discharged the trustee without any objection or appeal by the bankrupt, he could not thereafter disregard or dispute such allowance in a suit on the trustee's bond to recover the amount in his hands at the time the composition was confirmed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 373.\*]

4. BANKRUPTCY (§ 373\*)—TRUSTEE'S ACCOUNT—ALLOWANCE—CONCLUSIVENESS.

Where a bankrupt did not object to the allowance of the trustee's account showing that \$895 in the trustee's hands at the date of confirmation of a composition had been lawfully expended during the bankruptcy

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



administration, and did not appeal from the order allowing it, he could not successfully claim in a suit on the trustee's bond that the amount so expended by the trustee was the bankrupt's property, and should have been returned to him on a confirmation of the composition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 373.\*]

5. BANKRUPTCY (§ 373\*)—ACTION ON TRUSTEE'S BOND — PREREQUISITES — ACCOUNTING.

Where a bankrupt's trustee had not absconded without settling his accounts, but his account rendered had been allowed, showing the expenditure of the amount demanded by the bankrupt in the administration of the estate, an order directing that the trustee should account, was a necessary prerequisite to an action on his bond to recover property belonging to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 373.\*]

Action by the United States, for the benefit of Dennis J. O'Brien, against Philip J. Sondheim and the American Surety Company. On motion to dismiss. Granted.

Joseph P. Lyons, for plaintiff.

A. K. Cohen, for defendants.

DODGE, District Judge. Dennis J. O'Brien was adjudged bankrupt in this court July 27, 1907. The defendant Sondheim was appointed and qualified as trustee of his estate August 6, 1907. The present suit is brought against him and the surety company upon his bond as trustee. The declaration alleges that certain property came into the defendant's hands as trustee of the estate, which he sold for \$895; that an offer of composition was confirmed by the court on October 6, 1908; that the bankrupt thereupon became entitled to the \$895 received by the defendant as above; that he has demanded it from the defendant, who refuses to pay it; and that the amount is now due the bankrupt from the defendants because of a breach of the conditions of their bond. The records in the bankruptcy case show, besides his appointment and qualification as above, that the defendant Sondheim filed a final account as trustee before the referee on October 12, 1908. This was after the confirmation of the composition offer, which was on October 6th, as alleged, but the creditors' final meeting, duly notified for October 2, 1908, was still pending, having been on that day adjourned to January 22, 1909. There was a further adjournment of the final meeting to May 11, 1909, on which day the trustee's account was approved and allowed, the trustee discharged, the meeting closed, and the case concluded. There was no attempt to review the order of the referee allowing the trustee's account, and the time has expired within which such a review might have been had. The account purports to show that the \$895 had all of it been devoted by the trustee to expenses of administration.

[1] The defendant's motion to dismiss sets up the above facts, which are facts of record in this court in the bankruptcy case referred to. Strictly speaking, it might be said that they do not support a motion to dismiss, which is only to be allowed upon grounds appearing from the writ and declaration. What the defendant here relies

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on does not so appear, but is established otherwise, namely by the records of the bankruptcy case. The plaintiff, however, has not objected on this ground, and both parties have argued the question whether the facts relied on, which are undisputed, require the dismissal of the plaintiff's action. I therefore consider that question without regard to the form in which it is raised. The bond sued on follows official form No. 25, and is conditioned that the defendant as trustee—

"shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee."

The only requirement in the bankruptcy act regarding the form of bonds to be given by trustees is that their bonds shall be "conditioned for the faithful performance of their official duties." Bankruptcy Act, § 50b.

[2] The plaintiff contends that section 12e of the act, providing that "upon confirmation of the composition the consideration shall be distributed as the judge shall direct, and the case dismissed," and section 70f, which provides that upon confirmation of a composition offered by a bankrupt "the title to his property shall thereupon revert in him," have the effect of making the trustee unconditionally and immediately liable to the bankrupt for all property of the estate in his hands at the moment of the confirmation, so that there has been a breach of the bond if the trustee has failed to pay or deliver to the bankrupt any such property upon demand. According to the plaintiff's contention, the confirmation of the composition on October 6, 1908, rendered all the subsequent proceedings before the referee null and void. Confirmation of a composition implies and conclusively establishes, according to this view, a previous final and complete settlement of all claims by the trustee upon the estate, so that he cannot thereafter be heard to assert any claim, lien, or charge to or upon it or any part of it. It seems to me clear that section 12e does not mean that after confirming a composition the court has lost all further power over the case except to distribute the consideration. The case is to be dismissed, but "dismissed" in this connection can mean no more than that the court is not to proceed further with its administration of the estate under the bankruptcy act. It does not mean that there is to be no longer any case before the court, as if the petition or the proceedings had been dismissed under sections 3c, 18d, 18e, 58a (8), or 59d, 59g. Since the consideration must in every case remain to be distributed, and since compositions are not infrequently confirmed within the year allowed for proving claims, the court must retain jurisdiction for these purposes at least. Immediate dismissal is neither directed nor intended. Collier, Bankruptcy (7th Ed.) 243. Dismissal is to be when everything remaining for the court to do has been done, and not before, and until that time has arrived I do not see any sufficient grounds for saying that the referee has lost all power to act in the case for any purpose. A general reference like this, made

under section 22a (1), authorizes the referee "to take such further proceedings as are required" by the act. Presumably, therefore, it continues in force until no such proceedings are any longer required. Section 38a (4) excepts from the referee's jurisdiction all questions arising out of the application for composition, but there may obviously be further proceedings required after a composition has been confirmed which involve no such question. No such question would be involved in the receipt and allowance or disallowance of a creditor's claim not barred by section 57n, even if presented after the confirmation; and it is therefore not clear to me why the referee, if he has not closed the case, may not receive and allow or disallow such a claim. No such question would be necessarily involved in holding or closing the creditors' final meeting, nor in settling the trustee's final account at that meeting, and if any of these proceedings have not been had when the composition is confirmed, they are still proceedings required by the bankruptcy laws. When all these things have been done, and not before, can the referee, according to section 39, "perfect and transmit to the clerk" the records he is required to keep "when the case is concluded." I do not think a proper interpretation of the act requires confirmation of a composition to be regarded as superseding such further proceedings before the referee or rendering them impossible; provided, of course, that no further step be taken in the administration of the estate, which must stop with the confirmation of the composition. It may well be that steps previously taken will have raised questions which ought not to be left pending and undetermined, and the act can hardly have been intended to require that they must be so left for want of any authority to determine them. Section 2 (8) seems to contemplate approval of the trustee's accounts and his discharge as essential to the closing of an estate when it has been fully administered. For the purposes of this clause, confirmation of a composition may well have been intended as the equivalent of full administration, but there is difficulty in supposing it intended to divest the court at once of all jurisdiction to close the estate in the manner provided. If this is the right view, section 55f would seem to require or contemplate a final meeting when the affairs of the estate are ready to be closed, no less in cases terminated by composition than in others. A discharge, moreover, may well be a matter of importance to the trustee, and there is a further difficulty in supposing the act to intend that after confirming a composition the court shall be without power to order any discharge. In a recent case the trustee was ordered by the court to satisfy a judgment rendered against him after confirmation of a composition, in a suit, the defense of which he had undertaken before composition. The trustee, it was said, was still amenable to the orders of the court, as he had not been discharged. In *re Cadenas & Coe* (D. C.) 178 Fed. 158. And, if there is still jurisdiction in the court over the trustee, his final account, and his discharge, I think there is still jurisdiction in the referee, to whom such matters properly belong under the original order of reference, and under Gen. Order 17, 89 Fed. xxxvi, 32 C. C. A. ix.

[3] I must rule, therefore, that the proceedings before the referee after confirmation of the composition were valid and the bankrupt bound by their result. If they were valid as regards jurisdiction, he cannot claim that he had not due notice of them. Not only had the final meeting been notified for October 2, 1908, four days before the composition was confirmed, but the first meeting and examination, as the records show were still pending, had also been adjourned to October 2, 1908, and were thereafter successively adjourned, with the final meeting, to January 22 and May 11, 1909. If there was anything in the fact that these meetings were still pending and the trustee's final account not yet settled which made it improper or undesirable to confirm the composition on October 6th, I cannot see that the trustee was any more to blame than the bankrupt for omitting to represent the state of the case to the court. If there was anything in the composition offer or the referee's report thereon upon which the court acted on October 6th, constituting an objection to the allowance of the trustee's final account, the bankrupt should have raised the objection before the referee. Having neither opposed nor appealed from the allowance of the account, he cannot now disregard it nor be heard to dispute it.

[4] If, as the trustee's account purported to show, the \$895 demanded by the declaration had all been lawfully expended by the trustee during the bankruptcy administration, it was not the bankrupt's property in the trustee's hands, and confirmation of the composition could not revest him with any title to it. The plaintiff cannot be heard to allege, now that the trustee's account has been settled and he has been discharged, that the amount referred to was his property in the trustee's hands, or that he became entitled to it when the composition was confirmed.

[5] When a trustee has absconded without settling his accounts and cannot be found, an order directing him to account has been held not a necessary prerequisite to an action on his bond to recover property belonging to the estate. *Scofield v. U. S.*, 174 Fed. 1, 3, 98 C. C. A. 39. But, as said in that case, such an order might and probably would be proper where such a proceeding is practicable. The declaration does not allege that this trustee has failed to obey any order of the court or to account for the estate in his hands. Since what is alleged cannot be said, in view of the record, to constitute a failure in the faithful performance of his official duties, it cannot constitute a breach of his bond.

The motion to dismiss is granted.

## UNITED STATES v. PARK LAND CO.

SAME v. NICHOLS-CHISHOLM LUMBER CO. et al.

SAME v. DAVIS.

(Circuit Court, D. Minnesota, Sixth Division. February 14, 1911.)

## 1. INDIANS (§ 18\*)—INDIAN LANDS—ALLOTMENT—DESCENT.

Under Act Feb. 8, 1887, c. 119, 24 Stat. 388, providing for the allotment of Indian reservation lands to full or mixed blood Indians, under trust patents, as amended by Act Jan. 14, 1889, c. 24, 25 Stat. 642, providing that the law of descent and partition in force in the state or territory where the lands are situated shall apply thereto, where the allottee of land in Minnesota dies after his trust patent has issued, his allotment descends to his heirs, as provided by the laws of that state, to be ascertained by the probate court of the county in which the lands are located.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.\*]

## 2. INDIANS (§ 15\*)—INDIAN LANDS—ALLOTMENT—TRANSFER—STATUTES.

Act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, provided for the allotment of Indian lands to full and mixed blood Indians, and for the issuance of trust patents restraining transfer. By Act May 27, 1902, c. 888, § 7, 32 Stat. 275, Congress provided that the adult heirs of any deceased Indian, to whom a trust or other patent containing restrictions on alienation had been or should be issued, might convey the land inherited, but that in case of minors such conveyances could be made only under an order of court upon an application made by a guardian duly appointed; all conveyances being subject to the approval of the Secretary of the Interior. Thereafter Act 1902 was amended by Act 1907 (Act March 1, 1907, c. 2285, 34 Stat. 1034), providing that all restrictions as to the sale, incumbrance, or taxation of allotments in the White Earth Reservation in Minnesota held by adult mixed-blood Indians were removed, and that the restrictions should be removed as to full-blood Indians when the Secretary of the Interior was satisfied that they were competent to handle their own affairs. *Held*, that by such amendment all adult mixed-blood Indians acquired the right to transfer their allotments without restriction, whether they had acquired the same by selection or by inheritance from a full or mixed blood adult or minor, and that all such restrictions were also removed as to full-blood Indians on their being able to satisfy the Secretary of Interior that they are able to manage their own affairs.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 37-44; Dec. Dig. § 15.\*]

Actions by the United States against Park Land Company, and against Nichols-Chisholm Lumber Company and others, and against W. B. Davis. On exceptions to defendants' answer. Overruled.

Chas. C. Houpt, U. S. Atty., M. C. Burch, Asst. Atty. Gen., and W. A. Norton and Arthur M. Seekell, Sp. Asst. Attys. Gen., for the United States.

R. J. Powell and C. M. Johnston, for defendants.

MORRIS, District Judge (orally). In 1887 Congress passed the general allotment act (Act Feb. 8, 1887, c. 119, 24 Stat. 388). Under that act whoever received an allotment, whether a full-blood or a mixed-blood Indian, received from the government one of the 25 year trust patents provided for therein. In other words, Congress in effect

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said, whoever may be permitted to take an allotment under this act on any of these Indian reservations, whether he be a full blood or a mixed blood, upon him the government shall keep its hand and exercise a restraining influence. We are providing for the allotment of these lands for the purpose of leading him toward the habits of civilized life, and, in order to prevent him from being despoiled and to give time for him to acquire those habits, we intend that a restraining influence shall be placed upon him. We intend that the allottee shall go upon his allotment and, abandoning his Indian habits, live upon it and use it as a white man would, and we do not intend to permit him to part with it until a period of 25 years has elapsed, and not even then if the President shall deem it wise to further extend the period. That was the act of 1887, applying to Indian reservations generally.

In 1889 Senator Nelson framed and had passed what has ever since been known as the "Nelson Law" (Act Jan. 14, 1889, c. 24, 25 Stat. 642). That act provides for the removal of the Chippewa Indians here in Minnesota—the Indians up here in the northern part of our state—to the White Earth Indian Reservation, and for allotments to them on that reservation; or, if any of them preferred to stay on the reservations on which they then were, for allotments to them on those reservations. It provided that those allotments should be made in conformity with the general allotment act of 1887, and that the allotments should have the same effect, that is, be held in the same way, as I understand it. The allotments, therefore, made to Indians on the White Earth Indian Reservation here in Minnesota stood exactly as allotments made to Indians on any other reservation under the general allotment act. Now, in that general allotment act, after prescribing the method of making the allotments, and how the title should be held, that is, under the trust patents, with the restriction upon alienation provided for in the act, Congress provided:

"That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto [that is, to these allotments] after patents therefor have been executed and delivered, except as herein otherwise provided."

I do not understand there is any dispute as to Mr. Powell being correct when he says there is nothing "otherwise provided." So that the law of descent and partition in force in the state of Minnesota applies to these White Earth allotments after patents therefor—after these trust patents therefor—have been executed and delivered. *Beam v. U. S.*, 162 Fed. 260, 88 C. C. A. 240.

[1] As I understand the law, and I think that is the fair construction of it, if any allottee dies after his trust patent has issued, whether full blood or mixed blood, his allotment descends to his heirs, as provided by the laws of the state of Minnesota. And the only way that I know of that we can ascertain who his heirs are and what portion of the allotment those heirs are respectively entitled to would be by proceedings in the probate court. So that, it seems to me to be competent for the probate court of Becker county, where this reservation is, in case of the death of any allottee, whether full blood or mixed blood, to ascertain and declare who his heirs are and in what

proportions they inherit his allotment. I think it is an inheritable estate, governed by the law of descent and partition in the state of Minnesota. And I do not see why, if necessary, the proper proceedings might not be had to partition that allotment amongst the heirs of the deceased allottee. Now, we get down that far. That is the situation after the passage of the Nelson act in reference to allotments on the White Earth Indian Reservation. I understand the Steener-son act does nothing more than enlarge the Nelson allowance of 80 acres to 160 acres.

[2] Now, in 1902—I do not think I need to notice any other acts—in 1902 Congress passed this act of May 27, 1902. I forgot to say that those allotments evidenced by trust patents, under the act of 1887, and under the Nelson act, were not alienable even by the consent of the Secretary of the Interior, as I understand it. (Addressing counsel): Is that right?

One of Counsel: That is right.

The Court: Such allotment could not be conveyed even with the consent of the Secretary of the Interior. Now, in the act of May 27, 1902, c. 888, 32 Stat. 275, Congress removes to some extent the restrictions which it had theretofore imposed upon the sale and conveyance of these allotments, by providing in section 7 that:

"The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee."

Adult heirs could themselves sell and convey the land inherited from such decedent; but in the case of minor heirs their interest could be sold and conveyed only by a guardian duly appointed by the proper court, upon the order of such court. Adult heirs could sell and convey. Minor heirs could sell and convey by guardian, after the appointment of a guardian, and an order of court allowing it made upon petition filed by the guardian. But all conveyances, whether of an adult's interest or of a minor's interest, should be subject to the approval of the Secretary of the Interior. Now, there is a withdrawal, as it were, a going back—or a going forward, as to some it may seem to be—from the former position, the original position. Under the original law, the law as it was prior to this act, there could be no conveyance of that land with anybody's consent, by allottee or heir of allottee, whether he be adult heir or minor heir, until the expiration of the 25-year period. That was the situation then. This law allows the interest of the heir, whether he be adult or minor, to be sold and conveyed, if the Secretary of the Interior approves the transaction, and the conveyance then carries complete title, without any restriction whatever, just as if that trust patent had been an unrestricted patent. I do not know what the reason for this departure from the original

law was, unless it was upon this idea: That the allottee, the original allottee, coming out of the tribal relationship and going into separate ownership, would not be supposed to have the same discretion and business judgment that his heirs would have after they had for some time been brought up in the atmosphere of separate ownership.

That was in 1902. Now, going on from that: Senator Clapp, acting as the representative of this state in the Senate of the United States, representing not only the white people of the state but also the Indians of the state, occupying now (I do not know whether he did then or not) the high position of chairman of the committee on Indian affairs of the United States Senate, and being acquainted with the conditions existing here in the state of Minnesota, saw fit to have put upon the statute books this so-called Clapp amendment. First in 1906. Afterwards, in 1907 (Act March 1, 1907, c. 2285, 34 Stat. 1034), he seems to have made a slight change in the language. I shall only consider the 1907 act. This is the amendment:

"That all restrictions as to the sale, incumbrance, or taxation for allotments within the White Earth Reservation in the state of Minnesota, heretofore or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments."

The restrictions of the trust patent are removed as to adult mixed bloods, and, if any such mixed blood wished to have a fee-simple patent, he could get it upon application. The statute then goes on:

"And as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

Now, as I construe this Clapp amendment—I take its language as I find it—all restrictions as to the sale, and so forth, for allotments within this reservation heretofore or hereafter *held* by adult mixed-blood Indians are removed. *All* restrictions are removed. And the "trust deeds" (of course "trust patents" is meant) heretofore or hereafter issued by the department for such allotments are declared to pass the title in fee simple. It seems to me, gentlemen, that the contention of Mr. Powell is sound, and that the amendment means just what it says, that *all* restrictions are removed as to these allotments held—no matter how held—*held* by adult mixed bloods. That, it seems to me, is what it means. That is the only way I can read it—*no matter how held*. Therefore, no matter how the adult mixed blood has come to be the holder or owner of an allotment, or part of an allotment, whether by selection, that is, as the original allottee, or by inheritance from a full blood, or by inheritance from an adult mixed blood, or by inheritance from a minor mixed blood, or by inheritance from a full-blood minor—if there can be such an inheritance as that—all restrictions are removed as to the alienation of such allotment, or any part of it, held by any adult mixed blood. The trust patent is declared to convey to him, or vest in him—"pass" to him—if he is an



adult, or as soon as he becomes an adult, the fee-simple title, and he has the right to sell it without restriction. That is the way I construe that so-called Clapp amendment.

Now, let us see if we can find any reason for the policy of it. The act of 1902 removed the restriction on alienation as to any heir of a deceased Indian, whether mixed blood or full blood, and whether the heir be adult or minor, to the extent of allowing a sale and conveyance of an inherited allotment, in case of an adult heir by himself and in case of a minor heir by his guardian, with the approval or consent of the Secretary of the Interior. This on the assumption, as it seems to me, as I have heretofore explained, that the heirs of one to whom an allotment has been issued, and who has been put on the path of separate citizenship, and separate ownership, and separate responsibility in the struggle of life, would be more competent in many cases to manage their own affairs than would the original allottee have been; and that the Secretary of the Interior should be the judge as to whether that condition has come about. Then, coming down to the so-called Clapp amendment, it seems to go a step further and say that, when a mixed blood has come to be an adult, he is competent to handle his own affairs, and is therefore competent to sell without being swindled, to make a proper bargain for his land, and to use the money that he gets out of it judiciously. And the act seems to put his coming to the condition of an adult as the time when that competency has come about. Not so, however, with the full-blood adult. As to him, Congress still retains the restriction as to selling, incumbering, etc.; but, even as to him, the restriction is removed if the Secretary of the Interior is satisfied that he is competent to manage his own affairs. In other words, it seems to me that by the Clapp amendment Congress meant to say that it is to be conclusively presumed that an adult mixed blood is competent to go ahead and manage his own affairs, and therefore removes from him all restrictions on the sale of any allotment, or interest in any allotment, that he holds, no matter how it has come to him. And, as to an adult full blood, Congress means to say that, while he may also be competent to manage his own affairs, yet we will leave it to the Secretary of the Interior to say whether he is or not.

I think the exceptions to the answer should be overruled.

• Mr. Houghton: The court will allow us an exception to the ruling.

The Court: Certainly.

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PEL-ATA-YAKOT v. UNITED STATES et al.

(Circuit Court, D. Idaho, N. D. January 12, 1911.)

INDIANS (§ 13\*)—INDIAN LANDS—HEIRSHIP—DETERMINATION—JURISDICTION—STATUTES—REPEAL.

Act June 25, 1910, c. 431, 36 Stat. 855, conferring on the Secretary of the Interior exclusive jurisdiction to determine heirship of Indian allottees, repealed Act Feb. 6, 1901, c. 217, 31 Stat. 760, amending Act Aug.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

15, 1894, c. 290, 28 Stat. 286, in so far as the same might be construed to confer such jurisdiction on federal courts.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.\*]

Action by Jane Pel-ata-yakot against the United States and Mary Types. On demurrer to bill. Sustained.

Clay McNamee and James L. Harn, for complainant.

C. H. Lingenfelter, U. S. Atty., for defendants.

DIETRICH, District Judge. From the bill it appears that the complainant is a Nez Perce Indian woman, and was the wife of one Benjamin Types, a Nez Perce Indian, at the time of his death, which occurred on February 7, 1899. It further appears that, pursuant to treaty stipulations, and under authority of certain acts of Congress ratifying the same, certain lands embraced in what is known as the Nez Perce Indian reservation, in Nez Perce county, Idaho, were allotted to Benjamin Types in 1893; the title, however, being held by the United States in trust for 20 years, subject to the provisions of the treaty and the general allotment act Feb. 8, 1887, c. 119, 24 Stat. 388. The complainant avers that after the death of Benjamin Types the several superintendents of the Nez Perce Indian agency, at Lapwai, Idaho, recognized her and one James Types, the son of the deceased by a former wife, as the sole heirs of the deceased, but that since the month of October, 1909, the superintendents have wrongfully and unlawfully refused longer to recognize her as one of the heirs, and have declined to pay over to her any share of the rents and profits arising from the lands embraced in the allotment; but, upon the other hand, they have recognized the defendant Mary Types as an heir, paying over to her the share of the rents which rightfully belongs to the plaintiff, and that the defendant Mary Types has been unlawfully in possession of the allotment since October, 1909. The complainant prays for a decree declaring that she and James Types are the only lawful heirs of the deceased Benjamin Types, and requiring the defendant Mary Types to account for the rents, issues, and profits wrongfully received from the agents of the government. The bill was filed June 16, 1910. The case is submitted upon an amended demurrer interposed by the defendants, by which the question of jurisdiction is raised.

The suit, like several others of a similar nature heretofore brought in this court, was doubtless instituted under the provisions of Act Feb. 6, 1901, c. 217, 31 Stat. 760, amending Act Aug. 15, 1894, c. 290, 28 Stat. 286. I have never been fully satisfied that by these acts Congress intended to confer upon the courts jurisdiction to determine controversies involving the question of heirship to allotted lands; but the objection has never been raised and in a number of cases jurisdiction has been exercised. *McKay v. Kalyton*, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566. For the present purposes it may be assumed that under the provisions of these acts the court had jurisdiction to entertain this suit at the time it was commenced; but, by an Act of Congress approved June 25, 1910 (36 Stat. 855, c. 431), it is declared:

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: Provided, that if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor."

The provision is comprehensive, and clearly evinces the intention of Congress to confer exclusive jurisdiction to decide such controversies upon the Secretary of the Interior. That being true, it must be held that by implication the existing act conferring jurisdiction upon the courts was repealed. *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153. The repeal thus effected being without any reservation as to pending cases, the present case, although commenced prior to the passage of the repealing act, must fall with the act upon which it rested. *Railroad Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231. Precisely the same question was involved in *Bond v. United States* (C. C.) 181 Fed. 613, and with the conclusion there reached I am in accord.

The demurrer will be sustained, and the bill dismissed for want of jurisdiction.

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In re GRIFFIN.

(District Court, D. Massachusetts. July 2, 1910.)

No. 12,624.

**1. BANKRUPTCY (§ 330\*)—CLAIMS—SUFFICIENCY.**

Where at the time an executrix became a bankrupt she was holding the share of her husband's estate bequeathed to his daughter, to be paid to the daughter when she became 30 years of age, such time not having arrived, a claim filed by the daughter's guardian, charging that the bankrupt was indebted for the daughter's share of her father's estate in the sum of \$20,650, but which stated no facts to show that the claim was based on negligence of the bankrupt in managing the funds, was insufficient to justify an allowance of the claim on the theory that funds belonging to the daughter, or in which she was entitled to share, had been lost by the bankrupt's negligence.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 330.\*]

**2. BANKRUPTCY (§ 320\*)—CLAIMS—LIQUIDATION.**

Where a bankrupt was entitled to the sole management and control of the residue of the estate of which she was executrix, including the share bequeathed to testator's daughter, until she became 30 years of age, which time had not arrived when the executrix became bankrupt, the daughter being entitled on attaining that age to an equal share of the residue of the estate, a claim filed against the bankrupt's estate for

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the daughter's share so bequeathed, on the theory that the bankrupt had been guilty of negligence and mismanagement, was unliquidated, and could only be allowed after liquidation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 320.\*]

In the matter of bankruptcy proceedings of Jennie M. Griffin. On petition to review a referee's order disallowing a claim presented by Florence M. Griffin. Affirmed.

Charles M. Thayer, for trustee.

Vaughan, Esty & Clark, for Florence M. Griffin, creditor.

DODGE, District Judge. The proof of claim which the referee has disallowed is subscribed and sworn to by George McAleer as guardian of Florence M. Griffin. It sets forth that the bankrupt is indebted to the deponent in the sum of \$20,650, and that the consideration of said debt is "share of estate of John J. Griffin." Annexed to the proof is the following:

Jennie M. Griffin Dr. to Florence M. Griffin, by George McAleer, Guardian.	
Share in estate of J. J. Griffin, deceased, not including real estate,	
over which estate Jennie M. Griffin was appointed executrix March	
1, 1906.....	\$17,500
Int. at 6 per cent. from March 1, 1906.....	3,150
	<hr/> \$20,650

There is no dispute that the bankrupt is the executrix of the will of John J. Griffin, appointed by the probate court for Worcester county, March 1, 1904, nor as to the following facts. She is the widow of the testator, and Florence M. Griffin is his daughter. By the fourth clause of the will the residue of the testator's estate was left to the bankrupt and Florence M. Griffin in equal shares. The testator directed, however, in the same article, that his wife should have the sole control and management of the residue until his daughter should reach the age of 21, and be entitled meantime to the entire income for her sole use after making suitable provision for the daughter's support; that his wife should continue to hold, manage, and control the daughter's share until the daughter should reach the age of 30, paying to the daughter the income of her share from the time she should become 21 until the time she should become 30, with authority to pay over all or part of the daughter's share to her during the last-mentioned period; and that after reaching the age of 30 the daughter should hold her share free from control and for her sole and separate use. The testator's widow and executrix was authorized by the fifth article to carry on his business as long as she should deem it advisable. It was carried on after the probate of the will for a time by a special administrator, but after the bankrupt's appointment as executrix, which was on March 1, 1904, it was carried on by her. In April, 1907, she made a general assignment for the benefit of creditors, which resulted in her being adjudged bankrupt in these proceedings on June 29, 1908. There was an appeal from the adjudication, but it was affirmed by the court of appeals. See *Griffin v. Dutton*, 165 Fed. 626,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

91 C. C. A. 614. Florence M. Griffin is still a minor, and George McAleer is her guardian, duly appointed. The referee's present report, in connection with his former report on adjudication, filed June 5, 1908, to which his present report makes reference, shows that he had before him no evidence sufficient to support a finding that one-half the residue of John J. Griffin's estate was recoverable when the petition in this case was filed by or on behalf of Florence M. Griffin, as her legacy, from the executrix of the will, nor any evidence from which the amount of her share, if then due, could have been ascertained. The referee's finding, that so far as the claim is in contract it has no foundation, does not seem to be disputed except in the sense hereinafter stated.

[1] It is contended on Florence M. Griffin's behalf, as set forth in her petition for review, that her claim "is a mixed claim of either contract or tort arising out of fiduciary relation between your petitioner and the bankrupt, which was set forth in the will"; "that the bankrupt \* \* \* was guilty of culpable negligence in the management" of the funds of the estate, and "allowed them to depreciate to such an extent that the estate is now bankrupt"; also, that "the trustee has taken and sold the assets of the bankrupt owned in her individual capacity, together with the assets of the estate and the property held in trust by said bankrupt, regardless of the legal title to the same."

Admitting it to be true in some cases, as urged in the petitioner's brief, that "claims ex delicto are provable if the tort can be waived and recovery had quasi ex contractu," I find nothing in the proof of claim as presented to show whether this principle can be applied in the present case or not. In the proof of claim nothing whatever is said about any negligence on the bankrupt's part in managing funds in her care by virtue of the will. It is left to be discovered through other sources, if at all, that the claim is founded upon such negligence. While strict rules of pleading do not apply, it is nevertheless necessary that the claim and its consideration should be so set forth as to enable the trustee and the creditors to make proper investigation as to its fairness and legality without undue trouble or inconvenience. In *re Scott* (D. C.) 93 Fed. 418; In *re Stevens* (D. C.) 107 Fed. 243; In *re Coventry, etc., Co.* (D. C.) 166 Fed. 517, 523. If the claim is really such a claim as would appear from the petition for review, I do not think the proof can be said to comply with these requirements. The referee had before him no statement under oath that funds in which Florence M. Griffin has a right to share have been lost by the bankrupt's negligence or mismanagement. There is nothing in the facts found by him which, so far as I can discover, would warrant a finding that such funds have been so lost. It seems clear, therefore, that no ground is shown for overruling the referee's disallowance of the claim as presented.

[2] It appears from the referee's report that suits have been brought on Florence M. Griffin's behalf in the superior court for Worcester county to recover damages from the bankrupt, that one of these suits is against the bankrupt individually and the other against

her as executrix of the will, and that the declarations contain, in each suit, a count for money received by the defendant for the plaintiff's use, with a count for loss of property held under the will by her negligence and gross mismanagement. These facts, of course, have no tendency to prove that the petitioner for review has a claim allowable in these proceedings. But conceding that the proof of claim as presented might be supported, if no objection were taken to its form, by proof of negligence and mismanagement such as has been alleged in the pending suits referred to, I agree with the referee in thinking that it must be regarded at present as an unliquidated claim, only to be proved and allowed against the estate after being liquidated in such manner as the court may upon application direct, and that prosecution to judgment of the suits referred to would in this instance be the proper method of liquidation.

If it be true, as alleged in the petition for review, that the trustee in bankruptcy has possession both of the bankrupt's individual assets and of the assets belonging to her husband's estate, or the proceeds of assets of either class, I do not see that any question involving those facts has been raised before or decided by the referee.

The referee's order is approved and affirmed.

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In re GAY et al.

(District Court, D. Massachusetts. November 19, 1910.)

No. 14,188.

**BANKRUPTCY (§ 348\*)—CLAIMS—PRIORITY—"TRAVELING SALESMAN"—SALARY.**

Plaintiff was employed by the bankrupts as a bond salesman at the rate of \$3,000 per year, payable monthly. His contract provided that he should devote his entire time to the bankrupts' business in the territory over which he was to work, which would be principally in the state of Maine; the bankrupts agreeing to pay all traveling expenses while traveling in the bankrupts' business. The bankrupts maintained a branch office at Portland, of which complainant had charge. He also went from place to place in Maine to sell bonds, and conducted correspondence from such branch office on the bankrupts' letter heads and in their name. He had a junior salesman under him, and received bulletins issued by the bankrupts sent to managers of branch offices. *Held*, that everything done by plaintiff as the manager of the Portland office was subordinate to the work he did as traveling salesman, and that he was therefore entitled to priority as a "traveling salesman," within Bankruptcy Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447) for the amount due for his services earned within three months prior to the date of bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7082, 7083; vol. 8, p. 7820.]

In the matter of bankruptcy proceedings of E. H. Gay and others. On petition to review a referee's order denying priority to the claim of George F. Stetson. Reversed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Tyler & Young, for trustee.

Currier, Rollins, Young & Pillsbury, for George F. Stetson, creditor.

DODGE, District Judge. The bankrupts were engaged in the business of selling securities. They do not appear to have been stockbrokers in the ordinary sense, but to have confined themselves mainly to dealing in bonds of public service corporations. This creditor was employed by them, and it is not disputed that they owed him \$437.50 for services rendered after December 1, 1907, when these proceedings were commenced on October 17, 1908. The petitioner's employment was under a contract in writing dated March 1, 1907, from which it appears that he was employed as a bond salesman at the rate of \$3,000 per year, payable monthly, the employment to continue until December 1, 1909. If, as he contends, what remains due him for services was wages due him as a traveling or city salesman, \$266.66 thereof was earned within three months before the date of the commencement of these proceedings, and is, therefore, to have priority under section 64b (4) of the bankruptcy act, according to a stipulation of the parties filed here November 18, 1910, since the referee's order was made.

The trustee contends that the evidence does not show the creditor to have been a traveling or city salesman within the meaning of the section referred to, and denies his right to priority. The referee has adopted this view. There is no dispute that, as has been stated, the contract of employment was for services as a bond salesman, nor that by the contract he was to travel in rendering these services. The language of the contract is:

"It is understood that you are to devote your entire time to the business of the undersigned, and the territory over which you are to work will be principally in the state of Maine. We will pay all traveling expenses incurred by you when away from home and traveling on the business of the undersigned."

The above undisputed facts, standing by themselves, would, in my opinion, entitle this creditor to rank as a traveling salesman, within the meaning of section 64b (4). It cannot be said, in view of *In re Dexter*, 158 Fed. 788, decided by the Court of Appeals for this Circuit in 1907, that he is any the less within the meaning of the section referred to because he was receiving a salary of \$3,000 a year, instead of receiving a comparatively small compensation for his services, and, therefore, presumably dependent upon his earnings for present support. The trustee relies upon the facts disclosed by the creditor's own evidence, which is not contradicted, that the bankrupts, whose principal office was in Boston, also maintained an office at Portland, of which he had charge, besides going from place to place in Maine to sell bonds; that he conducted correspondence from that office on the bankrupts' letter head and in their name; that he had a junior salesman under him; that he received bulletins from the bankrupts, such as they issued to the managers of all their branch offices; that they recognized him in correspondence as manager of the Portland office;

and that in his letter of resignation, dated August, 19, 1910, he himself tendered his resignation "as manager of the Portland office." I am unable, however, to believe that any of these things are sufficient to prevent him from being a "traveling salesman," within the meaning of the act. It seems to me, on the evidence, that everything done by him as the manager of the Portland office was subordinate to the work he did as traveling salesman, and inconsiderable in comparison with that portion of his work. Circumstances somewhat similar were relied upon for the same purpose in *Re Dexter*, above cited, and the court held that they did not "change in any material way the real character of the service" for which the salesman was employed. I must, therefore, overrule the order denying priority altogether to this claim, and direct that the creditor be allowed priority as to \$266.66 thereof.

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In re BARTHIER.

(District Court, D. Massachusetts. December 31, 1910.)

No. 15,970.

**BANKRUPTCY (§ 409\*)—DISCHARGE—OBJECTIONS—OMISSION TO KEEP BOOKS.**

Where the bankrupt sold pianos, some for cash and others on lease or conditional sale, and his books showed all receipts from customers who had taken pianos under leases or conditional sales but not receipts from purchasers for cash, though from his stockbook and checkbook all money taken in or expended except \$965 was fully accounted for, and he testified that he did not show receipts for pianos sold for cash because he did not want his salesmen to know that he was selling pianos at cost for cash, the facts did not show that he failed to keep proper books with intent to conceal his financial condition, under the rule that such concealment can exist only when it obtains with reference to persons entitled to know the facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.\*]

In the matter of bankruptcy proceedings against Louis N. Barthier. On objections to discharge. Overruled.

Knight & Brewster, for objecting creditor.

James G. Dunning, for bankrupt.

DODGE, District Judge. This bankrupt was a dealer in pianos in Springfield, adjudged bankrupt on his own petition, filed April 25, 1910. The creditor who opposes his discharge alleges omissions from his books of account intended to conceal his financial condition. The referee's report sustains this ground of objection. The referee's report of the facts is mainly taken from a statement of them agreed on before him by the parties. The bankrupt had done business on his own account since August, 1907. Some pianos he sold for cash, others he disposed of by leases or sales upon condition involving payments in installments. In a book called a cashbook he entered all receipts from customers who had taken pianos under leases or condi-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



tional sales, but not receipts from purchasers for cash. These he did not enter as such upon any book, and he kept no record of the prices received for pianos so sold. From his sales for cash between October 1, 1909, and the time of filing his petition, he received in all about \$6,250. These sales were made for approximately what the pianos had cost. A stockbook was kept, showing all the pianos bought and sold, on whatever terms, by name and number. In the cases of the sales for cash the word "cash" in red ink appeared opposite the name and number. A checkbook was kept which showed amounts deposited in the bank, but not the sources from which the money came; also the amount of each check and the purpose for which it was drawn. Very nearly all the bankrupt's receipts were deposited in this bank account, whether from cash sales or other sources, and from the checkbook, therefore, could be ascertained what he had done with nearly all the money he had received; but a small proportion of his receipts from sales for cash was paid out by him in cash for salaries and living expenses. Of this part of his receipts and its disbursement by him no record was preserved. Other books were kept, which do not require special mention here. As to his intent in not recording these sales of pianos for cash there was no direct testimony but his own. He said it was done in order to prevent his salesmen from knowing that he was selling pianos at cost. He could not, according to his evidence, conveniently prevent them from having access to the books, and he feared that if they knew he was "pinched," so as to have to sell a piano at cost in order to meet an obligation, they might try to sell at cost, or might "tell it all over the city," customers to whom he had sold at higher prices might become dissatisfied in consequence, pianos sold on lease or installments might be returned, and his business might thus be injured.

The referee has found that there was apparently no intent on the bankrupt's part to work any fraud upon his creditors, and has reported that the refusal of discharge would be in his opinion harsh, and not within the general spirit of the bankruptcy act. He has, however, felt obliged to report in favor of refusal by the decision of the Court of Appeals for the Second Circuit in *Re Hanna*, 168 Fed. 238, 93 C. C. A. 452. In that case the bankrupt failed to enter on his books a loan considerable in proportion to the amount of his assets, and had done so in order to conceal his real financial condition from his confidential manager. In this case, while the bankrupt's exact financial condition was not ascertainable from his unexplained books, it is not clear that there was not enough on his books to show in substance how his assets and liabilities compared with each other. At any rate, the mere failure to make specific entries of receipts from cash sales and specific entries regarding the application of such receipts does not seem to have been enough to prevent them from doing so, and the creditor's specification of objections is expressly limited to these omissions. The stockbook showed which pianos had and which had not been sold, and the checkbook showed, out of \$24,880 total receipts during the last six months, what he had done with all but \$965, and the evidence is at most that what he wanted to conceal was a temporary lack of

ready money. There is nothing to show that he was insolvent before the filing of his petition. But supposing the case to have been that he was insolvent when he omitted the entries referred to, his salesmen had no such right to know that fact as a confidential manager would have. Concealment, it would seem, can only be from persons entitled to know.

The court said in *Re Hanna*, 168 Fed. 240, 93 C. C. A. 454, that "a provision intended to insure the keeping of correct and complete accounts should be rigidly enforced, especially one whose operation is made to depend upon intention, excluding mistake or neglect." With this I fully agree, and in view of the decision I reach a conclusion opposed to that of the referee with considerable hesitation. I think, however, that the facts in this case do not on the whole require, as the facts in *Re Hanna* did, the conclusion that there was an intent on the bankrupt's part to "conceal his financial condition," within the meaning of section 14b (2) of Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended in 1903 by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310).

I therefore grant the discharge applied for.

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UNITED STATES v. GIBSON et al.

(District Court, S. D. Georgia, W. D. May 16, 1911.)

1. COURTS (§ 356\*)—APPEAL—SUPERSEDEAS—DISCRETION OF COURT.

It is within the discretion of the United States court in the trial of a criminal case to grant or refuse a supersedeas, when informed by counsel for a convicted person that he purposed to sue out a writ of error or take an appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.\*]

2. COURTS (§ 353\*)—NEW TRIAL—PRACTICE IN FEDERAL COURT.

It is within the discretion of the United States judge in a criminal case to refuse a new trial, though under the state practice of Georgia he would have been obliged to entertain the motion therefor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 933; Dec. Dig. § 353.\*]

3. COURTS (§ 356\*)—APPEAL—REVIEW—DISCRETION OF TRIAL COURT.

The discretion of the United States judge as to the grant of a new trial in a criminal case is not reviewable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.\*]

John P. Gibson and others were convicted of burglary of a post office. Petition for appeal and supersedeas. Application for supersedeas denied.

Alexander Akerman, Asst. U. S. Atty.

W. D. McNeil, for defendants.

SPEER, District Judge (orally). [1] I am very much obliged to Mr. McNeil for his thorough examination of the authorities on this

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

important question of practice. His examination confirms the impression of the court, and that is that it would be difficult to find any obligatory rule that the United States court should grant a supersedeas when informed by counsel for convicted persons that he purposed to sue out a writ of error or take an appeal. The authorities all sustain the proposition that the matter is one entirely in the discretion of the trial court. Nor is it true that there are no precedents where the courts have refused a supersedeas. In one of the greatest, and perhaps the most tragic case ever tried in this court, that of conspiracy and murder on the part of Luther A. Hall, Lancaster, and others, the victim being Capt. John Forsyth, a supersedeas was refused after the court had given counsel some time in which to prepare for an appeal. It was complained that the court did not give the prisoners a chance to bid their families good-bye. It was remarked by some one that the prisoners did not give Capt. Forsyth, the murdered man, a chance to tell his family good-bye.

The section of the Code of Georgia which has been cited is one of the fruitful causes of delays in the administration of criminal justice in Georgia. That and perhaps the provision known as the "dumb act," which prevents the court from stating what has been proven, even though it may not be in the slightest dispute, from intimating an opinion as to the facts, whether they are in dispute or not, are perhaps of all others the most fruitful reasons why the condition of our state is so lamentable in so far as the criminal laws are involved, and perhaps explains why every year there are many more murders in the state of Georgia, with its less than 3,000,000 population, than there are in Great Britain and Ireland with more than 45,000,000 population.

[2, 3] Now, these men, in the opinion of the court, are clearly guilty. Notwithstanding the very able efforts of Mr. McNeil to acquit them, the jury did not hesitate to find them guilty. The court declined promptly, when the question was presented, to grant the motion for new trial. That is in the discretion of the United States judge. Under the state practice he would have been obliged to entertain the motion for new trial. It is otherwise here, nor is that discretion reviewable. The prisoners are confined in the jail here, none too secure, perhaps; there have been escapes from it. They are professional criminals in the opinion of the court, of the most skillful and desperate character—safe blowers and determined burglars. In its experience the court has never seen a tougher lot. I regret that the talented young kinsman of the presiding judge did not have a better chance for a defense of innocent men. I am very sure that I was proud of his efforts, and proud that we are descended from the same revolutionary sire. Even though I was generally obliged to rule against him, when I observed his original and vigorous exertions, my emotions are not unlike those of Mrs. Whackles, who had determined to turn down Mr. Richard Swiveller, who, as we are told in the "Old Curiosity Shop," was suing for the hand of her daughter, Miss Sophie. Notwithstanding his jealous rage for his successful rival, Cheggs, Mr.

Swiveller danced with such skill and agility, and executed such remarkable evolutions on the floor and in the air, that Mrs. Whackles felt after all that it might be a great honor to have such a dancer in the family.

For the reasons stated, I shall have to decline the application for supersedeas. These peripatetic burglars will be much more comfortable in the United States penitentiary in Atlanta than in the jail here, where the accommodations were not originally designed for gentlemen so eminent in their profession. Also more comfortable will be the community. In that great prison Mr. McNeil's clients will have every possible sanitary attention, and all reasonable luxuries. Their food will be most appetizing, indeed, more nourishing than that they could obtain in any hotel in Georgia. Besides, they would be serving their terms, and will get credit for every day they will continue to reside there.

Let order be taken accordingly.

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#### Ex parte COUNORT.

(Circuit Court, E. D. Washington, E. D. March 6, 1911.)

#### HABEAS CORPUS (§ 45\*)—FEDERAL COURTS—COMITY.

A writ of habeas corpus would not be granted by a federal court to review a petitioner's restraint under a conviction for neglecting or refusing to cause children to attend school, in violation of the state statute, on the ground that the information did not charge a crime, was not properly verified, and that the statute did not conform to the state Constitution; such questions being purely of local law, on which the decision of the state courts would be conclusive.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38-45; Dec. Dig. § 45; \* Courts, Cent. Dig. §§ 1096, 1376-1385.

Jurisdiction of federal courts, see note to *In re Huse*, 25 C. C. A. 4.]

Application of F. B. Counort for a writ of habeas corpus. Denied.

Moye Wicks, for petitioner.

Lovejoy & Jesseph, for Spokane County.

RUDKIN, District Judge. On the 27th day of February, 1911, the petitioner, Counort, was convicted before the superior court of Spokane County of the crime of neglecting and refusing to cause his children to attend school, in violation of section 1 of subdivision 16 of the Code of Public Instruction of the state of Washington (Laws of 1909, p. 364), and was committed to the keeper of the county jail in default of payment of the fine and costs imposed. He now applies to this court for writ of habeas corpus, claiming that his restraint and imprisonment are illegal, in this: First, because the information under which the conviction was had fails to negative certain exceptions contained in the enacting clause of the statute; second, because the information was verified by the deputy prosecuting attorney instead of by the attendance officer or county superintendent, as required by law; and.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

third, because the subject of the act under which the conviction was had is not expressed in the title, as required by section 19 of article 2 of the state Constitution.

Manifestly, the final judgment of a state court of competent jurisdiction cannot be reversed or annulled by a federal court on any such grounds or for any such reasons. In *Urquhart v. Brown*, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760, a writ of habeas corpus was sued out on the ground that the state statute under which the prisoner was held, as construed by the highest court of the state, violated the national Constitution; but in reversing a judgment discharging the prisoner the court said:

"It is the settled doctrine of this court that although the Circuit Courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon habeas corpus, one held in custody by state authority in violation of the Constitution or of any treaty or law of the United States, the court, justice, or judge has a discretion as to the time and mode in which the power so conferred shall be exerted, and that in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several states, a federal court or a federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under state authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies afforded by the state for determining whether he is illegally restrained of his liberty. After the highest court of the state, competent under the state law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination. The exceptional cases in which a federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the state are those of great urgency, that require to be promptly disposed of, such, for instance, as cases 'involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations.' The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision, upon habeas corpus, in the Supreme Court of the state, was in violation of his rights under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court. In *Reid v. Jones*, 187 U. S. 153 [23 Sup. Ct. 89, 47 L. Ed. 116], it was said that one convicted for an alleged violation of the criminal statutes of a state, and who contended that he was held in violation of the Constitution of the United States, 'must ordinarily first take his case to the highest court of the state, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this court upon appeal from a Circuit Court, intervene by writ of habeas corpus in advance of the final action by the highest court of the state.' So, in the recent case of *Drury v. Lewis*, 200 U. S. 1 [26 Sup. Ct. 229, 50 L. Ed. 343], it was said that, in cases of the custody by state authorities of one charged with crime, the settled and proper procedure was for a Circuit Court of the United States not to interfere by habeas corpus, 'unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the state; that, after a final determination of the case by the state court, the federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom."

The *Brown Case* presented stronger grounds for federal interference than does the case at bar, for in that case it was claimed that the

act under which the prisoner was restrained of his liberty violated the federal Constitution, whereas this case presents questions of local law only. Whether the information charges a crime or is properly verified, or whether the state statute conforms to the state Constitution, presents questions of local law only upon which the decision of the state courts is binding on the federal courts. Should this court discharge the prisoner for any of the reasons stated the Supreme Court of the state may hereafter sustain both the information and the statute and the condition thus brought about would be intolerable. In the exercise of its acknowledged jurisdiction a federal court must sometimes construe and apply a state statute in advance of the state tribunals, but it will not do so on an application of this kind.

The writ is therefore denied.

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KAMENICKY v. CATTERALL PRINTING CO. (two cases).

(Circuit Court, S. D. New York. June 13, 1911.)

REMOVAL OF CAUSES (§ 102\*)—DIVERSE CITIZENSHIP—ALIENS—JURISDICTION.

Where actions were instituted in a state court of New York, by an alien residing there, against a corporation organized and residing in New Jersey, and were removed by defendant to the Circuit Court for the Southern District of New York, the federal court's jurisdiction was doubtful, and the cases for that reason would be remanded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 220; Dec. Dig. § 102.\*]

At Law. Actions by Anna Kamenicky against the Catterall Printing Company. On motions to remand. Granted.

R. M. Overlander, for plaintiff.

Wheeler, Cortis & Haight, for defendant.

LACOMBE, Circuit Judge. Plaintiff is an alien, resident in this state; defendant, a corporation organized and resident in the state of New Jersey. The actions were brought in the state court (New York), and summons served here. Defendant has removed the causes, and motion is made to remand them.

Since plaintiff is an alien, the action, if brought in a federal court, could have been maintained only in the district of the residence of defendant. It is contended, therefore, that the removal is not into the "proper district," agreeably to the requirement of the statute. It is not necessary to discuss the question. The effect of the various decisions referred to by counsel is to leave the question a doubtful one. When there is any doubt about jurisdiction of the federal court, it is the practice in this circuit to remand the cause. *Plant v. Harrison* (C. C.) 101 Fed. 307.

Motions granted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## OMMEN v. TALCOTT.

(Circuit Court of Appeals, Second Circuit. July 10, 1911.)

No. 234.

**1. FACTORS (§ 1\*)—DEFINITION—"SELLING AGENT"—"COMMISSION MERCHANT."**

A "selling agent," "factor," or "commission merchant" is one who sells goods which another person has delivered to him for that purpose and receives compensation for his services by a commission or otherwise.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 1; Dec. Dig. § 1.\*

For other definitions, see Words and Phrases, vol. 2, p. 1305; vol. 3, pp. 2640-2642; vol. 8, p. 7660.]

**2. BANKRUPTCY (§ 303\*)—PREFERENCE—RECOVERY—EVIDENCE OF LIEN.**

In a suit to recover a preferential transfer of property by a bankrupt, in which the defendant claimed a factor's lien, evidence *held* not to show that defendant or any one in his behalf was ever in the physical possession, custody, and control of the property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.\*]

**3. FACTORS (§ 47\*)—LIEN—POSSESSION.**

It is absolutely essential to the validity of a factor's lien for advances that the property consigned be delivered by the consignor to consignee.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 65-71; Dec. Dig. § 47.\*]

**4. BANKRUPTCY (§ 188\*)—PREFERENCES—RECOVERY—EVIDENCE—LIENS.**

In a suit to recover a preferential transfer of property by a bankrupt, in which defendant claimed a factor's lien for advances made to the bankrupt, it appeared that the bankrupt and defendant had entered into a contract by which all sales of consigned goods should be in the name of defendant and invoiced to the purchasers in the name of defendant followed by the name of the bankrupt corporation, and, while defendant made no sales, the goods were invoiced to customers as "bought of J. A. T.," defendant, with the name of the bankrupt corporation on a lower line. The contract provided that certain accounts, where advances had been made on the goods about to be sold, should pass to defendant. *Held* that, in cases where the purchaser was notified by the invoice that he owed the money to defendant, this was an assignment of that account, and, where made before defendant had reasonable cause to believe that a preference was intended, was not obnoxious to the provisions of the bankrupt act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.\*]

Appeals from the District Court of the United States for the Southern District of New York.

Suit by Alfred E. Ommen, as trustee in bankruptcy of the John A. Baker Notion Company, against James Talcott. From a final decree of the District Court (175 Fed. 261), both parties appeal. Reversed and remanded.

See, also, 180 Fed. 925.

This cause comes here upon appeal from a final decree of the District Court, Southern District of New York, in favor of complainant, for something over \$23,000. The decree further provided that complainant should make certain payments to the special master and others, and should pay \$43 taxable costs to defendant.

The action was brought to recover a preferential transfer of property by the bankrupt to defendant, made shortly before bankruptcy. Upon the trial Judge Holt held complainant entitled to recover for certain goods and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

also for certain accounts current which defendant had collected, and ordered an accounting. After the accounting the case came, upon report of the special master, before Judge Hand, whose opinion will be found in 175 Fed. 261.

Fried & Czaki (F. M. Czaki, of counsel), for complainant.

Rounds, Schurman & Dwight (G. W. Schurman & Augustus L. Richards, of counsel), for defendant.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Defendant claims that he was the factor of the bankrupt, having a factor's lien upon the goods which the bankrupt had purchased. Finding that failure was imminent, he removed such goods on December 15, 1902 (the day before petition was filed), from No. 394 Broadway, where the bankrupt had its place of business, to the premises or place of business of defendant at No. 110 Franklin street. The goods so removed were, concededly, the property of the bankrupt, and such removal was a transfer of that property, the effect of which if enforced would be to enable defendant to obtain a greater percentage of his demand than any other creditor of the same class. Concededly, too, at the time of removal, defendant's agents had reasonable cause to believe that it would have such effect. The sole question to be determined is whether defendant had a lien upon the goods which warranted his taking them as stated and disposing of them to obtain the repayment of his advances. The suit is brought under sections 60a and 60b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), and under the amendments of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1308]) the District Court had jurisdiction. This suit was not a "bankruptcy case pending" when the amendments were passed, and therefore not affected by the exception in section 19 of the amending act.

The bankrupt is a corporation, which for about a year prior to December 6, 1901, had been engaged in the notion and small ware (dry goods) business at 114 Franklin street. Defendant has for many years been engaged in the dry goods business; his place of business during the period in question being at 108 and 110 Franklin street. Defendant and the bankrupt on December 6, 1901, entered into a written agreement, which contained the following provisions:

"The John A. Baker Notion Company herewith constitute and appoint James Talcott its sole factor, supervisor and selling agent and agree to consign to him during the continuance of this agreement, the entire stock of goods now or hereafter owned by them, or purchased by them, for sale upon commission. All sales of the consigned goods shall be in the name of James Talcott, and invoiced to the purchasers in the name of James Talcott, John A. Baker Notion Company Department."

2. The Baker Company is to assign to defendant all its outstanding accounts and to notify customers of such assignment.

3. Talcott is to employ and pay a bookkeeper who shall keep the book of accounts at his main store, 108-110 Franklin street, Talcott is to "attend to the collection of accounts and all questions as to



credit shall be decided by him and he shall own and pay for all books of accounts used in the business of said agency."

4. The Baker Company is to pay all other expenses incurred in the said business, including rent, salary of salesmen, or other employes, stationery, postage, telegrams, packing, cartage and storage, incidental expenses, and the premium of insurance; insurance to be in the name of and payable to Talcott.

6. Talcott "shall have the exclusive possession and control of said consigned goods, together with the accounts arising from the sale thereof and all remittances, checks, bills payable and proceeds of sales, shall be the exclusive property of James Talcott."

7. Talcott agrees to advance a certain percentage on the accounts assigned to him, with certain deductions.

8. He "may advance in his discretion an amount which shall be satisfactory to him upon the merchandise which may be consigned from time to time." It is agreed that the consigned merchandise be held by him as additional security for his advances upon the outstanding accounts.

He is to receive certain specified commissions for his services.

The Baker Company agrees to assign to Talcott the lease of any premises occupied by them, and he "shall have the exclusive control of said premises." Upon the expiration of the agreement by expiration of time or otherwise the Baker Company agrees to accept the reassignment of the lease for its unexpired term.

11. A sign is to be placed at the entrance of the building at which this business shall be conducted which shall read as follows: James Talcott, Annex John A. Baker Notion Company Department.

Talcott shall not guarantee the payment of sales and all the sales shall be made at the risk of the Baker Company.

The Baker Company, subject to the approval of Talcott, may designate the persons on and about the sale of the said goods and in and about the said agency. Talcott shall not be responsible for acts or omissions of persons so designated.

The agreement is to last for a year and to continue thereafter subject to termination by either party on 30 days' notice.

[1, 2] A selling agent, factor, or commission merchant is one who sells goods which another person has delivered to him for that purpose and receives compensation for his services by a commission or otherwise. Notwithstanding the statements contained in the agreement, we cannot find out that defendant ever sold a dollar's worth of the bankrupt's goods. All sales were made by salesmen whom defendant employed and paid; with such sales Talcott was in no way concerned. Defendant's brief contains the statement that the goods were sold as well as invoiced to customers in his name. The parts of the record referred to do not indicate that the sale was made in his name; the goods, however, were invoiced to customers as: "Bought of James A. Talcott," with the words, "John A. Baker Notion Co. Department," on a lower line. The Baker Company kept on buying goods just as it had before, taking them into its custody and control, handling, holding, and disposing of

them by its own employes whom it selected and paid. The most conspicuous sign, stretching across the front of the building, remained, as before, "John A. Baker Notion Company." The same title also appeared on smaller signs at the entrance door and at the head of the stairs, accompanied with the words, "James Talcott Annex." This would be a not inappropriate designation of premises where the Baker Company conducted its business, and where Talcott also had quarters for the transaction of some business of his own. Four witnesses, called by defendant, all commission merchants, testified that according to their understanding and the custom of their trade the presence of such an annex sign would indicate that the person whose name immediately preceded the word "annex" was financing the business and had a lien on the goods of the person whose name followed the word "annex." On cross-examination at least one of them admitted that the latter might also have goods of his own there for sale on which advances had not been made and on which no lien was claimed. The Baker Company, as we have seen, bought goods solely on its own credit, paying with its own checks; it also paid the duties, rent, and all business expenses. The goods it bought were delivered by the sellers to it at 114 Franklin street and afterwards at 394 Broadway, where they were received and cared for by its employes. When the company wanted an advance, it made out upon a blank furnished by the defendant a so-called "consignment invoice," which contained a list of goods with date of purchase, name of seller, amount, and (if imported) amount of duty. Upon the receipt of this invoice defendant made an advance to the extent stipulated in the agreement; occasionally he would make advances before the consignment invoice was made out. When such invoice was delivered, no change was made in the situation or condition of the goods, nor were any marks indicating a delivery to Talcott placed upon them. They remained where they had been on the premises where the Baker Company conducted its business and in the possession and control of its employes. There were three sets of keys of the premises, one carried by the vice president, one by the secretary and treasurer, and one by a minor employe. When each lease was assigned (covering 314 Franklin street and 394 Broadway), an employe of Talcott asked Shute, the secretary and treasurer, for his set. Immediately upon receiving them he returned them asking him to carry the keys for Talcott. There is nothing to show that defendant or any one in his behalf was ever in the physical possession, custody, and control of any of the property of the company at its premises until just before the bankruptcy.

[3] It is absolutely essential to the validity of a factor's lien for advances that the property consigned shall be delivered by consignor to consignee. We cannot find upon this record that there was ever a change of possession, custody, and control from consignor or consignee.

I concur fully with Judge Holt's conclusion that this is "one of the innumerable schemes by which merchants have attempted to cre-

ate liens on their goods, which shall be unknown to their creditors and shall not affect their credit, but which shall be enforceable if bankruptcy occurs. They are all based on the idea of giving notice enough to satisfy the law and not enough to inform the creditors."

A lien cannot be sustained on any theory of a mortgage. There was no mortgage in fact, nor was there any attempt to create one. Nor was there an attempt to create any lien other than a factor's lien on a consignment of merchandise for sale on commission. This attempt was made with such solicitude to conceal the facts from persons with whom the bankrupt was dealing on its own credit that it failed of accomplishment. We see no reason why the court should be astute to discover some equitable lien which the parties did not undertake to create. So much of the decree as covers the goods removed is affirmed.

[4] The accounts, or bills receivable for goods sold as described above, stand on a different footing. The contract in substance provided that certain of such accounts—those where advances had been made on the goods about to be sold—should pass to James Talcott. In all cases where the purchaser was notified by the invoice that he owed the money to Talcott, this was a complete assignment of that account. Judge Holt held that there is no satisfactory proof that defendant had reasonable cause to believe that a preference was intended before December 15, 1902. We see no reason to reverse such finding. Therefore as to all accounts, invoiced as above indicated prior to December 15, 1902, the transfer to defendant is not obnoxious to the provisions of the bankrupt act. So much of the decree therefore as requires defendant to account for these items should be reversed.

Several points were raised upon the accounting, which are fully treated in Judge Hand's opinion. We concur in his conclusions and do not think it necessary to discuss them.

The decree is reversed, and cause remanded, with instructions to enter a new decree in conformity with this opinion. Since both sides appealed and each has prevailed in part only, there will be no costs of this appeal to either side.

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BAKER-WHITELEY COAL CO. v BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. May 16, 1911.)

No. 974.

**1. MONOPOLIES (§ 16\*)—VALIDITY—PIER CONSTITUTING RAILROAD STATION—GRANT OF EXCLUSIVE DOCKING PRIVILEGES TO TUG OWNER.**

Defendant railroad company, which was a large interstate carrier of coal from the mines to the seacoast at Baltimore, built at Curtis Bay near there a pier, extending into the navigable water, for the handling of coal intended for transshipment by water. It did not undertake to carry coal beyond its own railroad line, but by its filed and published traffic schedules it made such pier a public terminal station, at which it undertook to deliver all coal so consigned by the bill of lading to "what-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ever vessel or vessels the shipper or consignees of the said coal may designate." *Held* that, while defendant had the right to make and enforce such regulations as were reasonably necessary for the use of the pier by shippers and consignees, it could not lawfully grant to a single tug owner the exclusive right to dock and undock vessels at such pier; it being within the rights of shippers and consignees to employ such tugs as they chose, and the right of such tugs to use the navigable waters surrounding the pier in the performance of such service.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 16.\*]

2. INJUNCTION (§ 55\*)—PROPERTY RIGHTS PROTECTED—INJURY TO BUSINESS.

A tug owner having contracts with steamship companies to do all towing for their vessels at a certain port, which was prevented from docking and undocking such vessels at a pier by an unlawful order of the owner, was thereby deprived of a property right, and entitled to maintain a suit in equity to enjoin enforcement of such order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 108, 109; Dec. Dig. § 55.\*]

Appeal from the Circuit Court of the United States for the District of Maryland, at Baltimore.

Suit in equity by the Baker-Whiteley Coal Company against the Baltimore & Ohio Railroad Company. Decree for defendant (176 Fed. 632), and complainant appeals. Reversed.

J. C. McLanahan and Joseph C. France, for appellant.

R. Marsden Smith and H. R. Preston, for appellee.

Before PRITCHARD, Circuit Judge, and BRAWLEY and DAYTON, District Judges.

BRAWLEY, District Judge. [1] This case comes up on appeal from the decree of the court below dismissing on final hearing a bill of complaint upon which a restraining order had been granted. The Baker-Whiteley Coal Company is a corporation of West Virginia owning a number of tug boats, and doing an extensive towing business with steamship lines trading to the port of Baltimore. It does a considerable business in supplying the steamships handled by it with bunker coal for their own consumption, which coal is bought from owners of mines on the line of the defendant company, and delivered by the railroad at the Curtis Bay pier. The defendant is a railroad company, a Maryland corporation, engaged in interstate commerce. The complainant, about the middle of June, 1908, had a contract with the owners or charterers of the Norwegian steamship Horda to tow her to the pier and to load her bunkers with coal, and the steamship was taken to the Curtis Bay coal pier by one of the complainant's tugs. The defendant refused to allow the Horda to make her lines fast to the pier, cast off those lines when they were made fast, and pushed the steamer off into the stream. This was in pursuance of an order of the defendant company, which was as follows:

"The Baltimore & Ohio Railroad Company.

"On and after June 15, 1908, docking and undocking of all classes of vessels at this company's coal pier, Curtis Bay, must be done by the tugs of Capt. R. M. Spedden.

By O. H. Hobbs, Superintendent."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

The bill of complaint was filed June 19, 1908, a preliminary injunction was prayed, and a restraining order passed, preventing the railroad company from putting this order into effect. The defendant company answered, testimony was taken, and upon final hearing the court below decreed, February 9, 1910, that the restraining order be rescinded and annulled, and the bill of complaint dismissed, and the case is here upon appeal from that decree.

Prior to 1900 coal brought to Baltimore by the defendant company was delivered by the railroad either at its own pier at Locust Point, or at various private piers owned by shippers and dealers in coal. Baltimore has long had a large trade in coal, and most of it is brought by the defendant company. The Curtis Bay coal pier was constructed about the year last named. It is about 800 feet long and about 60 feet wide, extending out into the navigable waters of the bay. To facilitate the business the United States government spent a considerable sum of money in dredging a deep channel from the main ship channel to a point a short distance from the pier, where, in part from natural causes, and in part from the dredging done by the railroad, there was a sufficient depth of water at the pier, and it appears from the testimony that practically all of the coal brought to Baltimore by the defendant company and intended for transshipment by water to points beyond the capes of the Chesapeake is now and has since the year 1901 been delivered at the Curtis Bay coal pier. The Curtis Bay coal pier is named in the freight tariffs of the defendant company filed with the Interstate Commerce Commission as a station of the railroad company, which company does not undertake to further transport coal brought by it to said pier, nor enter into contracts with the owners of vessels for the transportation of coal beyond the said Curtis Bay coal pier, but it undertakes to deliver all coal which is shipped over its road under a bill of lading designating said pier as the place to which said coal is to be carried, upon the arrival of said coal at said pier, to whatever vessel or vessels the shippers or consignees of the same may designate. The testimony shows that when the pier was first opened, five or six tug boat owners competed for the business of docking and undocking vessels at the pier. The railroad company from the beginning had some arrangement with R. M. Spedden for the docking and undocking of vessels there. The exact terms of this contract do not appear in the record, but there is testimony tending to show that from the beginning the officials of the railroad company adopted a policy of throwing obstacles in the way of some of the owners of tug boats, the result being that for several years prior to the commencement of the proceedings in this case only two tug boat owners have ever docked and undocked vessels at this pier, one of them being Spedden, and the other the complainant here; Spedden having practically a monopoly of the docking and undocking of sailing and other craft not propelled by steam, and the complainant having a large business in the docking and undocking of steamships. The complainant company had been in the towing business for many years. It had powerful and well equipped tugs, and had built up a large and prosperous business. It had been in the habit annually for many years of

making contracts with different steamship lines trading to the port of Baltimore. By these contracts it agreed to do all the towage required by these steamship lines in and about the harbor of Baltimore, including all docking and undocking of steamers. It met these steamships on arrival, did many small services such as putting their officers and crews on and off ships, for all of which they charged a definitely fixed sum. Its towage business, amounting to from \$90,000 to \$100,000 a year, is from 50 to 60 per cent. of all the towage business in Baltimore harbor. Its receipts for the work of docking and undocking steamers at the Curtis Bay coal pier amounts to something over \$7,000 a year, and this business seems to have been done with skill and energy. It appears from the testimony that for some years prior to 1908 the officials of the railroad in charge of the operations at the pier were dissatisfied with existing conditions, and desired to correct them. They claimed that delays in docking and undocking of vessels limited the capacity of the pier, created confusion and delay at the pier and yards, and prevented quick dispatch. On the part of the complainant testimony was offered tending to show that such delays as were proved were not properly imputable to it. An examination and careful consideration of all the testimony on both sides fails to convince us that the complainant is properly chargeable with dereliction in the docking and undocking of vessels, or fault as to any preventable delays. The railroad company would be clearly within its right in making all proper regulations for the use of this pier. It could provide for the time and method of docking and undocking vessels, and make charges for demurrage in all cases where delays occurred from inefficiency or other hindrances to the most rapid and economical use of its pier. It could have reserved the Curtis Bay pier for its own exclusive use, or for the use of such special transportation lines with which it made contracts for transshipment, as was the case in *Louisville & Nashville Railroad Co. v. West Coast Company*, 198 U. S. 494, 25 Sup. Ct. 745, 49 L. Ed. 1135. It could have constructed a wharf for its private use, as was decided in *Weems Steamboat Company v. Peoples Company*, 214 U. S. 345, 29 Sup. Ct. 661, 53 L. Ed. 1024. These two cases are cited in the opinion of the learned judge below, but the principles which should govern the use of the Curtis Bay pier differ entirely from those in the two cases cited, in neither of which was the wharf held out as a public wharf. In the agreed statement of facts and in the testimony this wharf is held out as a station of the defendant company, which made and published rates to it as to an ordinary railway freight station. In every sense it was a public terminal station for the delivery of coal to the consignees of all vessels which would come there for it. In the tariff schedules which appear in the record as exhibits there is no notice or reservation of any regulation for the exclusive handling of any coal delivered at that pier, but, on the contrary, "it undertakes to deliver all coal which is shipped over its road under a bill of lading designating said pier as the place to which said coal is to be carried upon the arrival of said coal at said pier to whatever vessel or vessels the shippers or consignees of the said coal may designate." The principles of law, therefore, applicable must be those which govern in the case

of an ordinary railway freight station. The real reasons which seem to have led to the adoption of the rule which gives rise to this controversy seem to be these: The Curtis Bay pier is beyond the jurisdiction of the city fire boat, and it is greatly to the advantage of the owner of the pier that it should have a tug constantly at hand for the prevention of fires. Such a tug is also needed for the breaking of ice in severe seasons, and it is greatly to the convenience of the pier owner that a tug should be always there. The ordinary tug boat which docks a vessel does not usually remain at the pier while the vessel is being loaded. It goes back to the city and seeks other employment, communication with it is not always prompt, and delays are thereby occasioned. Obviously it is of advantage to the owners of the pier to have a tug boat constantly at their command, and it appears from the testimony that in the contract with Spedden prior to 1908 it was stipulated that he should have a tug boat always at the pier, and it also appears that he kept a tug there, but that it was not an efficient one, and one of the witnesses in the employ of the defendant company stated:

"That Capt. Spedden could not keep a sufficiently large boat there because the business did not justify him to do so, and we had to do something else; either we would have to do the towing ourselves, or we would have to give it to one concern that had a good equipment."

This is probably the explanation of the reasons for the rule in question, and that it was an advantage and convenience to the railroad company to have an efficient tug boat always at hand must be conceded. It may also be conceded that the railroad company would have had the right to hire such a tug and include the expense of it as part of its terminal charges. Whether it can secure such advantage by the exclusive contract with Spedden, and at the expense of complainant, by excluding it from all participation in a business which it had built up and long enjoyed, is another question.

Some point is made in the argument that the contract with Spedden was not the result of fair competition. We cannot say that the testimony supports the inference that there was a preconceived intention on the part of the railroad company to give the contract to Spedden in any event. This is of no consequence, for if it had the right to make an exclusive contract, the method by which it accomplished it is immaterial, nor do we deem it necessary to consider in detail the controverted question whether the new regulation results in increased cost to vessels doing business at the port of Baltimore. The cost of docking and undocking merely has not been increased. That it is of great convenience to owners of steamships to have contracts with only one firm of tug boat owners to do all the work required for ships is obvious and it may be that, if such firm had charge of all the towing of the vessels while in port, there might be some saving; but the cost of a change from the old to the new condition is a matter that concerns mainly the shippers and consignees of the cargoes of coal, and they are not here to complain. The rule requiring every vessel taking coal at this pier to employ Spedden's tug has a tendency to give him a monopoly, which

may be most hurtful to the public interest. The railroad company may fix a maximum rate of charges for the docking and undocking of vessels, but it cannot effectively enforce the payment of such maximum rates. Spedden may give rebates upon such maximum charges for the securing of the other towage business, and the monopoly at this pier gives him an unfair advantage over his competitors, furnishes a leverage by which he can take away the towing business of his rivals. Free competition in the docking and undocking of vessels would more effectively prevent the establishing of an abhorrent system of rebates than the fixing of maximum charges for such services. We need not pursue this line of discussion, as it might lead farther than is required for a decision of the precise question before us.

It is well established that the tracks and stations of railroad companies continue to be private property, although devoted to public uses, and that they may make such rules and regulations for the use thereof as may be reasonably necessary and suitable for the accommodation of passengers and shippers, and cannot be restrained from using it to the best advantage of itself and of the public. A wharf or pier devoted to the public uses, as was the Curtis Bay pier, is a public station for the shipment of coal, and the railroad company is entirely within its rights in making rules and regulations for its use by shippers and consignees and their vessels; and inasmuch as in present conditions tugs are necessary for the docking and undocking of vessels, the owners of a pier may make such reasonable rules and regulations as to the time and manner of such use as may be necessary. It may prescribe how and when the pier shall be approached, and charge demurrage for any delays which may be injurious to its business. As its structure is liable to injury by the inefficient handling of vessels placed alongside of it, it may prescribe that none but tugs of power proportionate to the size of the vessels handled should be allowed to use it, but the complaint here is not as to the reasonableness of the regulations for the use of the pier, but of the rule which excludes from any use of it whatever, except by the tugs of a single owner; in fact the complainant here is not seeking to use the pier at all, the immediate occasion of this litigation being that a steamship which had the right to receive a cargo of coal at the pier was not allowed to be moored alongside of it, because it was brought there by the complainant's tug. Having a contract for the towing of such steamship, it was not allowed to use the public navigable waters of the United States near the pier for the purpose of performing its contract.

In support of this rule the argument of the appellee here is that tug boats are not within the class to whom it owes any duty whatsoever, and, while conceding that it is necessary that patrons of the railroad should have their vessels docked by a tug boat, the railroad has the right to choose the particular tug boat, so long as the service rendered by that tug is adequate, and sanction for the rule is sought in the Express cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, and the Pullman Cases, 139 U. S. 59, 11 Sup. Ct. 489, 35 L. Ed. 69. The following citation from the case first named is in the brief:



"So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

The question in both those cases involves the use of the actual property of the railroad company, its tracks and stations, and the decision in the Express Cases was that railroad companies are not required to transport the traffic of independent express companies over their lines, or to furnish them equal facilities for doing an express business upon their passenger trains.

"The real question," says the court, on page 20 of 117 U. S., on page 552 of 6 Sup. Ct. (29 L. Ed. 791) of the opinion, "is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person especially appointed for that purpose, nor whether they shall carry express freights for express companies as they carry like freights for the general public, but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford any other express company."

In the Pullman Car Cases it was decided that it was the duty of the railroad company as the carrier of passengers to make suitable provision for their comfort and safety, that it was a matter of indifference to the public who owned the drawing-room or sleeping cars so long as it was supplied with the requisite number, and, instead of furnishing its own cars, as it might have done, it was within its right to employ the Pullman Company, whose special business it was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel.

The principles established in these cases do not seem to us to touch the real issue here. They relate to the use by the railroads of their own property. In the nature of things railroads are entitled to an exclusive use of their tracks. In the case before us the complainant claims no right to any use of the defendant's property. His tugs do not even touch that property. They approach it upon the public navigable waters, which he is as free to use as is the public free to use the public streets in approaching the public freight stations for the delivery there of merchandise for transportation. The exclusive profits legislatively granted by most of the states to corporations for the building and operation of railroads are of necessity monopolies, for the transportation of passengers and freight, upon a fixed metallic rail, the substitution of steam for horse power, and the large expenditures necessary required the granting of exclusive privileges, while the efficient handling of the traffic necessitates the control by the railroad companies of all the operations directed to that end, where a divided control of locomotive power was found inadmissible, from the experience in the early years of railroads, where they were considered more as public highways. Such monopolies are granted because it is believed that

the public receives equivalent benefits, and the exclusive powers granted are applicable to those privileges only with which there is no available competition, for the very nature of the mode of conveyance forbids free competition. It was for a time a controverted question whether the monopoly could be extended to what the courts have called "the accessorial business," that is, the business of collecting freights at the doors of consignors, and making deliveries at the doors of consignees. Chief Justice Erle in England long maintained that a railroad company as a recompense for its large outlays had the legal right not only to a monopoly of the carriage of goods upon the line of the road itself, but also the accessorial carriage performable off its line. He stood almost alone in this opinion for many years, but after a full consideration both in the Exchequer Chamber and in the House of Lords this opinion was definitely rejected. We are not concerned here with this question particularly, as the railroad company is not claiming the right to this accessorial business, but, conceding the rightfulness of such claim, there is no reason why it should be monopolized. Such a monopoly was permitted in *Louisville & Nashville Railroad Case*, 198 U. S., 25 Sup. Ct., 49 L. Ed. already referred to, but the ground upon which that decision rests is that the wharf there in question was not a public station or terminal, the railroad company published no rates to the wharf, and it was not held out by the company owning it as a public wharf. Monopolies are void by the common law as discouraging labor and industry, and being against the freedom of trade. While tolerated and sanctioned by legislative grants within definite limitations, they are never permitted to be extended beyond the limits which necessitate them. They depend wholly upon this necessity, and cannot be extended beyond this exigency. As to all accessorial business, there is no such necessity, and if the railroads as common carriers cannot monopolize it for their own profit, can they promote the monopoly of it by any one else, or give preferential advantages for conducting it to any other person? That is the precise question here, or rather, the question is: Can the railroad company, under the guise of regulations for the use of its wharf, limit the right to approach it to a single person, give to him the monopoly of the free and navigable waters of the United States, so that no vessel seeking a cargo of coal at this public wharf can approach it or depart from it unless carried to or from it by the tugs of one person? That a railroad company has the right to keep a pier for its own use, and for the use of such transportation lines as have contracts with it for transshipment, cannot be denied, provided it affords to the public reasonable facilities elsewhere at equal rates for the receipt of coal shipped over its road to Baltimore to be there transhipped; but this it not such a pier. By the agreed statement of facts found in the record (pages 50, 51) the Curtis Bay pier is referred to as "a station of said respondent," and it undertakes to deliver all coal which is shipped over its road under a bill of lading designating said pier as the place to which said coal is to be shipped, upon the arrival of said coal at said pier, to whatever vessel or vessels the shippers or consignees of the said coal may designate.

"As a railroad company, the defendant owes a duty to the public to operate its railway and maintain stations for the convenience of all who require transportation over it. It cannot with due regard to the character of its line as a quasi public highway interfere with the coming or going of its patrons to or from any of its stations by whatsoever vessels or vehicles may be employed for the purpose; nor can any vessel or vehicle offering to serve the public by carrying passengers or freight to and from a railway station be discriminated against by being excluded from sharing privileges allowed to others without depriving the people in general of conveniences and facilities which they have a right to enjoy." Judge Hanford in *Oregon Short Line & U. N. R. Co. v. Ilwaco R. & Nav. Co.* (C. C.) 51 Fed. 612.

"Undoubtedly the mooring of vessels at public wharves is a well recognized right, and ought to be protected by the law as that of navigation itself." Judge Acheson in the *St. Lawrence* (D. C.) 19 Fed. 330.

An instructive discussion of the rights and duties of railroad companies with respect to accessorial business may be found in the opinion of Judge Cadwalader in the case of *Camblos v. R. R. Co.*, 4 Fed. Cas. 1104 et seq., where, among other things, it is said:

"Conceding the rightfulness of such accessorial business beyond the rails, there can be no reason that it should be monopolized. \* \* \* A railroad company, as it cannot encounter competition upon the rails, may have consequent inseparable advantages in conducting the accessorial business. \* \* \* This gives peculiar force to the reasons that the company should be restrained in the latter business from assuming preferential facilities to itself or extending them to any one else. Railroad companies have in this respect an immense power, whose abuse cannot easily be prevented. On all questions under this head, therefore, to guard against the danger of encroachment on the rights of the public the charters of the companies are construed strictly against themselves and liberally in favor of the public. \* \* \* Arbitrary discrimination is of course illegal, and so is discrimination for the advantage or disadvantage of one person or of a select few. There can be no abatement for the advantage, direct or indirect, of the company itself, or of its managers or officers or agents or servants or friends."

The case chiefly relied on in support of the rule is *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192, and demands critical examination. It came before the Supreme Court on a certiorari to the Circuit Court of Appeals of the Seventh Circuit. The Pennsylvania Company was the owner in Chicago of a passenger station, and had made a contract with the Parmalee Transfer Company, under which two agents of the transfer company are stationed within the depot building to solicit the custom of passengers. The appellants, who were hackmen, continuously asserted the right, over appellee's repeated objections, to have two of their number enter the building to solicit custom, and the main question in the case was as to the right of the hackmen to solicit business within the station over appellee's protest. The decision of the court, that although its functions are public, a railroad company holds the legal title to the property employed in the discharge of its duties, and to that end may make reasonable rules and regulations for the use of its property, consistent with the purposes for which it is created, and may make arrangements with and grant special privileges to a single concern to supply its passengers arriving at its terminals with hacks and cabs, and is not bound to accord similar privileges to other persons, is not and cannot be controverted. The court held that:

"Its property is to be deemed in every legal sense private property as between it and those of the general public who have no occasion to use it for purposes of transportation; that it was its right, if not its legal duty, to erect and maintain a passenger station, and to so manage it as to subserve primarily the convenience, comfort, and safety of passengers and wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its station house or of the grounds over which said passengers, whether arriving or departing, would pass; that it was easy to see how in a great city, and in a constantly crowded railway station, such an arrangement as that complained of might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business; that the hackmen only sought to use the property of the railroad company to make profit for themselves, and that such hackmen, in no wise connected with the railroad company, cannot of right, and against the objections of the company, go upon its ground or into its station or cars for the purpose simply of soliciting the custom of passengers."

No such right is claimed by the complainant in this case. He does not ask to be allowed to go upon the pier or other property of the defendant, or to make any use of it for the purpose of soliciting business, or otherwise, as claimed by the hackmen, and it follows that the decision upon the main branch of that case does not touch the rights claimed here; but there is a branch of the case which is relevant, and that relates to so much of the injunction of the court below as restrained the appellants—

"from congregating upon the sidewalk in front of, adjacent to, or about the entrances of appellee's passenger station in Chicago, and from there soliciting the custom of passengers, so as to interfere with the ingress and egress of passengers and employes."

It will be observed that the words above quoted are carefully guarded. They are from the decree of the Circuit Court of Appeals, which modified the injunction of the court below that enjoined the appellants "from congregating on the sidewalk in front of, adjacent to, or about the entrances, and there soliciting the custom of passengers." "This injunction," said the Court of Appeals, "was too broad; the congregating that may be restrained in this suit is only such as interferes with the ingress and egress of passengers and employes"; and, inasmuch as the decree by its terms was not limited to protecting appellee's private right of property, it was ordered that it should be modified. The opinion of the Circuit Court of Appeals appears in *Donovan v. Pennsylvania Co.*, 120 Fed. 215, and on page 219, 57 C. C. A. 362, on page 366 (61 L. R. A. 140), the relevant facts are thus stated:

"The main entrance to the station comprises three doorways, each five feet wide. Most of the thirty-odd thousand passengers a day go through this entrance. The building abuts upon the street. In the street, in front of the building, some distance from the entrance, is the hack stand established by the city ordinance. From 10 to 20 hackmen throughout each day have persisted in congregating about the entrance, to the material interference with the ingress and egress of passengers and railroad employes. The number has been swelled by the presence of baggagemen, hotel runners, and Parmalee agents. The Parmalee Company has no greater rights in the street and on the sidewalk than the others, and appellee has not undertaken to give it any. Every one who has an existing contract to deliver or receive a passenger has, through the passenger, the right of access and entry to serve the passenger. This the appellee concedes. The title and the right of control of the streets

for street purposes are in the city. If the streets are obstructed, the city should clear them. Appellee may not take upon itself the vindication of the city's or the public's rights, but to have a free and unobstructed entrance is a property right and easement appurtenant to the abutting realty."

It will be seen that neither in this opinion nor in the opinion of the Supreme Court is there any discussion of what are called "accessorial privileges," that is, the privilege of bringing passengers to or taking them from the station. The exclusion of the hackmen from the station itself is put upon the ground that the station is private property. The injunction, in so far as it affects the sidewalk and streets, rests upon the ground that the railroad company as owner of the station has an easement in the sidewalk and streets appurtenant to the abutting realty, and free and unobstructed entrance is a property right, and it is only such congregating there as interferes with the ingress and egress of passengers and employes that is enjoined. The right of hackmen to bring passengers to the station from the public streets is nowhere sought to be interfered with; on the contrary, it is asserted in the opinion of the Supreme Court:

"Licensed hackmen and cabmen, unless forbidden by valid local regulations, may within reasonable limits use the public sidewalk in prosecuting their calling, provided such use is not materially obstructive in its nature; that is, of such exclusive character as in a substantial sense to prevent others from also using it upon equal terms for legitimate purposes. Generally speaking, public sidewalks and streets are for the use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established, subject, of course, to such valid regulations as may be prescribed by the constituted authorities for the public convenience; this to the end that as far as possible the rights of all may be conserved without undue discrimination."

And there is quoted from the opinion of *Pennsylvania Company v. Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223, as follows:

"The city has no power or authority to grant the exclusive use of its streets to any private person or for any private purposes."

Elsewhere in the opinion of the Supreme Court appears the following:

"A hackman in no wise connected with the railroad company cannot of right and against the objections of the company go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; but of course passengers upon arriving at the station in whatever vehicle is entitled to have such facilities for his entering the company's depot as may be necessary. When, therefore, licensed hackmen and cabmen have at appropriate times placed their vehicles in the public streets next to the sidewalk in front of the company's passenger house, they did not violate the regulations established by the city council, nor, so far as the plaintiff is concerned, did they violate such regulations when, leaving their vehicles in the public streets at the appointed place, they stood near by them for a reasonable time, upon the sidewalk, awaiting the coming of passengers from the station house; but what they could not legally do—what the final decree properly forbade them to do—was to congregate upon the sidewalk in front of, adjacent to, or about the passenger house, so as to interfere with the ingress and egress of passengers."

In so far as attempt is made to justify the rule on the ground that it is necessary in order to prevent delays in the loading of vessels at the pier, we may repeat that such delays as occurred under the old

system are not proved to have been due to complainant, and other means to prevent such delays may readily be adopted. If it be true, as charged, and as seems not improbable, that the real reason for the adoption of the rule is the desire and interest of the railroad company to have a powerful tug always at the pier for various purposes of its own, such as protection from fire, the breaking of ice, for messenger service, and the like, it should hire and pay for such tug, and not seek to secure it under the guise of a regulation for the use of the pier. Much less can it, under the guise of regulations for the use of its own property, adopt a rule not of regulation, but of exclusion, which, in effect, forbids approach to the pier on the public navigable waters of the United States. The railroad company by public advertisement offers to deliver coal at this pier to whatever vessels the shippers or consignees of the coal may designate. The tug boat is the instrumentality by which the vessels approach the pier, and it therefore has the right of the vessel. The public waters are free to its use, as the public streets are for passengers and vehicles approaching a public station. It was so expressly held in the *Donovan Case*, for it is said that:

"Of course a passenger upon arriving at the station in whatever vehicle is entitled to have such facilities for his entering the company's depot as may be necessary."

And again:

"Passengers may therefore in their own right, as well as in right of the company, use the sidewalk in order to gain access to the depot grounds and station, or to reach the public street when leaving the station."

And in that case so much of the decree as related to the public streets and sidewalks was sustained, solely upon the ground that congregating in large numbers on the sidewalk tended to obstruct the free ingress and egress of passengers and employés. There is no attempt here to support this rule upon any such ground.

[2] Another point pressed in the argument needs only brief attention. It does not seem to have been made in the court below, or at least is not referred to in the opinion, that is, that complainant has no standing in court. It is not disputed that if this rule goes into operation a large and profitable business of the complainant is destroyed. This is a property right, which it is the duty of courts to protect. The complainant has through its contracts with the owners of vessels and consignees of coal a considerable property interest in their towage, and, as we have held, it has through these vessels the right of access and entry to the pier, which, like any other station of the railroad, is impressed with the public use, and open to all having contractual relations with the consignees of coal to be delivered there. The disregard of these rights to its injury gives complainant a standing in court which by a bill in equity seeks to prevent a multiplicity of suits and circuity of action.

The decree of the court below is reversed.  
Reversed.

## LOUISVILLE &amp; N. R. CO. v. WILSON.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,110.

**1. MASTER AND SERVANT (§§ 286, 289\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.**

Plaintiff's intestate was a freight conductor on defendant's railroad, and on feeling a sudden shock while riding in the caboose rushed upon the platform to look ahead, when the two parts of the train, which had separated, came together with such force that he was thrown to the track and killed. The separation of the train was due to the opening of a coupler on a car which had been taken into the train at the station last passed, which came uncoupled again a short time later. There was evidence tending to show that the pin which held the two parts of the coupler in place was worn and fitted loosely and might have been thrown up by the movement of the cars. *Held*, that the question of defendant's negligence in permitting the continued use of a coupler so defective from wearing, and also the question of the contributory negligence of deceased in going upon the platform, were both properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050, 1089-1132; Dec. Dig. §§ 286, 289.\*]

**2. MASTER AND SERVANT (§ 246\*)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

A master through whose negligence a servant has been placed in sudden peril cannot require of the servant the same measure of prudence and care which one having time for reflection might be expected to exercise.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-794; Dec. Dig. § 246.\*]

**3. MASTER AND SERVANT (§ 289\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

A rule of a railroad company, requiring conductors to "examine couplings, wheels, journals and brakes of the cars in their trains while on the road as often as their duties will permit," did not impose on the conductor of a freight train such an absolute duty to inspect the couplers of a car taken into his train at a way station as to charge him as a matter of law with contributory negligence which would preclude a recovery for his death because he failed to discover an obscure defect in one of such couplers, in consequence of which his train broke in two and he was killed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**4. MASTER AND SERVANT (§ 288\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.**

A conductor of a freight train cannot be held as matter of law to have assumed the risk from a defective coupler which it was the duty of the railroad company to maintain in good order, where the defect was not obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

**5. MASTER AND SERVANT (§ 264\*)—ACTION FOR INJURY TO SERVANT—PLEADING—VARIANCE.**

Where the declaration, in an action against a railroad company to recover for the death of a conductor, alleged that he was thrown "out of"

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 188 F.—27

the caboose in which he was riding, evidence that he was thrown from the platform of the caboose did not constitute a material variance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action by Nell Moore Wilson against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Albert W. Biggs and John B. Keeble, for plaintiff in error.  
Jere Horne, for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

SEVERENS, Circuit Judge. The defendant in error brought this suit in a court of the state of Tennessee, from whence it was removed into the Circuit Court of the United States for the Western District of Tennessee upon the petition of the railroad company. Its object was to recover damages alleged to have been sustained by her in consequence of the death of her husband through the negligence of the railroad company, and is founded upon a statute of that state giving such a remedy.

Charles Wilson, the husband, was at the time of the accident which caused his death in the employment of the railroad company as a conductor of a freight train running between Paris, Tenn., and Guthrie, Ky. Proceeding from Paris on February 7, 1907, he stopped at a minor station called Erin and took a freight car standing there into his train. When the train was connected up for its further journey, this car was in the midst, ahead by several other cars of the caboose which was at the rear end of the train. After the train had proceeded three or four miles, Wilson, who was having a lunch in the caboose with Porter, an assistant trainmaster of the company, and Brown, a flagman, experienced a sudden shock which startled them. They surmised that the train had broken in two. Wilson rushed to the forward platform of the caboose and looked around the cars ahead to see what had happened. A curve in the road prevented his sight. He turned to the other end of the platform where he would have a better view. At about this moment, the rear section of the train came into violent collision with the forward part, Wilson was thrown down upon the track, where he was fatally injured by the passing wheels, and shortly after died. On examination, it appeared that the train had fallen apart from the opening of the coupler on one end of the car taken in at Erin. By the impact of the collision the coupler had been closed again. The train got under way, and, after going a few miles further, the train parted again by the opening of the same coupler. Thereupon the parts of the coupler were secured together by wires, and the rest of the journey was made without accident. Shortly thereafter this coupler was taken apart and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



carefully examined by the company's experts. The substance of their testimony was that they could find no particular defect and that they were unable to account for its coming apart, unless it happened from the becoming loose of the pin or block which normally drops down into a space in the inside of the arms of the coupler when closed and secures them in that position. The coupler is unlocked by raising the pin out of the space between the arms. The pin was found to be worn and it fitted loosely in its place. From the evidence in the record, it would seem that the jury would probably turn to these facts and conclude that the accident happened from the loose and imperfect co-operation of the pin and the arms of the coupler, by reason of which the pin might be thrown up by the agitating movement of the cars.

Upon the trial of the case before a jury the defendant, after the testimony was in, moved the court to instruct the jury to find a verdict in its favor. This was refused, and the case was submitted. The plaintiff recovered a verdict for \$10,000. There was a motion for a new trial, which was denied. Thereupon a judgment was entered in conformity with the verdict.

It should be noted that the declaration founded the plaintiff's right to recover upon the principles of the common law. Subsequently, the plaintiff obtained leave to amend, and thereupon an amended declaration was filed in which was included a charge that the defendant was negligent, in that while it was engaged in interstate commerce it failed to comply with the requirements of the federal safety appliance acts in respect to the couplings. But, when the case came on for trial, the defendant moved that the amendment be stricken out, and, the plaintiff consenting thereto, the court granted the motion, and the cause proceeded to trial upon the original declaration. Upon the hearing in this court, these conditions have been observed, and no reference has been made to the question whether the defendant was at the time engaged in interstate commerce, or to the obligations assumed by a railroad company in respect to the couplings of its cars when so engaged.

Three leading propositions were involved in the issues and were controverted before the jury:

First, was the defendant negligent in permitting the car to be used while in a defective and dangerous condition?

Second, was the plaintiff's deceased husband guilty of negligence in failing to properly inspect the couplings of the car when he took it into his train at Erin?

Third, whether, as contended by the defendant, the deceased husband assumed the risk of conditions such as existed in the couplings of the car in question.

[1] Upon all these questions the court stated to the jury correctly the general rules of law pertaining to the relative duties of the employer and the employé in such cases. We are of opinion that the court properly submitted the case to the jury, instead of assuming the material facts to be incontestable. First, the jury might not unreasonably have found that the coupling was defective and dangerous

from the uncontradicted facts that it opened while in ordinary use and opened a second time in the same circumstances soon after, and the further testimony concerning the worn and loose condition in which the parts were found on subsequent examination. These facts would tend also to indicate that the defects had existed for some time—long enough to have been discovered by proper inspection.

[2] Second, upon the question whether the deceased conductor was guilty of contributory negligence in rushing out upon the platform of the caboose to find out what was the trouble with his train, instead of remaining in the caboose until the danger was passed or going up into the lookout, a place of comparative safety, to obtain a view, the jury might well have thought that the exciting character of the circumstances in which he was placed ought to excuse him from that degree of prudence and regard for his own welfare which a man would exercise upon deliberation in cooler moments, and that the employer whose negligence had led to the peril ought not to be heard to require of its servant that measure of prudence which one having an opportunity for reflection would be expected to exercise. Such is the general rule of law applicable to the conduct of men in emergencies not resulting from their own fault. *Labatt on Master & Servant*, § 358; *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *Killien v. Hyde (D. C.)* 63 Fed. 172; *Marande v. Texas & Pac. R. Co.*, 102 Fed. 246, 42 C. C. A. 317; and 29 Cyc. 521, where many cases are cited.

[3] It is urged for the defendant that the plaintiff was also guilty of contributory negligence, in this, that there was a rule of the company which required the conductor, when taking in freight cars at stations where there was no inspector, to see that they are in a safe condition, and that this duty extended to an inspection of its couplings. And it is contended that, it not appearing that Wilson made such an inspection, he should be held guilty of such contributory negligence as to prevent a recovery. This is assigned as a reason why the court should have directed a verdict. The testimony incorporated in the bill of exceptions concerning the supposed rule leaves the subject in doubt. The testimony of officers of the company was to the effect that there was such a rule, and one of them produced on cross-examination a printed book of rules, and among them there was found this:

"Conductors must examine couplings, wheels, journals and brakes of the cars in their train while on the road as often as their duties will permit."

And this rule was put in evidence. It is fairly inferable, and the jury might have understood that the witnesses just mentioned, when they testified about the duties of conductors, were giving their opinions of what this rule required. The jury were not bound to accept this interpretation of the rule. Indeed, it is proper to say that it is not fairly susceptible of a construction which absolutely imposed the particular duty of inspecting the coupler of this car taken in by Wil-

son at Erin. And no other rule of the company concerning this subject was produced. It might properly have been inferred, from the failure to produce it, that in fact there was no other. Moreover, the testimony offered by the company to exonerate itself from fault in using this coupler tended to show that, upon a careful and pains-taking examination of the coupler made after the accident, no defect was discovered which should have caused the accident. Yet it is now urged that the defect was so obvious that the conductor, occupied with the whole care of the train, ought to have observed it. Between these inconsistent propositions, the jury might find a middle ground and say that the defect was grave enough to show a failure to give proper inspection on the part of the company, but not so grave as to be obvious to such inspection as the conductor would be bound to make under a duty to examine the cars in his train "as often as his duty will permit." The defect in the coupler was not apparent to observation of external indications, but would be likely to require a somewhat critical examination of its interior parts.

[4] Third. Did the conductor assume the risk of this coupler being, or becoming, out of order? The duty of maintaining it in order was a duty of the company. The conductor assumed only those risks which were obvious or which would have been ascertained by a proper discharge of his duty. What we have said upon the subject of his contributory negligence applies equally to this of his alleged assumed risk. Though not the same, they are often closely related defenses, especially when the alleged negligence consists in not discovering that the master has not performed his duty in making safe the conditions in which the employé is required to perform his service. The principles of law applicable to the case are familiar. The questions of fact were for the jury, and it is impossible to say upon this record that, as matter of law, the jury manifestly erred in its conclusion upon any of the substantive facts which would entitle the plaintiff to recover.

[5] It remains only to notice that the defendant proposed certain specific instructions, five in number, which were all refused. There was a general exception. In order to make the exception available, it must appear that all of the requested instructions ought to have been given. Some of them had been substantially covered by the instructions already given. One of these specific instructions requested was this:

"It is alleged in the declaration that the deceased, Chas. Wilson, was thrown out of the caboose in which he was riding as conductor, and which was his post of duty, etc. Plaintiff's evidence shows that he was not in the caboose, but on the platform of the same immediately before his injury. Therefore there can be no recovery under this declaration."

The supposed variance was not material, and should have been disregarded. To have required the jury to make their verdict turn on so nice a distinction as this might have led to a miscarriage of justice.

There are no other questions of sufficient merit to require further discussion.

The judgment must be affirmed, with costs.

## UNITED STATES v. WHITMIRE et al.

(Circuit Court of Appeals, Eighth Circuit. May 20, 1911.)

No. 3,354.

## 1. EQUITY (§ 419\*)—DECREE PRO CONFESSO—POWER TO VACATE.

Under equity rule 19 a federal court of equity is authorized, on motion and a showing, to vacate an order pro confesso taken against a defendant and enlarge the time for filing an answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 972-985; Dec. Dig. § 419.\*]

## 2. INDIANS (§ 13\*)—ALLOTMENT OF LAND—CANCELLATION OF CERTIFICATE—APPOINTMENT ON COURT'S OWN MOTION.

In a suit by the United States to cancel a certificate of allotment of Indian land, in which the material allegations of the bill were denied, and the court denied a motion by complainant for a temporary injunction against defendant, who was in possession of the land, it was within its discretion to appoint a receiver therefor; it appearing that oil was being produced thereon.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Suit in equity by the United States against Albert Whitmire and John R. Greenlees. From an order appointing a receiver, the United States appeal. Affirmed.

J. C. Denton, Asst. U. S. Atty. (William J. Gregg, U. S. Atty., on the brief), for the United States.

W. A. Chase and W. H. Kornegay, for appellee Greenlees.

Before VAN DEVANTER and HOOK, Circuit Judges, and CARLAND, District Judge.

HOOK, Circuit Judge. This is an appeal from an order of the Circuit Court appointing a receiver. The suit was commenced by the United States against Albert Whitmire and John R. Greenlees to cancel a certificate of allotment to Whitmire of a tract of land and his deed thereof to Greenlees, and otherwise to clear the title and to establish its right to possession, to the end that the provisions of the acts of Congress respecting the disposition of the land may be complied with. Greenlees is the real defendant in interest. The case presented in the amended bill of the government is as follows:

Whitmire, who was an enrolled freedman of the Cherokee Tribe of Indians and entitled to an allotment of tribal lands, was not entitled to select the particular tract in question; but he secured an allotment of it to himself by false and fraudulent representations respecting his ownership of the improvements. On the same day he made the deed to Greenlees, who took with notice. Under an act of Congress the allotment was open to contest for nine months. Within that period a contest was instituted, and it resulted in a decision, affirmed by the Secretary of the Interior, annulling the allotment to Whitmire. The land was then allotted to another. It is also

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

averred that Greenlees appeared and participated in the contest and is concluded by the final determination thereof. Greenlees obtained a decree in a suit in a state court that he was the owner and entitled to the possession of the land; but it is claimed neither the government nor the Cherokee Nation were parties thereto, and are not affected by it, also that the court was without jurisdiction of the subject-matter. The theory of the bill is that the acts of Whitmire and Greenlees and the decree of the state court interfere with and obstruct the performance of the duties respecting the allotment and distribution of the Indian lands imposed by the acts of Congress upon the Department of the Interior and subordinate agencies, which are constituted special tribunals for such purposes and given exclusive cognizance.

An order *pro confesso* was taken against Greenlees for failure to answer the amended bill in time. The government filed a motion, stating that Greenlees had wrongfully taken possession of the property, and asking that he be required to restore it and be enjoined from further interference. Greenlees moved that the order *pro confesso* be set aside, and that he be allowed to answer the amended bill. After hearing the motions the court entered an order by which it vacated the order *pro confesso*, granted Greenlees leave to answer, and denied the temporary injunction. As part of the order the court of its own motion appointed a receiver to take charge of the land. Greenlees filed his answer on the same day, specifically denying the averments of the amended bill essential to the government's recovery. It appears from the briefs, though not from the pleadings, that the land was oil producing, which probably accounts for the importance of possession during the pendency of the suit.

As already stated, the appeal of the government is from the appointment of the receiver; but we will assume that it brings up the entire interlocutory order for review. See *Smith v. Vulcan Iron Works*, 165 U. S. 518, 524, 17 Sup. Ct. 407, 41 L. Ed. 810. The order *pro confesso* was merely *nisi*, and upon motion, and the showing that was made, the court was fully authorized by equity rule 19 to vacate it and enlarge the time for answer. The requirement of the rule as to costs, which does not appear to have been observed, can be attended to by the court at any stage of the case without reversal of the order. The averments of fact in the amended bill upon which the government relied were controverted, and the case had not sufficiently progressed to show clearly that it was entitled to a decree or would likely receive one. When the trial court acted, the land was in the possession of Greenlees; but it took it out of his possession, and put it in the hands of its own officer pending the suit. Greenlees is not complaining of this, and under the circumstances we do not think the government has just cause for complaint. There was no showing to move the court's discretion toward a temporary injunction, which would have the effect of putting it into possession. True, the government did not seek a receiver; but it was benefited, not prejudiced, by the appointment of one.

The order is affirmed.

## CORENMAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 6, 1911.)

No. 277.

**1. CRIMINAL LAW (§ 1134\*)—APPEAL AND ERROR—QUESTIONS REVIEWABLE.**

In the federal courts, the denial of a motion for a new trial in a criminal case is not reviewable by an appellate court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.\*]

**2. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS.**

In a prosecution of a bankrupt for fraudulently concealing property from his trustee, where the jury were instructed that to convict they must find certain facts, from which a fraudulent intent must be inferred as matter of law, a specific instruction that such intent must be found was not required.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**3. BANKRUPTCY (§ 485\*)—CRIMINAL OFFENSES BY BANKRUPT—FRAUDULENT CONCEALMENT OF PROPERTY.**

That a bankrupt used a part of the proceeds of property concealed from his trustee in the payment of debts does not negative a fraudulent intent in such concealment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 485.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Zindil Corenman was convicted of a criminal offense, and brings error. Affirmed.

H. W. Unger (Abraham Levy, on the brief), for plaintiff in error.  
Henry A. Wise, U. S. Atty. (A. S. Pratt, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. We have carefully considered all of the contentions made in behalf of the defendant. In view, however, of the large number of assignments of error, and of their nature, we deem it unnecessary to state the facts or review the contentions in any further detail than is required to explain the following conclusions reached:

(1) The evidence tending to establish the guilt of the defendant was quite sufficient to warrant the trial court in submitting the case to the jury. The motions to dismiss the indictment and to advise the jury to acquit were properly denied.

[1] (2) The action of the trial court in denying a motion for a new trial is not reviewable in this court.

[2] (3) There was no error in the charge with respect to the fraudulent intent of the defendant. The facts which the trial court instructed the jury that they must find in order to convict the defendant were facts from which the inference of a fraudulent intent followed as a matter of law. If they found such facts, it was not only the right, but the duty, of the jury to find the intent alleged.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[3] (4) The defendant was not entitled to an instruction that the jury could find a want of fraudulent intent from the mere fact that he used a part of the proceeds of the check to pay debts with. After bankruptcy the check belonged to the bankrupt's estate, and not to him, and it was for the trustee to distribute it. The request to charge itself assumed that only \$300 of the proceeds had been used for debts. The question of the bona fide application of moneys alleged to have been concealed was not fairly raised.

(5) We find no error in any other portions of the charge.

(6) The date of the filing of the petition in bankruptcy was clearly established by the stamped indorsement thereon, supplemented by the testimony of the witness Cohen.

(7) We think it the better view that the testimony concerning the \$300 check was admissible as a part of the *res gestæ*. It tended to show the date of the transaction. But, if the testimony were immaterial, we think that there was no such error in receiving it as would require a reversal of the judgment.

(8) The testimony regarding the second check was probably immaterial, but we fail to see that the defendant was prejudiced by it. The offense was completed when he fraudulently concealed the first check, and it could not have materially affected him to show what was subsequently done with it. Moreover, there was testimony that the defendant participated in the matter of the substitution of the checks.

(9) The trial court properly excluded the question put to the trustee in bankruptcy upon cross-examination with respect to his efforts to collect the check. The question related to an irrelevant and immaterial matter. The question was whether the bankrupt had concealed property, not whether the trustee had done his duty with respect thereto.

(10) We find no reversible error in any of the other rulings upon evidence.

The judgment of the Circuit Court is affirmed.

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In re DR. VOORHEES AWNING HOOD CO.

(Circuit Court of Appeals, Third Circuit. May 31, 1911.)

No. 35.

**BANKRUPTCY (§ 342½\*)—CLAIMS—REVIEW—EVIDENCE.**

On a referee's certificate to review the partial allowance of a claim against a bankrupt, it was error for the court to increase the allowance for alleged "damages for breach of a patent license agreement, \$1,000," where there was no evidence in the case that damages in any amount had been proved by breach of such agreement.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 342½.\*]

Petition for Revision and Appeal from the District Court of the United States for the Middle District of Pennsylvania.

In the matter of the bankruptcy proceedings of the Dr. Voorhees

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Awning Hood Co. On petition to revise an order increasing the amount allowed on a claim presented by Samuel H. Voorhees (187 Fed. 611). Reversed.

Watson, Diehl & Watson, for trustee.

Before BUFFINGTON and LANNING, Circuit Judges, and McPHERSON, District Judge.

BUFFINGTON, Circuit Judge. In the course of the proceedings in bankruptcy of the Dr. Voorhees Awning Hood Company, a claim against the bankrupt estate for \$14,687.84 was presented by Samuel H. Voorhees. After hearing, the referee allowed the claim to the extent of \$625.83. The court below, on the matter being certified at the request of the claimant, entered a decree that in addition to \$625.58, allowed by the referee, and two items aggregating \$85, to all of which no objections are here made, a further allowance be made, viz.: "Damages for breach of license agreement, \$1,000." To review the court's action in allowing this \$1,000, the present petition to review and appeal are brought, and the assignment of error is that:

"In the findings of fact made by the referee, there is no finding, nor is there any evidence in the case that damages in any amount have been proved, and there is no finding of fact, nor is there any evidence in the case, upon which the order of the court allowing damages in the sum of \$1,000 is based."

We have carefully examined the testimony before the referee, and we find no testimony whatever bearing on the question of damages and on which this allowance of damages could have been supported. We have not had the benefit of a brief or argument on behalf of the claimant, and it is possible that the court below was led, by the then attitude of counsel, to allow such sum, feeling it would end the controversy; but, whatever may have been the inducing cause, it is clear to us that there was no proof to support the allowance of the \$1,000 in question. This underlying fact determines the case and renders it needless on our part to discuss the question whether the bankruptcy of the company did not terminate the patent license and whether, in any event, the patentee, by resuming control of the patent and working thereunder, had not precluded himself from claiming for the use of a monopoly he was himself enjoying.

The decree below must therefore be reversed at the appellee's cost, and the case remitted to the court below, with instructions to enter a decree in favor of the claimant for \$710.58.



FIRST NAT. BANK OF MERCER, PA., v. CITIZENS' NAT. BANK OF  
NORFOLK, NEB., et al.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1911.)

No. 3,494.

## CHATTEL MORTGAGES (§ 177\*)—MORTGAGED CATTLE—SALE—EVIDENCE.

In an action against a bank for conversion of mortgaged cattle, evidence held insufficient to justify a verdict for plaintiff.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 177.\*]

In Error to the Circuit Court of the United States for the District of Nebraska.

Action by the First National Bank of Mercer, Pa., against the Citizens' National Bank of Norfolk, Neb., and others. Judgment for defendants and plaintiff brings error. Affirmed.

H. C. Brome and Clinton Brome, for plaintiff in error.

M. D. Tyler and John P. Breen, for defendants in error.

Before ADAMS and SMITH, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This suit was instituted by the plaintiff in error, who was plaintiff below, to recover from the defendants in error, defendants below, the value of 85 cattle, which had been mortgaged to plaintiff by one S. W. Deuel to secure the payment of a debt of \$3,000 due from him to the plaintiff. It was alleged in the petition that the defendants, with full knowledge of the existence of plaintiff's mortgage, caused the cattle mortgaged to be sold and disposed of, and appropriated the proceeds thereof to their own use. Issue having been joined on this allegation, the cause went to trial, and resulted in an instructed verdict for the defendants.

A careful review of the evidence fails to disclose that the defendants had anything to do with the sale or disposition of the cattle in question. They were sold by the mortgagor of his own motion, without even the knowledge, so far as this record discloses, of either of the defendants. The fact that Deuel at the time in question owed the banks some money was made the occasion of a searching examination of their officers by counsel for the plaintiff, in an attempt to show that some part or all of the purchase price of the cattle was appropriated to the payment or reduction of Deuel's debt to the banks; but this examination proved ineffectual. It failed to disclose, with any degree of definiteness, that either of the banks received any of the proceeds of the sale of the cattle; and certainly there is no substantial evidence of knowledge on the part of either of the defendants that they were receiving such proceeds. The trial court characterized the evidence as too uncertain and conjectural to establish the right of recovery under the pleadings in the case.

This we think was right, and the judgment is affirmed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## AMERICAN GRAPHOPHONE CO. v. VICTOR TALKING MACH. CO. et al.

(Circuit Court of Appeals, Third Circuit. June 13, 1911.)

No. 24.

## COURTS (§ 290\*)—JURISDICTION OF FEDERAL COURTS—SUITS ARISING UNDER PATENT LAWS.

A federal court is without jurisdiction of a suit as one for infringement arising under the patent laws, where the bill shows that defendant entered on the use of the invention under a license contract which has not been rescinded nor abrogated by agreement of the parties or the decree of a court, and that the real question involved is one of contract rights.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 832; Dec. Dig. § 290.\*]

Jurisdiction of federal courts in suits relating to patents, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Suit in equity by the American Graphophone Company against the Victor Talking Machine Company and Eldridge R. Johnson. Decree (188 Fed. 431) for defendants, and complainant appeals. Affirmed.

C. A. L. Massie, John W. Griggs, and Philip Mauro, for appellant.  
Horace Pettit, for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and YOUNG, District Judge.

BUFFINGTON, Circuit Judge. In the court below the American Graphophone Company filed a bill in equity charging the Victor Talking Machine Company and Eldridge R. Johnson with infringing patent No. 688,739, granted December 10, 1901, to Joseph W. Jones. The bill further states that complainant by contracts, copies of which are attached to the bill, granted to respondents a license under said patent, and that respondents are using said license and claim to do so under said contracts. The bill charges, however, that respondents have forfeited said contracts by denying the validity of said patent. To this bill the respondents demurred, and the court below in an opinion reported at 188 Fed. 431, sustained the second ground of demurrer, viz.:

"That the complainant has not in and by its said bill of complaint made or stated a case such as entitles it in a court of equity to any relief from or against this defendant, touching the matter contained in said bill of complaint or any other matter."

To avoid repetition, we note especially and quote two parts of the opinion of the court below, which call attention to features on which in our judgment this case turns. Those statements are:

"Recurring again to the bill of complaint, it will be found it contains no allegation that the above-mentioned agreement has been rescinded or broken, nor any prayer for a decree to that effect. So far as thereby disclosed, the agreement in all its provisions is in full force and effect and binding upon the parties thereto, except, as already mentioned, it is alleged that the de-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendants by their conduct, as set out in the above quoted paragraphs, have renounced and repudiated the license to manufacture under the Jones patent."

And this:

"I might add, however, that in my judgment, in view of the character of this contract, even if the power to elect to abrogate or rescind it were admitted, it could not elect to abrogate or rescind a part only and retain the balance of the contract, since, as already stated, by its terms it provides for an exchange of licenses. The covenants are mutual and interdependent and constitute the consideration of the contract. To treat as rescinded or abrogated a single license forming but a small part of the intermingled subject-matter of the contract, and at the same time, impliedly at least, retain the balance, did not lie in the power of the complainant."

From these extracts, it will appear that the present bill, while brought as a patent case, and therefore falling within the purview of R. S. § 629 (U. S. Comp. St. 1901, p. 503), in fact involves a question, not of patents, but of contract. The pertinent questions embodied in the statements are: Are there existing contracts between these parties? Has the conduct of the respondents been such as to preclude them from availing themselves of the license granted by said contracts? Does the law give the complainant a right to ignore the contracts and enforce the monopoly of its patent? Stripped of all verbiage and extraneous matter, the question to which this case would ultimately come is one of contract rights. Indeed, of this case it may be said, as it was in *Wilson v. Sandford*, 10 How. 99, 13 L. Ed. 344:

"The dispute in this case does not arise under any act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles."

And, as to it, it may be pertinently inquired, as it was in *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357:

"What is there here arising under the patent laws of the United States? What controversy that requires for its decision a reference to those laws or a construction of them? There is no denial of the force or validity of plaintiff's patent, nor of his right to the monopoly which it gives him, except as he has parted with that right by contract."

This case, it seems to us, is governed by *Hartell v. Tilghman*, supra. In that case it was ably contended by Judge Bradley, representing a strong minority, that a dispute over a license right was a defense proper to a suit for infringement, and was not a subject-matter of a bill that goes to the jurisdiction of the court, but his dissent shows that this view was at variance with that of the majority. The significance of the decision in *Hartell v. Tilghman* may be seen in the court's opinion showing what was common between that case and *Wilson v. Sandford*. Thus, speaking of the latter case, the *Hartell v. Tilghman* opinion says:

"In that case a contract was made under which the defendant entered on the use of the invention. This is also true of the case before us. In that case it is charged that an act to be performed by the defendant and licensee under the contract was not performed, to wit, payment of the notes. In the case before us it is alleged in like manner that the defendants failed to perform part of the contract, to wit, to sign a license. In that case the

complainant asserted, as in this, that all right under the contract had ceased, and he was remitted to his original rights under the patent, and could, therefore, sue in the federal court under the statute; but the court held this to be erroneous, and that the rights of the parties depended on the contract, and not on the statute."

Now the same things may be said of the present case, for in it also "a contract was made under which the defendant (the Victor Company) entered on the use of the patent." In it "it is charged that an act to be performed by the defendant and licensee under the contract was not performed, to wit," loyalty of the licensee to the licensor's patent. Here, too, as there complainant asserted "that all right under the contract had ceased, and he was remitted to his original rights under the patent, and could, therefore, sue in the federal court under the statute," for here, to quote from the bill, the allegation is that the Victor Company, "in disregard of their contract obligations, undertook to adduce, and over your orator's objections and protests did adduce, evidence. \* \* \* And your orator charges that such conduct on the part of the defendants herein \* \* \* is a violation of their contract obligations, \* \* \* and that such conduct on the part of the defendants herein amounts in law to a renunciation and repudiation by them of said license." From this it seems clear that *Hartell v. Tilghman*, supra, is conclusive of the case in hand, unless the principle of that case is affected by later decisions, and it is said this is done by *White v. Rankin*, 144 U. S. 635, 12 Sup. Ct. 768, 36 L. Ed. 569, where the bill was sustained. But, without stating the complicated facts of that case, we content ourselves with saying that a study of them shows the case was decided as it was because it involved nothing but patents, for the opinion, after showing that the real significance of *Hartell v. Tilghman* was that it involved a case of alleged license, "while the present case (*White v. Rankin*) stated by the bill arises on the patents. There is no suggestion in the bill that there ever was any contract or agreement or attempt to make one between the plaintiff and defendant thereupon, or that either the plaintiff or defendant claim anything under any contract." It is clear from this that *White v. Rankin*, where there was no contract, in no way qualifies *Hartell v. Tilghman*, where there was a contract. The present case therefore falls under the *Hartell* Case, as involving a question of contract, and is governed by its principle. This view is in accord with *McMullen v. Bowers*, 102 Fed. 494, 42 C. C. A. 470; *American Co. v. Jones* (C. C.) 122 Fed. 803; *White v. Lee* (C. C.) 3 Fed. 222; *Adams v. Meyrose* (C. C.) 7 Fed. 208; and *Standard Co. v. National Co.* (C. C.) 95 Fed. 291, decided in this circuit.

The court below, therefore, rightly sustained the second ground of demurrer quoted above, and its decree dismissing the bill is sustained without prejudice to the enforcement of other remedies.

## AMERICAN GRAPHOPHONE CO. v. VICTOR TALKING MACH. CO. et al.

(Circuit Court, D. New Jersey. January 3, 1911.)

## 1. PATENTS (§§ 214, 265\*)—SUIT FOR INFRINGEMENT—EFFECT OF LICENSE.

A license under a patent for a stated term cannot be terminated before the expiration of such term except by mutual agreement of the parties on the adjudication of a court, and the licensor cannot by himself declaring a forfeiture maintain a suit under the patent laws for infringement against the licensee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327, 407-409; Dec. Dig. §§ 214, 265.\*]

## 2. PATENTS (§ 214\*)—LICENSE—REVOCATION.

Where a contract provides for an exchange of licenses to manufacture under specified patents severally owned by the respective parties, the consideration being such mutual agreements, one party cannot elect to abrogate or rescind it with respect to a single license while retaining it in effect as to the others.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 321-327; Dec. Dig. § 214.\*]

In Equity. Suit by the American Graphophone Company against the Victor Talking Machine Company and Eldridge R. Johnson. On demurrer to bill. Demurrer sustained.

Affirmed in 188 Fed. 428.

John W. Griggs, C. A. L. Massie, and Philip Mauro, for complainant.

Horace Pettit, for defendants.

CROSS, District Judge. The complainant has filed its bill of complaint against the Victor Talking Machine Company and Eldridge R. Johnson, alleging that they have infringed patent No. 688,739, issued to one Jones, December 10, 1901, and duly assigned to the complainant, and praying for an injunction and an accounting of profits and damages in the usual form in such cases. It further appears by the allegations of the bill that the patent in suit has been upheld by the adjudications of several Circuit Courts of Appeals; also, that the defendants held the complainant's written license to manufacture under the patent from December 8, 1903, to June 3, 1907, when that license was annulled and canceled by another of the latter date which was substituted in its place. Both of the above-mentioned licenses are referred to in the bill of complaint and made a part thereof, and copies are annexed thereto as Exhibits B and C. The bill further alleges that on or about May 11, 1907, the defendants renounced and repudiated said license of June 3, 1907, and their obligations thereunder, notwithstanding which they have continued to use, and are still using, the process set forth in, and claimed by, the said Jones patent. The allegations upon which said renunciation and repudiation are predicated are set forth in the following paragraphs of the bill:

"(18) More particularly, your orator shows that said defendants Victor Talking Machine Company and Eldridge R. Johnson did on or about May 11, 1907, file or cause to be filed in the United States Patent Office certain

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

affidavits and amendments and claims and arguments, which were by them intended to have, and did have, the legal effect of claiming for said Johnson, on behalf of said Victor Talking Machine Company, as his assignee, the very invention previously awarded to your orator as assignee of said Joseph W. Jones, by the adjudication of said Court of Appeals in said suit against said Universal Talking Machine Manufacturing Company to which suit said Johnson and said Victor Talking Machine Company were privies as aforesaid; that subsequently said Johnson and said Victor Talking Machine Company did procure the issuance on August 11, 1908, to the latter as assignee of the former of United States letters patent No. 896,059, with claims substantially identical in scope and legal effect with the two claims of your orator's said Jones patent here in suit; that thereafter, on or about October 4, 1909, said Victor Talking Machine Company (with the approval and ratification, as your orator believes and charges, of said Eldridge R. Johnson) did file its bill of complaint in the United States Circuit Court for the Southern District of New York, charging your orator with infringement of said Johnson patent No. 896,059, last referred to; and in support of its charge did show and prove that your orator was practicing the very process already disclosed and patented to your orator by your orator's said Jones patent.

"(19) And still more particularly your orator shows that when your orator by its proofs in opposition to the suit last referred to on said Johnson patent had established that the claims of said Johnson patent were substantially identical with the claims of your orator's Jones patent aforesaid, and were anticipated by the latter—thereupon said Johnson and said Victor Talking Machine Company introduced further adequate proof that the invention of the defendants' said Johnson patent is substantially identical with the invention of your orator's said Jones patent, and thereafter, in rebuttal proofs, the said Johnson and said Victor Talking Machine Company, in defiance of the prior adjudication and in disregard of their contract-obligations, undertook to adduce, and over your orator's objections and protests did adduce, evidence intended by said Johnson and said Victor Talking Machine Company to prove that said Johnson had anticipated said Jones in the production of said invention, and that said Jones was not the true and first inventor of the process patented in and by your orator's said Jones patent—which, if true, would have the legal effect of invalidating your orator's said Jones patent, and thereafter said Johnson and said Victor Talking Machine Company have persisted in attempting to prove said invention to have been made by said Johnson and not by said Jones, and to prove that your orator in practicing its own patented Jones process is infringing said Victor Talking Machine Company's said Johnson patent."

The defendants have separately demurred to the bill of complaint, assigning various causes therefor, which, however, need not be specifically set forth. It is sufficient to say that they fairly raise the question to be considered later. An examination of the license agreement of June 3, 1907, shows that it was to continue in force until October 9, 1923. No royalties, however, were to be paid upon any patent therein mentioned subsequent to its expiration or declared invalidity. The agreement in substance provided for a mutual exchange of licenses to manufacture under certain specific patents severally owned by the respective parties thereto. The consideration of the agreement was manifestly the mutual agreement and undertakings of the parties, each to allow the other the right to use its patents upon the therein prescribed terms and conditions. The agreement contained no clause of forfeiture nor any provision whereby one party could terminate it, either in whole or in part, without the consent of the other. It was, however, expressly provided therein that no royalties should accrue or be payable by the Victor Company to the Graphophone Company for the

right to manufacture under the Jones patent, until the expiration of the Berliner patent, No. 534,543, which date of expiration, it was further stipulated, should not be construed to be earlier than February 11, 1911. Recurring again to the bill of complaint, it will be found to contain no allegation that the above-mentioned agreement has been rescinded or broken, nor any prayer for a decree to that effect. So far as thereby disclosed, the agreement in all its provisions is in full force and effect, and binding upon the parties thereto, except, as already mentioned, it is alleged that the defendants by their conduct, as set out in the above quoted paragraphs, have renounced and repudiated the license to manufacture under the Jones patent.

[1] Under the circumstances, the bill of complaint, considered as a whole, does not state such a breach or rescission of the license as entitles the complainant to the relief it seeks. The contract of license under which the defendants are manufacturing has not been abrogated or annulled either by the decree of any court, the act of the parties, or by virtue of any provision therein contained. Its alleged renunciation or repudiation by the defendants rests merely upon the complainant's assertion. Whether the defendants by their conduct have afforded legal ground for its rescission at the instance of the complainant, the courts upon proper application will determine. It does not, however, lie in the mouth of one of the parties to determine the question and thereupon act in a manner which would only be justifiable in case it has been judicially determined. Before the defendants can be held as infringers of the patent in suit, the license in question must be disposed of, and that constitutes an independent question which must be determined by itself before this court will entertain a bill under the patent laws for its infringement. The rule thus stated is supported by the case of *Comptograph Co. v. Burroughs Adding Machine Co.* (C. C.) 175 Fed. 787, decided by Judges Kohlsaat and Sanborn, which presented a situation very like the present. The defendant in that case was a licensee under a patent and as such was guilty of conduct which the complainant insisted amounted to a repudiation of the license. The conduct referred to was described by the court in its opinion as follows:

"There can be no reasonable doubt that defendant by its counsel assumed a hostile position to complainant in said test suit before the Court of Appeals. It asserted various hostile positions, some of which were not insisted on by the then defendant. It set up title in itself to the Pike patent, No. 595,864, an alleged infringer of the Felt patent in suit. It asserted the Felt patent to be an abandoned experiment. It substantially sided with the original defendant. It charged various acts calculated to invalidate the patent in suit, such as delay, abandonment, the Pike patent as an anticipation, Felt's misrepresentation to the Patent Office—all this in face of the well-known doctrine that a licensee may not be heard to contest the validity of his licensor's patent. 'A licensor,' says our Court of Appeals in *Indiana Mfg. Company v. J. I. Case Threshing Machine Company*, 154 Fed. 365 [83 C. C. A. 343], 'has the right \* \* \* to appellee's (the licensee's) silence respecting the validity and prima facie scope of the patent.' It further appears that it was to defendant's advantage to have the patent declared invalid, since large payments were thereby avoided. Complainant insists that

the defendant's course in the former case amounted to both a breach and repudiation of the license contract; that defendant, after said decision, proceeded to ally itself with another infringer and entered upon other alleged infringements; that it has by its silence apparently acquiesced in the annulment of the contract by complainant up to the time of bringing this suit (i. e., more than 18 months); that it has made no attempt to pay royalty, has made no reports, nor has it marked its machines under the patent in suit.

"All and each of the foregoing allegations are deemed to be fairly established by the record."

The court in disposing of the question says:

"It is a familiar rule that a party may not enter into a contract to do or pay something upon the happening of a certain event, and then proceed to make the happening of the condition impossible, and such a course is held to be ground for the cancellation of a contract; but, in the absence of a special condition of the contract to that effect, a licensor cannot by his own act revoke and terminate a license contract. He may file his bill for a rescission, but cannot terminate it by his own declaration, especially when some part of it has been performed. 'The law does not arm one party to a contract,' says Judge Gray in *Standard Dental Mfg. Co. v. National Tooth Co.* (C. C.) 95 Fed. 291, 'with the power to determine in his own favor a condition of this kind, and thus produce for the other party to the contract all the disabilities and consequences that would follow a forfeiture legally ascertained and declared. Even where the contract provides that the failure to pay shall render it null and void, the defendant has a right to be heard as to the facts upon which such annulment is made to depend. Forfeitures are not favored in equity, and the best-considered decisions hold that even licenses containing express stipulations for their forfeitures are not, ipso facto, forfeited upon conditions broken, but remain operative and pleadable until rescinded by a court of equity.'

"In *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357, the court says: '\* \* \* We do not agree that either party can of his own volition declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice.'

"The same rule is held to in *Wilson v. Sanford*, 10 How. 99, 13 L. Ed. 344, and in *Hanifen v. Lupton* (C. C.) 95 Fed. 465, and *McMullen v. Bowers*, 102 Fed. 494, 42 C. C. A. 470.

"We hold, therefore, that the license contract was not made void by the several acts of the parties thereto as above recited, that it is still in force, and that the plea which is hereby held to constitute a valid defense to the bill should be and is sustained."

Again, in *American Street Car Advertising Co. v. Jones et al.* (C. C.) 122 Fed. 803, Judge Ray says:

"This action can be maintained in equity because the license was granted, went into effect, and both parties recognized and acted under it. It could not be revoked or ended except by mutual consent. The defendants have never consented to its revocation. True, they say, the patent was invalid, but this is not an assent to a revocation of the license."

These authorities are in point and control this case.

[2] I might add, however, that in my judgment, in view of the character of this contract, even if the power of the complainant to elect to abrogate or rescind it were admitted, it could not elect to abrogate or rescind a part only and retain the balance of the contract, since, as already stated, by its terms it provides for an exchange of licenses. The covenants are mutual and interdependent, and constitute the consideration of the contract. To treat as



rescinded or abrogated a single license forming but a small part of the intermingled subject-matter of the contract, and at the same time, impliedly at least, retain the balance, did not lie in the power of the complainant. The demurrers must be sustained, with costs.

This conclusion disposes of the rule to show cause why a preliminary injunction should not issue, which was argued with the demurrers.

That rule will be discharged, with costs.

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WALKER PATENT PIVOTED BIN CO. v. BERNARD GLOEKLER CO.

(Circuit Court, W. D. Pennsylvania. August 3, 1909.)

No. 31.

1. PATENTS (§ 328\*)—INFRINGEMENT—TILTING BIN.

The Walker patent, No. 614,279, for a tilting bin, *held valid and infringed* on a motion for preliminary injunction.

2. PATENTS (§ 297\*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a patent has been sustained on final hearing by a Circuit Court and also by the Circuit Court of Appeals, a preliminary injunction against its infringement should not ordinarily be denied by another court in the same circuit on affidavits attacking its validity.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.\*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

In Equity. Suit by the Walker Patent Pivoted Bin Company against the Bernard Gloekler Company. On motion for preliminary injunction. Motion granted.

Ernest Howard Hunter and J. P. Sproul, for plaintiff.

J. M. Nesbit and W. G. Doolittle, for defendant.

ORR, District Judge. The patent in this suit was considered and sustained by the Circuit Court for the Eastern District of Pennsylvania in the suit of Walker Patent Pivoted Bin Co. v. Brown et al. (C. C.) 110 Fed. 649, and again by the same court in Walker Patent Pivoted Bin Co. v. Miller et al. (C. C.) 132 Fed. 823, which last decision was affirmed on appeal. *Miller et al. v. Walker Patent Pivoted Bin Co.*, 139 Fed. 134, 71 C. C. A. 398.

[1] This is a bill filed for an infringement of the same patent in which the defendants again attack the validity of claim 1, notwithstanding the careful consideration given to such claim by Judge Archbald, who decided both the cases in the court below, and whose opinion was adopted in the Court of Appeals in the case last cited.

Claim 1 in the letters patent which were granted to Edwin J. Walker, November 15, 1898, No. 614,279, reads as follows:

"The combination with a casing, comprising a bin chamber, of a bin tiltably mounted in said chamber and of depth substantially equal thereto, the axis of oscillation of said bin being at the front edge of said casing, and a

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

counterbalance front for said bin projecting forward of said axis, substantially as and for the purpose set forth."

It is well shown in those cases that the novelty of complainant's bin is the location of the axis at the front edge of the casing *and* the formation of the counter-balancing swell front beyond that axis. Infringement is denied on the ground that the defendant's bin is simply a box projecting out of the bin casing and allowed to assume a tilted position. The bottom of defendant's bin back of the axis of oscillation lies in the same plane with the bottom of the swell front. In fact that portion of the bottom of defendant's bin extending in front of the bin casing and connecting with the front of said bin makes a counterbalance swell front for said bin projecting forward of said axis. The most important feature of the Walker patent is clearly seen in the defendant's bin. So far as I can see there is nothing in the defendant's case which would justify refusing to the complainant the relief which it asks for.

[2] The affidavits presented by the defendant for the purpose of furnishing new evidence in respect to anticipation are uncertain, if not evasive, and therefore insufficiently convincing. Were they otherwise, because the patent has been sustained in other suits, a preliminary injunction would not be denied. *Armat Moving Picture Co. v. Edison Mfg. Co.* (C. C.) 121 Fed. 559; *American Graphophone Co. v. International Record Co.* (C. C.) 155 Fed. 427; *Consolidated Fastener Co. v. Hays* (C. C.) 100 Fed. 984; *New York Filter Mfg. Co. v. Niagara Falls Water Works Co.*, 80 Fed. 924, 26 C. C. A. 252; *American Bell Telephone Co. v. Cushman* (C. C.) 57 Fed. 843; *Macbeth v. Braddock Glass Co.* (C. C.) 54 Fed. 173; *Brush Electric Co. v. Accumulator Co.* (C. C.) 50 Fed. 833.

Again, defendant's resistance to the motion on the ground of complainant's laches should not be seriously considered. The litigation complainant was put to by other infringers was sufficient reason for delaying proceedings against the defendant.

A preliminary injunction should issue. Let an order be drawn accordingly.

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#### SCHMERTZ WIRE GLASS CO. et al. v. WESTERN GLASS CO.

(Circuit Court, N. D. Illinois, E. D. May 13, 1911.)

No. 30,345.

#### PATENTS (§ 328\*)—INFRINGEMENT—PROCESS OF MAKING WIRE GLASS.

The Schmertz reissue patent, No. 12,443 (original No. 791,216), for an apparatus and process for making wire glass, *held* not infringed by a process which is in effect the three-step process of the prior art.

In Equity. Suit by the Schmertz Wire Glass Company and the Mississippi Wire Glass Company against the Western Glass Company. Decree for defendant.

Arthur J. Baldwin and Drury W. Cooper, for complainants.  
Offield, Towle, Graves & Offield, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SANBORN, District Judge. Bill filed March 22, 1911, for infringement of the Schmertz reissue patent, No. 12,443, of January 30, 1906. During the hearing on the accounting under interlocutory decree in the former suit (178 Fed. 977, affirmed 185 Fed. 788), it was found that defendant had modified its process after the former injunction took effect, February 10, 1910, by dispensing with the tension wire-feed described in 178 Fed. 979, and by completing the first layer of glass before the wire is introduced. During the accounting complainants applied to the court to direct the master to take testimony as to this modified process. At that time I thought it was best, and more convenient, to let the master take testimony as to this process, which is now known as defendant's regular one, and the damages and profits, so that a new suit, or a supplemental bill, would not be necessary. Complainants, however, decided to file a new suit. All the evidence was adduced at the hearing, and the case is now to be decided. A view was had of the defendant's process, but by misunderstanding complainants' counsel and experts were not present.

The apparatus and process may be thus described: There is a movable cast-iron table, kept cool by a constant supply of water, two water-cooled rolls, a wire chute or carriage, and long strips of iron-called trangs, a quarter inch thick. The table and rolls are driven by either a steam engine or electric motor, as may be most convenient. Rolls and table move at the same relative speed, controlled by a friction clutch, so that the speed may be increased and diminished at will. The table is run on a railroad, from a point near the lehr, where the glass is annealed, in a southerly direction. The wire chute is similar to the Schmertz apparatus and is run on a track laid slightly above the southerly half of the table track.

The first step is to lay a sheet of wire mesh on the chute, and adjust it parallel to the table by movable collars sliding on the framework of the chute. Two ladles of molten glass are then taken from the furnace, one after another, and the first is poured on the table on the north side of the south roll. Immediately the machinery is started, the table moves south, and the first pour is rolled down into a flat sheet by the south roll, whereupon the power is turned off, and the bottom layer, a quarter inch thick, lies on the table, directly under the wire mesh. The lehr foreman then takes a stick or iron rod, and pulls the north end of the wire to the north until it is over the north end of the bottom layer, and close to the south side of the other or north roll. The end of the wire falls or rests upon the glass sheet and is gripped by the hot layer and firmly held. When the lower layer has cooled off a little, the second pour is made, on the south side of the north roll, upon the north end of the bottom layer and upon the same end of the wire resting thereon. Two workmen then pull the wire carriage quickly backward, towards the south, allowing the wire sheet to fall prone upon the lower sheet, which is now sufficiently cooled off so that it will not grip or hold the wire. While these steps have been going on, the quarter-inch trangs have been so adjusted that the collars of the north or second roll run thereon, and the surface of the roll itself is brought a half inch from

the table, and a quarter inch from the lower sheet. The machinery is now given a reverse motion, the table runs north, towards the lehr, and the second pour is spread over the first, and the wire, until the end of the sheet is reached, and the table is stopped at its extreme north limit. While the upper layer is being rolled, the wire squirms and crawls upon the bottom layer, but adjusts itself properly, because the latter is cool enough not to grip or hold it. A few seconds after the upper layer is completed, the lehr foreman seizes a corner of the completed sheet with a pair of tongs, and pulls it upon a table situated north of the operating table, so as to bring it in front of the lehr. A few seconds later the sheet is pushed into the first lehr furnace, and by successive steps it is moved into diminishingly heated chambers for three hours, when the annealing process is complete, and the glass is ready for polishing. The process of completing a sheet ready for the lehr takes from 30 to 60 seconds.

Some of the steps described may be modified without affecting the result. The wire carriage may be left out, and the wire laid on rods having collars to adjust the wire sheet longitudinally. The stick or rod for pulling the front end of the wire toward the north may be dispensed with, and the north end of the wire sheet allowed to fall on the bottom layer and be gripped thereby. The carriage or wire supports may be allowed to remain in place; the wire being pulled off by the movement of the table, as in the Schmertz process. And the wire may be coiled in a roll and supported by rods instead of being laid out on the chute or other supports. Finally, one roll may be used instead of two; the pours being on its respective sides.

The question is whether this process infringes. Complainants' position is that it simply avoids the terms of the patent while embodying their substance. They also urge that the process reads almost exactly on claims 2 and 6, reading as follows:

"2. An apparatus for making sheets of glass with wire inclosed therein, consisting of a table, a leading roll to roll a layer of glass, means to support and introduce wire to the said layer, a second roll, behind the leading roll, to form a layer of glass on the first or underneath layer, the periphery of the second roll being higher above the table than that of the leading roll, and the two rolls being far enough apart to allow the glass for the second or upper layer to be poured between them."

"6. An improvement in the process of manufacturing wire glass which consists in rolling a sheet of glass of less thickness than the ultimate produce required, simultaneously forcing wire upon said sheet and forming a second sheet of glass upon said first sheet."

On the other hand, defendant insists that they are using the old European three-step process, by first rolling a sheet of glass, placing wire thereon, and rolling a second sheet over the first; the only difference being that by improved mechanical and manual skill the old difficulty of a too rapid cooling is entirely overcome. In fact, it appears that the thing can be done so quickly as to injure the quality of the glass, and that the wire can be placed on the bottom layer while it is too hot, resulting in gripping the wire surface and spoiling the sheet; so that the process has to be slowed instead of hastened.

I was at first inclined to think that defendant's process was in reality simply a variation of Schmertz, a substantial use of his in-

vention; that he showed the way to avoid his own discovery, in terms, or in form, by a process virtually his own, in practical effect. But a careful re-reading of the opinion of the Circuit Court of Appeals in the former case has convinced me to the contrary. Judge Baker says:

"In the ante-Schmertz method there were three steps, separately taken. The cooling of the first layer before the sandwich could be finished prevented the making of large sheets." "The practice and publications regarding the three-step sandwich prevented Schmertz from claiming the sandwich method generically."

As suggested by Judge Gray in the Highland Case, 178 Fed. 944, 962, 102 C. C. A. 316, defendant has by skill and manual dexterity so perfected the European process as to be able to accomplish each of the three steps separately, and entirely overcome the necessity of their being simultaneous.

Bill dismissed.

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WILLIAMS v. SUTTON et al.

(Circuit Court, N. D. Illinois, E. D. August 4, 1911.)

No. 29,236.

PATENTS (§ 328\*)—ANTICIPATION—MEANS FOR PRODUCING AERIAL GYMNASTIC PERFORMANCES.

The Williams patent, No. 847,139, for means for producing aerial gymnastic performances, *held* void on evidence of prior public use of substantially the same combination of elements, all of which were old.

In Equity. Suit by Joseph J. Williams against John H. Sutton and others. Decree for defendants.

James H. Griffin and John G. Elliott, for complainant.

Banning & Banning, for defendants.

KOHLSAAT, Circuit Judge. Complainant brings suit to enjoin infringement of claims 1, 2, 4, 5, 6, and 7 of patent No. 847,139, for means for producing aerial gymnastic performances, issued to Joseph John Williams on March 12, 1907. Claim 6 fairly sets out the matter in issue. It reads as follows, viz.:

"In a device for the purpose described, a horizontal bar, means for raising, lowering, and suspending said bar in mid-air, a drum connected with said bar, means for actuating said drum and revolving the bar horizontally about a vertical axis, of suspending devices attached at or near the opposite ends of said bars, and depending below the same, and means whereby performers may suspend themselves by their mouth in mid-air therefrom, substantially as described."

The bar is sustained by a rope which passes through a swivel from which it depends, the ends whereof are respectively made fast on the bar at points at the bar ends, thus forming a triangle in appearance, of which the bar is the base. Near its upper angle the revolving device or drum is located. From each end of the bar depends a rope, provided with a mouthpiece, adapted to be held in and by the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mouth in such a manner as to enable the performer to support her or his body with no other means or aid. The whole device may be raised or lowered by the use of pulleys. When lifted into the air the device is revolved by means of the drum, with the usual centrifugal effects. Both the patent and the evidence are engaged more particularly with the methods employed in producing scenic effects than with the mechanical arrangement of the device. What with the attractive accessories disclosed in the record and the silence perforce of the performers, a fairly popular spectacular act is produced.

No one of the elements of the device of the claims is new, and unless there is patentable novelty in the combination, as applied to the use to which it is put, there seems to be little invention in the combination. It was not new to lift performers into the air by means of pulleys and ropes. It was not new to provide means for revolving any kind of an object in the air. It was not new to suspend oneself or others by means of a mouthpiece. It was not new to adjust a suspended rope so that a performer might wind the rope up and then untwist in such a manner as to whirl himself through the air. All these are old, and a part of every lively boy's experience, and the means for doing these stunts were always attainable, though somewhat crude. It was not new to support the ends of the bar. The prior art does not disclose the device of the patent in suit in connection with the suspension of performers by the mouth holds, thus enabling the free use of the rest of the body for other purposes. Nor is there any evidence that the bar, drum, suspension ropes, and mouth supports were ever used in combination before. This fact, together with the presumption arising from the grant of the patent and the favor with which the ærial acts produced upon it have been received by the public, might, in the absence of the evidence as to the prior art hereinafter referred to, be conceded that the device of the patent contains some degree of novelty of the patentable character, but at the best that must be deemed very slight.

The alleged infringing device is in all substantial respects the same as that of the patent in suit. It is claimed by defendant that he first used a large wheel, the original wheel being produced as an exhibit; that the mouth straps were fastened to the rim of the wheel; that the rim was provided with extensions constituting a groove in which the revolving rope was held; that performances were given on this wheel as early as 1901 and 1902 in China, Japan, the Philippines, Hawaii, and San Francisco, and also in other places. Numerous newspaper clippings are in evidence, taken from the newspapers in these various places, praising the performance of Miss Aimee Tasma, "when she revolves on an ærial wheel, holding by the teeth only." The original wheel also bears upon it the stamp of its place of manufacture; i. e., "Sydney." There is no reasonable doubt of the truth of this prior use. The evidence clearly establishes the above facts beyond a reasonable doubt. Defendant John H. Sutton himself has furnished the only evidence which casts doubt on the defense. His letters to his witness Steinburg are of a character to awake suspicion in the mind of one who reads them. He cautions his witness to avoid

calling attention to several features of his device. Notwithstanding, however, his devious course, the evidence aliunde is convincing. The subsequent adding of a bar under the wheel required no invention. The idea is the same. Either method keeps the bodies of the performers apart and performs the same services. The prior use being established, this suit must fail.

The cause is dismissed for want of equity.

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**SANITARY METAL TILE CO. v. NEW YORK METAL CEILING CO.**

(Circuit Court, S. D. New York. November 7, 1910.)

**PATENTS (§ 310\*)—INFRINGEMENT—BILL—DEMURRER.**

A demurrer will not be sustained to a bill for patent infringement on the ground that the patent shows no patentable invention, except in the plainest cases, and when there is no room for doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 508; Dec. Dig. § 310.\*]

In Equity. Bill by the Sanitary Metal Tile Company against the New York Metal Ceiling Company for infringement of letters Patent No. 851,579, granted to Whitney and Weyand April 23, 1907, for a facing for walls and other surfaces, to which defendant demurred on the ground that the patent on its face showed no patentable invention. Overruled.

James H. Griffin, for complainant.

Henry D. Williams, for defendant.

COXE, Circuit Judge. I have delayed action in this cause to await the decision of the Circuit Court of Appeals in *Stillwell v. McPherson*, 183 Fed. 586, 106 C. C. A. 354, which has just been handed down and which, in my judgment, requires a decision here overruling the demurrer. The rule in this circuit is to the effect that it is only in the plainest cases that a demurrer to a bill founded on letters patent will be sustained and that if there be any doubt, it must be resolved in favor of the patent.

It is enough to say that, tested by this rule, I am unable, at this stage of the litigation, to say that the patent is invalid.

Demurrer overruled, the defendant to answer within thirty days.

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**HAVENS et al. v. BURNS.**

(Circuit Court, E. D. Pennsylvania. June 13, 1911.)

No. 635.

**1. PATENTS (§ 285\*)—CAUSES OF ACTION—JOINDER—INFRINGEMENT OF PATENT—UNFAIR COMPETITION.**

Where there was requisite diversity of citizenship sufficient to give a federal court jurisdiction, it was proper to join in one bill a cause of ac-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion for infringement of a design patent and for unfair competition in trade.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 445; Dec. Dig. § 285.\*]

**2. EQUITY (§ 149\*)—MULTIFARIOUSNESS—COMPLAINANTS—INTEREST—DEMUR-  
RER.**

Possible lack of title or interest in the subject-matter of a suit, so far as one of the complainants is concerned, which could not injuriously affect the defense, cannot be determined on demurrer to the bill on the ground of multifariousness of parties.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 149.\*]

In Equity. Suit by Morton Havens, Jr., and another, against James F. Burns. On demurrer to bill. Overruled.

Parsons, Hall & Bodell, for complainants.

Howson & Howson, for defendant.

J. B. McPHERSON, District Judge. [1] It is clear, I think, that infringement of the trade-mark "Condulet" is not charged, and is therefore not before the court. The bill rests on two grounds only, infringement of a design patent and unfair competition in trade, and I see advantage rather than objection in dealing with such controversies in one suit, where the parties are the same and the controversies are really only different aspects of the same facts. In the pending cause the Circuit Court has undoubted jurisdiction to hear both disputes, because the bill discloses the necessary diversity of citizenship.

[2] Whether Havens has transferred the whole of his interest in the patent to the other plaintiff, and whether he has any interest in the trade that is alleged to be interfered with, need not be determined now. It is not apparent that his possible lack of title or of interest can injuriously affect the defense, and the final decision of these questions may therefore stand over for the present. Where it is clear that one or more of several defendants have been erroneously included, it may be proper to grant relief on demurrer; but if it be a plaintiff's standing that is doubtful, ordinarily no harm is done by awaiting further light on that subject. This objection of multifariousness, either of subject-matter or of parties, can scarcely ever be determined by hard and fast rules. In the case before the court I see no serious objection to the bill as it stands. Much of the defendant's ingenious argument amounted in essence either to an attack on the validity of the patent, or to a defense of the defendant's design on the ground that it does not infringe, although his brief admits for present purposes the validity of the patent, and although I think it clear that the infringing character of a defendant's device can rarely be determined with safety at this stage of a suit.

The demurrer is overruled, and the defendant is directed to answer within 20 days.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



## MAYER v. COHRS.

(Circuit Court, E. D. Washington, E. D. March 29, 1911.)

No. 1,489.

**1. COURTS (§§ 311, 322, 329\*)—FEDERAL COURTS—JURISDICTION—CITIZENSHIP.**

In a suit by a bankrupt's trustee, jurisdiction of the Circuit Court depends on the citizenship of the bankrupt, and not on the citizenship of the trustee, and the requisite diversity of citizenship, as well as the requisite amount or value of the matter in dispute, must appear on the face of the record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 858, 876-887, 897; Dec. Dig. §§ 311, 322, 329.\*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

**2. COURTS (§ 322\*)—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.**

An averment that one of the parties to a suit in the federal court is a "resident" of a certain town and county in another state was not equivalent to an averment that he was a citizen of that state, required to show jurisdiction on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-887; Dec. Dig. § 322.\*]

**3. COURTS (§ 329\*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.**

A suit by a bankrupt's trustee in the federal court, alleging that, by reason of defendant's failure to complete a certain contract and by reason of the consequent loss of the value of their bargain, the bankrupts and plaintiff have been damaged in a large sum of money, to wit, the value of certain jewelry and railroad inspection business agreed to be sold and transferred to defendant, the value of which was peculiarly within defendant's knowledge, was insufficient to show that the matter in dispute exceeded the sum or value of \$2,000, so as to confer federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. § 329.\*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

In Equity. Suit by Joseph Mayer, as trustee of the property of George O. Buhn, Sr., bankrupt, and as trustee of the property of George O. Buhn, Jr., and Edward H. Buhn, doing business as Buhn Bros., bankrupts, against George F. Cohrs. On demurrer to bill. Sustained.

McBurney & Cummings and Lester P. Edge, for plaintiff.  
E. V. Kuykendall, for defendant.

RUDKIN, District Judge. This is a bill in equity by the complainant, Mayer, as trustee of George O. Buhn, Sr., a bankrupt, and also as trustee of George O. Buhn, Jr., and Edward H. Buhn, copartners as Buhn Bros., bankrupts, for an accounting. The bill is based upon or grows out of a certain contract entered into between the copartnership of Buhn Bros. and the defendant, Cohrs, prior to the adjudica-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions in bankruptcy; the copartnership acting for the firm and as agents for George O. Buhn, Sr. The defendant has interposed a demurrer to the bill of complaint, on the ground, among others, that the court has no jurisdiction of the subject-matter of the suit or of the parties thereto.

[1] The demurrer must be sustained. The complainant sues as a trustee in bankruptcy, and in such cases, with certain exceptions not material here, the jurisdiction of the Circuit Court depends upon the citizenship of the bankrupt, and not upon the citizenship of the trustee; and the requisite diversity of citizenship, as well as the requisite amount or value of the matter in dispute, must appear on the face of the record.

[2] The bill under consideration does not aver the citizenship of any of the parties to the suit, nor does it aver the amount or value of the matter in dispute. The averment that George O. Buhn, Sr., is a *resident* of the town of Crookston, county of Polk, state of Minnesota, is not the equivalent of an averment that he is a *citizen* of that state. *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932. And the same is true of the averment that the defendant, Cohrs, is a *resident* of Spokane, state of Washington.

[3] The only reference to the sum or value of the matter in dispute is contained in the averments:

"That by reason of the failure, neglect, and refusal of said defendant to complete said contract as aforesaid, and by reason of the consequent loss of the value of their said bargain, said George O. Buhn, Sr., George O. Buhn, Jr., and Edward H. Buhn, plaintiff has been damaged in a large sum of money, to wit, the value of said jewelry and railroad inspection agreed to be sold and transferred as aforesaid."

"That the facts relating to the sale or other disposition of said jewelry and railroad inspection business, and of said goods, wares, and merchandise, and the invoice value of said goods, wares, and merchandise in said store at Pomeroy, and the value of said jewelry business and railroad inspection business at the time set for performing the aforesaid agreement, are peculiarly within the knowledge of the defendant."

And such averments fail to show that the jurisdictional amount is involved. In any event, under the averments of the bill, the bankrupts, George O. Buhn, Jr., and Edward H. Buhn, had a substantial interest in the matter in controversy, and would be necessary parties to the suit, were it not for the adjudications in bankruptcy, and they are both residents of the same state as the defendant.

It not appearing that the matter in dispute exceeds the sum or value of \$2,000, or that the requisite diversity of citizenship exists, this court is without jurisdiction, and the demurrer is sustained.

In re MATTHEWS, Inc.

In re KNICKERBOCKER TRUST CO.

(District Court, S. D. New York. May 17, 1911.)

**1. BANKRUPTCY (§ 214\*)—CLAIMS—SECURITY—COLLATERAL—SALE.**

Where bonds deposited as collateral to a corporation's note were simple promises to pay, not secured, and had never been issued by the bankrupt until delivered to secure the bankrupt's note, the creditor was not entitled to sell the bonds to realize funds with which to pay the note; since to do so would simply increase the corporation's indebtedness, to the prejudice of other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320-327; Dec. Dig. § 214.\*]

**2. BANKRUPTCY (§ 214\*)—PLEGGED COLLATERALS—SALE OF EQUITY—EFFECT.**

Where a corporation's obligations in the form of unsecured bonds were originally pledged by the corporation as security for its note, the fact that the corporation's equity in certain of the pledged notes was sold to others did not affect the rights of the corporation and the pledgee, nor the rights of other creditors of the corporation, with reference to the debt evidenced by the bonds, on the corporation becoming bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 320-327; Dec. Dig. § 214.\*]

In the matter of bankruptcy proceedings of John Matthews, Incorporated. Claim of Knickerbocker Trust Company. On motion to modify an injunction so far as to grant the trust company leave to sell certain debenture bonds issued by the bankrupt as collateral for the bankrupt's note. Motion denied.

Davies, Auerbach, Cornell & Barry (Herbert Barry, of counsel), for petitioner.

Thomas & Oppenheimer (Leo Oppenheimer, of counsel), for receiver.

HOLT, District Judge. This is a motion by the Knickerbocker Trust Company to modify an injunction issued in this proceeding, so far as to grant the trust company leave to sell certain debenture bonds issued by the bankrupt for \$29,000, and held by the trust company as collateral for a note of the bankrupt for \$16,693.20. The bonds in question are in form simply promises to pay money. They are not secured by any mortgage or other security. They never were issued by the bankrupt until they were delivered to the trust company as security for its note. The trust company now proposes to sell these bonds. It claims to hold them as collateral security for the note, and to have the right to sell the bonds, apply the proceeds on the note, and then prove as an unsecured creditor for the balance of the note. In this way an indebtedness of \$16,000 might easily be increased to an indebtedness of about \$45,000. In my opinion, the delivery of these bonds to the Knickerbocker Trust Company added nothing to the security of their note. Their note was a promise to pay about \$16,000. That was the sole indebtedness due to the trust company from the bankrupt. By delivering to it debenture bonds for \$30,000 more, no

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

additional security was given, but simply another promise of the bankrupt to pay money. The amount due was the amount stated in the note. When that amount is paid, the trust company's claim will be satisfied. After bankruptcy, it would be unjust to the other creditors to permit the trust company, by selling these bonds, to apparently establish a large additional indebtedness, for which there was no consideration. No precisely similar case is cited by either side upon the question, but the principle involved is illustrated in *Re Waterloo Organ Co.*, 20 Am. Bankr. Rep. 110, 159 Fed. 426, 86 C. C. A. 406. The question is itself novel, but in my opinion the true position of the trust company is that of an unsecured creditor. It is entitled to prove for the amount of the note, but is not entitled to sell the bonds, and thereby create an additional indebtedness.

I do not perceive any valid distinction between the 6 bonds, the equity in which is alleged to have been sold to George and John H. Matthews, and the remaining 23 bonds. All were admittedly originally issued and delivered by the bankrupt to the trust company simply as collateral to the bankrupt's note. The fact that the equity in 6 of them was afterwards formally sold does not, in my opinion, affect the rights of the original parties or of the creditors of the bankrupt.

The motion to modify the injunction is therefore denied.

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#### LEACH v. SCARFF.

(Circuit Court, N. D. Illinois, E. D. August 4, 1911.)

No. 28,540.

#### TRADE-MARKS AND TRADE-NAMES (§ 85\*)—INFRINGEMENT—RIGHT TO RELIEF.

Complainant is not entitled to enjoin use by a competitor of such names as "Oil of Pine," "Virgin Oil of Pine (Pure)," or "Virgin Oil of Pine Compound (Pure)," though complainant's use of the names is original and fanciful as applied to his compound, where he is in the position of either perpetrating a fraud on the public by falsely claiming the presence of oil of pine as an ingredient, or claiming a trade-name in a mere proper pharmaceutical designation of the drug he seeks to protect.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.\*]

In Equity. Suit by Sue S. Leach, as administratrix of W. A. Leach, against Fred W. Scarff. Judgment for defendant.

Buell & Abbey and Ellis B. Gregg, for complainant.  
Wm. R. Rummeler, for defendant.

KOHLSAAT, Circuit Judge. Complainant's intestate brought this suit to restrain unfair competition and infringement of a trade-name. Pending the suit, W. A. Leach died, and the cause was duly revived. The bill alleges that Leach had in his lifetime, and for about 20 years before his death, prepared and sold a certain alleged remedy for various ills, such as coughs, colds, and affections of the mucous surface, under the name of "Oil of Pine," which name he claimed was origi-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nal and fanciful; that in 1905 he changed the name to "Virgin Oil of Pine (Pure)"; that in 1906 he further changed the name to "Virgin Oil of Pine Compound (Pure)"; that he advertised his remedy extensively under these names at great cost; that he did not use his own name, but only that of the compound; that he has acquired an exclusive right to use the said names as trade-names, and under the same has built up a large business.

It appears from the record that there is such an article as oil of pine, that complainant's article has no appreciable amount of any oil of pine in it, and that it is mainly liquified resin. It further appears that complainant has misrepresented as to his qualifications to prescribe for the ills for which he proclaims his compound a specific; that he was not a physician, as implied in the use of the term "Dr. Leach" in connection with his advertising; that his "camp for consumptives in the pine woods of Maine" was a pure fiction; and that the remedy was advertised ingenuously as reading matter, conveying the idea of some new discovery.

While complainant's use of the name is undoubtedly original and fanciful as applied to his compound, it yet describes an actual pharmaceutical article of trade, and is therefore descriptive. This being so, complainant confronts the dilemma either of perpetrating a fraud on the public by claiming the presence of any oil of pine as an ingredient on the one hand, or, on the other hand, of claiming a trade-name in the mere proper pharmaceutical designation of the drug or compound he seeks to protect. In either case, a court of equity is not open to him, nor is it to his administratrix, and the suit must be dismissed for want of equity.

The infringement complained of is plain and palpable, and does not commend itself to the court. Under the facts of the case, as now presented, however, the court can grant no relief.

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#### DODDS v. PALMER MOUNTAIN TUNNEL CO.

(Circuit Court, E. D. Washington, E. D. March 27, 1911.)

No. 1,533.

#### 1. RECEIVERS (§ 9\*)—APPOINTMENT—JURISDICTION.

While a receiver should not be appointed in a federal court at the instance of a simple contract creditor, the absence of a judgment or other lien does not defeat the court's jurisdiction to appoint.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 15; Dec. Dig. § 9.\*]

#### 2. COURTS (§ 508\*)—INJUNCTION PROCEEDINGS IN STATE COURT—COMITY.

Where a state court of competent jurisdiction had acquired jurisdiction over certain property long prior to an application to the federal court for the appointment of a receiver, any attempt by the federal court to restrain or interfere with the enforcement of the state court's judgment would be a violation of comity, and a violation of Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), providing that injunction shall not be granted by any federal court to stay proceedings in any state court, except in cases

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

where such injunction may be authorized by any law relating to proceedings in bankruptcy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.\*]

Action by Fabian B. Dodds against the Palmer Mountain Tunnel Company: On motion to dissolve a restraining order against the sheriff of Okanogan county restraining an execution sale under mortgage foreclosure. Granted.

A. G. Elston, for plaintiff.

F. W. Dewart, for receiver.

Skuse & Morrill, for defendant.

W. W. Tolman, for Fred Thorp, sheriff of Okanogan county.

RUDKIN, District Judge. On the 17th day of February, 1911, a receiver was appointed in this action at the suit of a simple contract creditor of the defendant, by and with its consent. On the same date a temporary restraining order was granted on the petition of the receiver, restraining the sheriff of Okanogan county from selling certain property belonging to the defendant at execution sale under a judgment of foreclosure theretofore rendered and entered in the superior court of Okanogan county. The sheriff has appeared in obedience to a show cause order, and now moves the court to dissolve the restraining order on two grounds: First, because the order appointing the receiver and the restraining order are null and void, by reason of the fact that the receiver was appointed at the suit of a simple contract creditor, and the court was therefore without jurisdiction; and, second, because the restraining order was issued in violation of section 720 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581), which provides that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

[1] The order appointing the receiver and the restraining order are not void for the first reason assigned, and cannot be collaterally attacked in this manner. While I am of opinion that a receiver should not be appointed in a federal court at the instance of a simple contract creditor (*Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113), nevertheless the absence of a judgment or other lien does not defeat the jurisdiction of the court (*Brown v. Lake Superior Iron Co.*, 134 U. S. 531, 10 Sup. Ct. 604, 33 L. Ed. 1021; *Hollins v. Brierfield Coal & Iron Co.*, *supra*).

[2] On the second ground, however, the motion to dissolve must be sustained. A state court of competent jurisdiction acquired jurisdiction over this property long prior to the application for the appointment of a receiver in this court and any attempt on the part of this

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court to restrain or interfere with the enforcement of its judgment is a palpable violation of the above section of the Revised Statutes, and is also in violation of the rule of comity which universally obtains between courts of concurrent jurisdiction.

The matter of the allowance of costs will be determined when the order is presented for signature.

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Ex parte MICHELE.

(District Court, E. D. Washington, S. D. April 17, 1911.)

**ALIENS (§ 54\*)—DEPORTATION—WARRANTS.**

A deportation warrant charged that the alien was a member of the excluded classes, in that he was a contract laborer and had been induced to migrate by an offer or promise of employment under an agreement to perform manual labor in the United States. *Held*, that the charge was sufficiently set forth in the warrant.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.\*

Importation of contract labor, see note to *United States v. Parsons*, 66 C. C. A. 133.]

In the matter of the application of Bughi Michele for a writ of habeas corpus. Petitioner remanded.

Dunphy, Evans & Garrecht, for petitioner.

Oscar Cain, U. S. Atty., and E. C. Macdonald, Asst. U. S. Atty., for inspector.

RUDKIN, District Judge. 'This was a petition for a writ of habeas corpus, upon which the writ was issued by my predecessor in office to E. L. Wells, immigrant inspector of the Department of Commerce and Labor, in whose custody the petitioner was held. The officer to whom the writ was directed has made return that he is holding the petitioner under a warrant of deportation issued by the Secretary of Commerce and Labor, based on a hearing had before the immigrant inspector at Walla Walla, and the deportation warrant and the report of the hearing before the inspector are made a part of the return. The deportation warrant charges:

"That the said alien is a member of one of the excluded classes, in that he is a contract laborer, and was induced or solicited to migrate to this country by an offer or promise of employment, or in consequence of an agreement, oral, written, printed, express, or implied, to perform manual labor in the United States."

The report accompanying the warrant sets forth an affidavit of Regalia Pietro, taken before the immigrant inspector on June 28, 1910, an affidavit of the petitioner, taken before the same officer on the 2d day of July, 1910, the testimony of the petitioner and his employer, Guiseppi Fausti, taken at a hearing had before the commissioner in Walla Walla on the 6th day of July, 1910, at which the petitioner was present and was informed of the charge against him, of his right to have an attorney, and was given a full opportunity to be heard, and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

a further affidavit of his employer, taken on the same day, but at a different time and place. The petitioner has demurred to the return, and its legal sufficiency to justify his detention is the only question presented for consideration.

He objects to the sufficiency of the deportation warrant on the ground that it does not specify the nature of the charge against him, and to the hearing had on the ground that he was not present and was given no opportunity to confront or cross-examine the witnesses. The charge against the petitioner is sufficiently set forth in the warrant. *Ex parte George* (D. C.) 180 Fed. 785. This case differs widely from the case of *United States v. Sibray* (C. C.) 178 Fed. 150, where the alien was charged with having committed a felony or misdemeanor involving moral turpitude.

It appears from the return that the petitioner was given a full hearing, with an opportunity to produce witnesses and to be heard in his defense. Ignoring the *ex parte* affidavits taken at other times and places, I am fully convinced from the testimony taken at such hearing that the petitioner is within the excluded class called "contract laborers," and is subject to deportation under the laws of Congress.

The writ of habeas corpus is therefore discharged, and the petitioner is remanded for deportation, pursuant to the warrant of the Secretary of Commerce and Labor.

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#### UNITED STATES v. DEMPSEY.

(District Court, E. D. Arkansas N. D. May 26, 1911.)

No. 489.

#### 1. POST OFFICE (§ 31\*)—NONMAILABLE MATTER—STATUTES.

Pen. Code § 211 (U. S. Comp. St. Supp. 1909, p. 1453), prohibits the mailing of every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, or other publication. *Held*, that such act was not limited to publications and writings relating to sexuality, but extended to other publications and communications which were within the definition of the term "filthy."

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 50, 52; Dec. Dig. § 31.\*]

#### 2. POST OFFICE (§ 50\*)—NONMAILABLE MATTER—FILTHY PUBLICATION—QUESTION FOR JURY.

In a prosecution for mailing an alleged nonmailable letter, whether the letter was filthy, within the ordinary acceptance of that term as used in Pen. Code, § 211 (U. S. Comp. St. Supp. 1909, p. 1453), *held* for the jury.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87-89; Dec. Dig. § 50.\*]

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

Marcus Dempsey was indicted for sending nonmailable matter through the mails, and demurs to the indictment. Demurrer overruled.

W. G. Whipple, U. S. Atty., and Powell Clayton, Asst. U. S. Atty. Lyman F. Reeder, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



TRIEBER, District Judge. The defendant, having been indicted for sending through the mails an obscene letter in violation of section 211 of the federal Penal Code (U. S. Comp. St. Supp. 1909, p. 1453), has demurred to the indictment upon the ground that the contents of the letter were not of the character prohibited by that section of the Penal Code. The letter was mailed in this district and addressed to a young lady in the state of Mississippi, and was as follows:

"Do it a little Club. I kiss and hug all the girls when they get initiated. Need no light in hall. President. Professional hand-holder. Nights only."

Assuming, without deciding, that the contents of the letter were not of that character which would make it nonmailable, in view of the construction of section 3893, R. S. (U. S. Comp. St. 1901, p. 2658), in *Swearingen v. United States*, 161 U. S. 446, 451, 16 Sup. Ct. 562, 40 L. Ed. 765, that would still not be conclusive of this case, as the Penal Code amends that statute very materially, by adding, after the words "every obscene, lewd, and lascivious," the words "and every filthy" book, pamphlet, picture, or letter.

[1] In the *Swearingen Case* the court held that the words "obscene," "lewd, and lascivious," as used in section 3893, R. S., "signify that form of immorality which has relation to sexual impurity, and has the same meaning as was given them at common law in prosecutions for obscene libel." If the intention of Congress had been to confine that statute to the offense as defined by the Supreme Court in that case, it would not have amended it by adding the words "and every filthy." This clearly demonstrates that in the opinion of Congress the use of the mails should be prohibited, not only to such letters, books, and pictures which are lewd and lascivious, but also to every filthy communication, book, or picture.

[2] It is next claimed that the contents of the letter, while objectionable, are not obscene or filthy, within the meaning of the law. The law, as it has been settled by numerous decisions, and especially by the Circuit Court of Appeals for the Eighth Circuit, is that, while in prosecutions under this statute there is a preliminary question for the court to determine whether the writing could by any reasonable judgment be held to come within the prohibition of the law, whenever the character of the matter mailed is of such a nature that reasonable minds might reach different conclusions, it is the duty of the court to submit the question to the jury. *Knowles v. United States*, 170 Fed. 409, 95 C. C. A. 579.

While the court will not express any opinion as to whether the language used in the letter is clearly within the prohibition of the act of Congress as amended by section 211 of the Penal Code, it does not feel justified to say that the language is such that reasonable minds might not reach different conclusions as to its character. That being the case, it is the duty of the court to submit the question to a jury to determine under proper instructions from the court whether the language is such as to make it within the prohibition of the act of Congress.

For these reasons the demurrer to the indictment is overruled.

## In re BLOND.

(District Court, D. Massachusetts. December 29, 1910.)

No. 14,546.

**BANKRUPTCY (§ 328\*)—CLAIMS—PROOF—TIME.**

Since Bankruptcy Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), requiring claims to be proved within a year from adjudication, is prohibitory, leaving the court no discretion to extend the time, a creditor who failed to prove his claim within such time, though it was scheduled, was not entitled, against the bankrupt's objection, to prove it afterward and thus receive a dividend on it out of the amount deposited by the bankrupt to carry out a composition, though the deposit made was of sufficient amount to pay the dividend on the claim objected to, as well as on the claims proved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.\*]

In the matter of bankruptcy proceedings of Morris Blond. On petition to review a referee's order disallowing the claim of the James A. Houston Company. Affirmed.

Daniel B. Beard, for bankrupt.

Jacobs & Jacobs, for James A. Houston Co.

DODGE, District Judge. Adjudication was ordered in this case on February 23, 1909. The petitioner for review appeared as a creditor in the schedules filed. Thirty claims having been proved and allowed before the referee at various times within the year following adjudication, the bankrupt made a composition offer on April 2, 1910, which was in due course confirmed by the court. After the composition offer but before the referee's report on it, three more claims, duly presented but suspended, were allowed. The petitioner for review did not present any claim for allowance until June 6, 1910. On November 22, 1910, the referee disallowed it, because not proved within the year allowed for proof by section 57n of the bankruptcy act. The deposit made for the purpose of the composition was of an amount sufficient to cover all the scheduled claims, including this claim, as rule 8 of this court requires. The only opposition to allowance comes from the bankrupt, and it is contended on the creditor's behalf that the court should permit the claim to be allowed rather than let the deposited dividend upon it go back to the bankrupt. I held in *Re French* (D. C.) 181 Fed. 583, that a claim barred by section 57n has no standing before the bankruptcy court in composition proceedings, and I am now unable to see any reason for doubting the correctness of the ruling. That section 57n is prohibitory, and leaves the court no discretion to extend the time, has been often held. A very recent decision to that effect is *In re Meyer* (D. C.) 181 Fed. 904. No reason for the failure to prove this claim in time, other than forgetfulness on the creditor's part, is suggested. If the bankrupt had asked to be excused from depositing a dividend on this claim, on the ground that it had become barred, I do not see how his request

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

could have been refused. This creditor would have had no standing to oppose it. The fact that the deposit made covered this claim I am unable to regard as avoiding the prohibition of section 57n in its favor, or as enlarging the court's discretion.

The referee's order is therefore approved and affirmed.

## UNITED STATES v. ONE CAR LOAD OF CORNO HORSE AND MULE FEED.

(District Court, M. D. Alabama, N. D. May 31, 1911.)

### 1. FOOD (§ 2\*)—DEFINITION—FOOD AND DRUGS ACT.

The term "food," as used in the food and drugs act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), includes all articles used as food by man or other animals, whether simple, mixed, or compound.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2856.]

### 2. FOOD (§ 14\*)—"ADULTERATED"—COMPOUNDS—HORSE AND MULE FEED.

The food and drugs act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]) provides that food shall be deemed adulterated if any substance has been mixed with it to lower or injuriously affect its quality or strength, or if it contains any added poisons or deleterious ingredient which may render the article injurious to health, or if it consists wholly or in part of a filthy, decomposed, or putrid animal or vegetable substance. Section 8 contains a proviso that food which does not contain any added or deleterious ingredients shall not be deemed adulterated, and if in the case of mixtures or compounds, known as articles of food by their own distinctive name, such name shall be accompanied on the same label or brand with a statement of the place where the article has been manufactured or produced, and in the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale. *Held*, that where a substance sold under the name "Corno Horse and Mule Feed" was contained in a package branded: "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois"—followed by a guaranteed analysis, such substance, being a compound and so described on the package, was not adulterated, because it contained a quantity of oat hulls mixed and packed therewith in excess of the amount normally present in oat feed consisting of whole ground oats.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 14.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 210-212.]

### 3. EVIDENCE (§ 51\*)—JUDICIAL NOTICE—MEANING OF TERMS—SOURCES OF INFORMATION.

Where a court is required to take judicial notice of the meaning of a term as a matter of law, it may resort to any authoritative sources of information to enlighten its judgment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 72; Dec. Dig. § 51.\*]

### 4. FOOD (§ 15\*)—MISBRANDING—"OAT FEED."

Since the term "oat feed" in its ordinary acceptation does not mean the whole oat grain, either crushed or ground, but instead means that part of the grain which remains after the miller subtracts the portions useful for human food, consisting of nubbins, middlings, hulls, and oat dust,

a compound substance sold in packages under the name "Corno Horse and Mule Feed," and described on the package as a "mixture of ground alfalfa, oats, corn, alfalfa, oat and hominy feeds," with the name of the manufacturer and place of manufacture, followed by an analysis of its contents, was not misbranded in violation of the food and drugs act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), because it contained an excess of oat hulls in compound and not the whole ground oats.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.\*]

#### 5. WORDS AND PHRASES—"LANGUAGE."

"Language" is the expression of thought by means of spoken or written words which are but signs of ideas.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 3990.]

#### 6. FOOD (§ 5\*)—FOOD AND DRUGS ACT—COMPOUNDS.

Under the food and drugs act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), relating to the sale of compounds, compounds known as articles of food can be sold under their own distinctive name so long as no deleterious matter is put into the product and the label states where it is manufactured and it is not an imitation sold under the distinctive name of another article.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 5.\*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

Information by the United States against One Car Load of Corno Horse and Mule Feed. Libel dismissed.

This is an information exhibited against one car load of "Corno Horse and Mule Feed," praying a seizure and condemnation for confiscation, under section 10 of the food and drugs act approved June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1193]).

The libel as amended is based on the following grounds:

"First, for that said food is adulterated in this, that the same purports to be, and is so labeled and branded, 'a mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds,' when in fact and in truth the same is mixed and packed with a foreign substance, to wit, oat hulls, so as to reduce and injuriously affect its quality and strength. Second, for that said food is adulterated in that a large quantity of the substance, to wit, oat hulls, has been mixed and packed with the same so as to reduce or lower or injuriously affect its quality or strength. Third, for that said original packages are misbranded in violation of section 8 of said food and drugs act, in this, that they purport to contain a mixture of ground alfalfa, oats, corn, and flax bran, oat and hominy feed, which label or brand is false or misleading, in that the contents of said packages contain a foreign substance, to wit, a quantity of oat hulls mixed and packed therewith in excess of the amount normally present in oat feed, one of the constituent parts named in the brand on said package."

The usual process having issued, a seizure was made, and Hudson and Thompson claimed the property and answered the libel, denying that the Corno horse and mule feed was adulterated or misbranded, but admitting the interstate character of the shipment, the description of the brands thereon, etc. A jury trial was waived.

Subsequently, the parties agreed on a statement of facts, as follows:

"That the car load of Corno horse and mule feed against which this libel is filed was contained in original bags or sacks of about 100 pounds and of about 175 pounds each, and that each of said original packages, being said sacks or bags, was branded: 'Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, flax bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois. Guaranteed analysis: Protein

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

10%; sugar and starch, 58.5%; fat, 3.5%; fiber, 12%.' Said brand being contained on each sack and label connected therewith. That the said Corno horse and mule feed is an article of food within the meaning of the food and drugs act. That on February 8, 1909, the above-described bags or sacks of Corno horse and mule feed were received in the city of Montgomery, in the state of Alabama, by Hudson and Thompson, claimants herein, a partnership composed of W. M. Hudson and J. A. Thompson, and that the car load of Corno horse and mule feed, aforesaid, was shipped to said Hudson and Thompson on or about, to wit, February 4, 1909, from the city of East St. Louis, in the state of Illinois, by the Corno Mills Company of said city of East St. Louis, and that said car load or a large portion thereof of the Corno horse and mule feed, aforesaid, at the time of the filing of this libel, was in the original unbroken packages and in the possession of said Hudson and Thompson, in the city of Montgomery, state of Alabama, in the Northern division of the Middle district of Alabama, and within the jurisdiction of this court. It is further admitted that there was present in the Corno horse and mule feed, aforesaid, seized under the libel herein, a quantity of oat hulls in excess of the amount that would have been naturally and normally present in case whole ground oats had been used in lieu of the same amount of oat feed—using the term 'oat feed' here according to the construction contended for by the claimants herein, namely, as a by-product consisting of the oatmeal or rolled oat factory, said by-product consisting of the entire residue of the oats after the manufacture of the oats into food for human consumption, and consisting of the middlings, nubbins, oat dust, and hulls. By this admission is meant that there was used in the Corno horse and mule feed aforesaid a quantity of the by-product of the rolled oat mill consisting of the oat hulls, middlings, nubbins, and dust as above described."

The defense also admitted that "oat feed" contains less of protein and more of hulls than an equal amount of whole ground oats. A great volume of the testimony was taken from manufacturers, millers, middlemen, brokers, and consumers as to the meaning of the term "oat feed," and how it was used and understood in commerce and trade and among the people generally.

Warren S. Reese, U. S. Atty.

Carter, Collins, Jones & Barker and J. Manly Foster, for claimant.

JONES, District Judge (after stating the facts as above). [1] The term "food," as used in the food and drugs act, includes all articles used for food by men or other animals, whether simple, mixed, or compound.

[2] An "article of food" is deemed to be adulterated, "if any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength," or "if any substance has been substituted, wholly or in part, for the article," or "if any valuable constituent of the article has been, wholly or in part, abstracted," or "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health," or "if it be mixed, colored, powdered, coated or stained whereby damage or inferiority is concealed," or "if it consists, wholly or in part, of a filthy, decomposed or putrid animal or vegetable substance," etc.

An article of food is "misbranded," within the meaning of the statute, if it be "an imitation of, or offered for sale under the distinctive name of another article," or, "if it be labeled or branded so as to deceive or mislead the purchaser," or "if in package form and the contents are stated in terms of weight and measure they are not plainly and correctly stated on the outside of the package," or "if the pack-

age or label containing it shall bear any statement, design or device regarding the substances or ingredients contained therein, which statement, design or device shall be false or misleading in any particular."

Section 8 contains a proviso:

"That an article of food which does not contain any added poisonous or deleterious ingredient, shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive name, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. Second. In the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends, and the words 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package and the package in which it is offered for sale."

The manufacturer, without violating any of the provisions of the statute against adulteration, may mix any number of constituents in his compound, so long as these constituents are not poisonous or deleterious to health and he gives the compound a distinctive name and states where it is manufactured. The matter thus produced is "the article of food" whose quality and strength the statute seeks to preserve, and the nature of the product in these respects is fixed and determined by the elements which enter into it. How is it possible chemically, or in the eye of the law, to "lower or injuriously affect" the quality or strength of the particular "article of food," whose characteristics are thus produced, and safeguarded by the law as thus produced, under its own distinctive name, by mixing in the compound anything which may be lawfully incorporated therein? Putting in a mixture things which may be lawfully blended therein cannot amount to adulteration of the blend, since, other things aside, the statute declares, its other conditions being complied with, the blend shall not thereby "be deemed to be adulterated."

Corno horse and mule feed is a compound, sold under its own distinctive name. One of the constituent elements which fix and determine the quality and strength of that blend is "oat feed." The incorporation of "oat feed" in the blend, unless it be noxious or deleterious to health, cannot adulterate the blend which has its own standard, quality, and strength, made up in part of "oat feed." To make a case of adulteration it must be shown that "oat feed" contains noxious qualities, as described in the statute. Otherwise, it is manifest that the incorporation of "oat feed" in the blend has not mixed or packed any substance with the blend—"Corno horse and mule feed"—so as to reduce or lower or injuriously affect *its* quality or strength," or that "any valuable constituent of the article of food has, wholly or in part, been subtracted from the blend, or that any substance has been substituted, wholly or in part," for the "article of food." Corno horse and mule feed is not an imitation of, or offered for sale under the distinctive name of, another article, but is sold under its own distinctive name, and the label or brand contains a statement which shows that it is a mixture, and truthfully states its constituents and the place where the article was manufactured or produced. There

is no charge of removal of any part of the contents of the package as originally put up. It is not claimed or proved that the matter of which the "oat feed" consists is deleterious in any way to man or other animal, or charged that the provisions of the statute against adulteration have been violated in any way, save by putting "oat feed" on the label. The libel must fail as to the charges of adulteration.

The label here does not contain any design or device of any kind, and whether there has been a misbranding within the meaning of the statute must depend on the words employed in the label to describe the Corno horse and mule feed. Save by the declaration in the statute as to what a label shall not contain, no standards are prescribed for brands or labels, or the minuteness or particularity in which they must indulge in describing an article of food. The statute should be liberally construed to effect its beneficent purposes; but no rule of construction permits us to so construe its language that the statute shall operate as a snare or trap to the honest manufacturer or producer, who brands or labels his products in descriptive words or devices, which fairly inform the purchaser of the nature and ingredients of the product offered for sale, and are not so framed as to deceive or mislead the ordinary purchaser.

The parties have deemed it important to introduce a vast mass of testimony as to the meaning of the term "oat feed." As the court is sitting both as trier of the law and the facts, it is deemed unnecessary to determine whether the meaning of the term "oat feed," as here used, is a matter of pure law, or whether it is a question of fact, to be ascertained as by a jury from the whole evidence.

[3] If it be a matter of law of which the court must take judicial notice, the court may nevertheless resort to any authoritative sources of information to enlighten its judgment, and, on the other hand, if it be a question of fact, the judge sitting as a jury may well determine the meaning of the words here as a question of fact, according to the weight of the evidence.

[4] The government claims that "oat feed" means the whole grain of the oat, either crushed or ground, and that the ordinary purchaser of the blend so understands the term "oat feed" used in the label, though it admits the manufacturer gives a different meaning to it. The manufacturer claims, on the contrary, that "oat feed" means the by-product of the rolled oat or oatmeal mills; that part of the grain which remains after the miller subtracts from it the portions useful for human food, consisting of nubbins, middlings, hulls, and oat dust, the entire residue of the grain after the oat is prepared by the manufacturer for human consumption; and that the term has long been so understood in commerce and trade and by the public at large.

The whole trend of the evidence is that in nearly all by-products the word "feed," when connected with a grain, is used to denote the by-product from that grain, meaning the residue of the grain after it is manufactured into food for human consumption, and that, when it is intended to designate the whole grain or the crushed grain entering into articles of food for man, the thing is spoken of as "food" and not "feed."

The government admits that the words "hominy feed" mean the by-product from the hominy mills and are so used, known, and understood. It admits that other terms are used in the same way to denote other products. The evidence leaves no doubt that the terms "barley feed," "rye feed," "wheat feed," buckwheat feed," "mixed feed," and other similar terms, are used to designate those by-products, and are popularly known and understood as such. It shows that "oat feed" is different from whole ground oats or crushed oats, and that the difference is clearly apparent to the naked eye, and that at all times the price of "oat feed" is considerably lower than that of the ground oats. It further shows that "oat feed" seldom reaches the consumer as a separate commodity, but is most generally offered for sale as an ingredient of a mixed feed, or, as it is denominated in many of the state laws, "concentrated feed stuff." It also shows that the term "ground oats" is universally used to designate that product, and that likewise "crushed oats" is used to designate the oats when they are crushed, and that "chopped oats" or "oat chops" is used to designate the chopped oats, and there is no evidence to show that any of the products have ever been designated or understood to mean the same thing as "oat feed." Many of the states have recognized "oat feed" as a by-product of the oat, in their food laws, notably New York, Maine, Louisiana, Iowa, Wisconsin, Virginia, New Hampshire, New Jersey, Texas, Florida, Connecticut, Illinois, Michigan, Massachusetts, Maryland, and Tennessee. - Bulletins from various state agricultural experiment stations were offered in evidence, showing that "oat feed" is recognized as a by-product in New Jersey, Georgia, Ohio, Tennessee, and Virginia.

Among other evidence introduced by the defense was a letter of January 27, 1910, from the board of food and drug inspection, concurred in by all its members, and addressed to counsel in this case. It is given in full because it shows the government was by no means certain as to the correctness of its contention as to the meaning of "oat feed." It indicates that its inquiries tended to show that "oat feed" in fact means the by-product of the oat mill, but that its opinion was that it should not be known as "oat feed," which the board thought should include ground oats only. In this particular, it is aside the issue, for the question is what "oat feed" describes in our language, and not what it ought to describe. Neither the Secretary of Agriculture nor any official intrusted with the administration of the food and drugs act has any authority to change the meaning of words. The letter, omitting address and signature, is as follows:

"Your letter of January 15, 1910, in reference to the cases reported to the Department of Justice against the Corno Mills Company of East St. Louis, Ill., for prosecution under the food and drugs act, has received careful consideration. Your statement is noted that you are of the opinion that unless the Department of Agriculture has changed its view as to the meaning of the term 'oat feed' the proceedings against the shipment of Corno horse and mule feed seized at Valdosta, Georgia, should not be dismissed, in view of the promise of this department of an early judicial construction of the meaning of the term and the completion of your arrangements for the taking of all necessary evidence.



"You are advised in reply that the records of the board do not show that a promise has been made by the board that the meaning of the term 'oat feed' shall be construed by the courts at an early date. As you are aware, such promise, even if made by the board, would be ineffective. The duties of the board of food and drug inspection end with the collection of evidence and the preparation of reports of violations of the food and drugs act. When the evidence is complete and the circumstances of the violations appear to the Secretary of Agriculture to warrant such action, the cases are reported to the Department of Justice for prosecution, and the time when a particular case may come on for trial rests with the Department of Justice. After cases are so reported, whenever additional evidence bearing on the questions involved comes to the knowledge of the board, such evidence is also brought to the attention of the Secretary of Agriculture for consideration whether the same should be transmitted to the Department of Justice.

"When the question was presented to the board whether proceedings should be instituted against the shipment seized at Valdosta, Georgia, such action was recommended on the statement of the Bureau of Chemistry that the term 'oat feed' properly includes only ground whole oats, and the amount of oat hulls found on examination of samples to be present in the product was considerably in excess of the amount which normally would be present in a product containing ground whole oats. Analysts of the Bureau of Chemistry were of the opinion that the term 'oat feed' as applied to oat-offal or by-products of the oatmeal, is misleading, and the Bureau of Chemistry has in its possession affidavits of dealers in cattle feed and grain who express the opinion that the product sold in the trade as 'oat feed,' which consists largely of oat hulls, should not be known as 'oat feed,' and that the term 'oat feed' should include ground oats only.

"Inasmuch as the foregoing views of the Bureau of Chemistry were earnestly controverted by the Corno Mills Company and other manufacturers of cattle feeds and many dealers in cereal products, letters of inquiry were addressed by the solicitor of this department to representative manufacturers and dealers, and replies were received indicating that 'oat feed' is generally understood among the trade to be the by-product of the oatmeal mill and consisting of oat hulls, oat nubbins, oat dust and middlings. It further appears from these replies that screenings from oat elevators are also known and sold as 'oat feed' and that ground whole oats are never sold as 'oat feed' but as ground oats.

"In view of the difference of opinion as to the significance of the term 'oat feed,' as set forth above, the crop technologist in charge of grain standardization in the Bureau of Plant Industry in this Department, who has a thorough knowledge of the grain industry in this country, was consulted. The crop technologist stated, so far as he is informed, the term 'oat feed' in the grain trade means the by-products of the oat mill, including oat hulls, oat nubbins, oat dust, middlings, and screenings from oat elevators; he further stated that ground whole oats are not designated as 'oat feed' because ground whole oats are a superior product and command a higher price in the market than oat feed.

"When, therefore, the United States attorney in charge of the proceedings against the seizure at Valdosta requested the opinion of the Department of Agriculture concerning the disposal of the case, in view of the stipulation which had been entered into with the defendants for the taking of testimony, he was informed by the solicitor of all the facts hereinbefore related in reference to the meaning of the term 'oat feed' and was advised that the Department of Agriculture was satisfied to leave to his discretion the question whether the case should be prosecuted or dismissed. After consideration of the matter, the United States attorney decided to dismiss the case.

"When the department was advised of this action of the United States attorney, it was deemed advisable to inform the United States attorneys at Montgomery, Alabama, and Danville, Illinois, to whom cases involving the same question had been referred for prosecution, of all the facts within the knowledge of the Department of Agriculture concerning the

meaning of the term 'oat feed.' They have been informed accordingly, and have been requested to advise the solicitor of this department whether, after consideration thereof, they are of the opinion that the cases pending in their respective districts based on shipments of Corno horse and mule feed, should be prosecuted or dismissed. The department is not yet in receipt of the opinions of the United States attorneys. Pending the decision of the United States attorney at Montgomery, Alabama, and the United States attorney at Danville, Illinois, whether cases can be maintained under the food and drugs act which are based on the significance applied to the term 'oat feed' by the Bureau of Chemistry, the board of food and drug inspection has not determined whether cases shall be reported for prosecution in the future in which the same issue is presented. When the replies of the United States attorneys, are received, however, the board will consider and determine what attitude shall be taken in this particular, and when a decision has been reached you will be informed accordingly."

The testimony introduced on behalf of the defense was from manufacturers, middlemen, wholesalers, retailers, and consumers, and covered not only the United States, but two foreign countries as well, and showed that in them for a great many years the term "oat feed" has been used and understood not only by the manufacturer and all classes of middlemen, but also by the ultimate consumer, to mean the by-product of the rolled oat or oatmeal mills, in the same way that other by-products have been known by similar names. No witnesses, except Mr. Brown, testified that he ever heard the term "oat feed" applied to whole, ground, or crushed oats. Dr. Vorhees, of the New Jersey Experiment Station, and Mr. Fuller, of the Indiana Experiment Station, showed very clearly from their examinations and experience the term "oat feed" in commercial usage and wherever used in trade and commerce is known and understood to be the by-product of the oat mill.

The defense also introduced Bulletin No. 108, issued by the Department of Agriculture, April 2, 1908, regarding the "Commercial Feeding Stuffs of the United States." This is a very valuable paper prepared by Dr. J. K. Haywood, Chief of the Miscellaneous Laboratory, and one of the principal witnesses for the government in this case, Mr. Warner, the Chief Chemist, and Mr. Howard, Chief of the Microchemical Laboratory. The paper is the result of chemical examinations of the various stock foods, their methods of manufacture and analyses of commercial feeding stuffs conducted at a number of the state experiment stations. Table 17 of "Oat Feed" deals with the contents of seven different samples of "oat feed." The bulletin says, on page 12:

"The main source of oat feed is the breakfast food factories. In many cases they are composed almost entirely of the oat hulls and light oats left as waste from oat meal manufacture."

It distinguishes between oatmeal and ground whole oats. In Farmers' Bulletin No. 170, issued by the Department of Agriculture, it is shown that "oat feed" is recognized by the department as a by-product of oats.

The government offered testimony of a considerable number of witnesses, consumers and dealers in feeding stuffs, near Washington, St. Louis, Knoxville, Kansas City, and Montgomery. Almost with-

out exception, the result of the testimony of these witnesses when analyzed amounted to no more than their expression of opinion as to what the term "oat feed" should mean, not disclosing any knowledge of its actual meaning as understood by customers familiar with the product. Dr. Haywood, chemist of the board of food and drug inspection, Mr. Lynch, inspector, and Hon. L. F. Brown, of New York, gave the strongest testimony for the government as to what "oat feed" meant. Upon cross-examination, Dr. Haywood testified that without first telling the person that "oat feed" was a part of the label describing a compound commodity, or asking whether he was acquainted with the commodity, he would ask him what he would expect to get if he were buying *oat feed*. That practically nobody whom he interviewed had ever heard of that particular commodity, which counsel for the defense called "oat feed," and, when questioned by Dr. Haywood about the term "oat feed," the persons questioned would immediately answer, "Yes, ground oats." Dr. Haywood further testified on cross-examination that, at the time of his inquiries, a year or two before this proceeding was instituted, he had never heard the term "oat feed" used to designate ground oats, and that in his opinion the term "oat feed" meant ground oats, and that such was the result of his investigations. He further testified, on cross-examination, that he had never heard of the term "oat feed" being used to designate ground whole oats; but that "ground oats" is a term well understood throughout the length and breadth of the country; that ground oats means the oats ground up, without anything added or subtracted, the whole grain with nothing taken away or added; that he had never heard of anybody offering ground oats, crushed oats, or chopped oats or oat chops under the name "oat feed."

Mr. Brown, the Chief of the New York State Department of Agriculture, testified that the meaning of the term "oat feed" with the New York State Department of Agriculture was ground oats, either crushed, whole, or ground oats, from which nothing had been taken away or added, and that the term was so understood throughout the state. His practical experience, however, was limited to Cobleskill, a town of about 2,500 inhabitants, some 15 years ago. His testimony on this point is directly opposite to that of the numerous witnesses called by the defense as to the understanding of the term "oat feed" in New York state, and its weight is destroyed by the fact that the laws of the state of New York, relative to feed stuffs, recognize the distinction between oats and oat feed, classing the latter among the by-products. It is not unlikely that Mr. Brown's experience at Cobleskill was a confusion of the expression "feed of oats" with the commodity term "oat feed."

Mr. Lynch, the inspector, conducted his investigations along the same lines as Dr. Haywood. He would show the person of whom he inquired a copy of the label and ask what meaning it conveyed; and, if the answer should be ground oats, crushed oats, or whole oats, he would ask the person if he found out, in purchasing feed thus labeled, that he had gotten the oat refuse or by-product of an oatmeal mill, would he consider that he had been deceived? That he did not first

ascertain from the person, of whom he inquired, whether he had any knowledge of the commodity "oat feed." In most instances the person, of whom the inquiry was made, had little, if any, knowledge of by-products or any feeding stuffs except hay and in some instances wheat by-products, and they were the ones who were asked to give their opinions as to the meaning of the term "oat feed" in the Corno horse and mule feed label. Lynch states that he interviewed about 200 people in the different Southern states, and, almost without exception, they would expect to get ground or crushed oats, from looking at the term "oat feed" on the label.

The issue, however, is not what such persons with such lack of familiarity with the product would understand "oat feed" meant, but what idea the term ought to convey to persons of ordinary intelligence, who are conversant with our language. The power of Congress to pass the statute is derived solely from its authority to regulate commerce, and it must have uniform operation throughout the United States. It deals with articles of food which enter into interstate commerce. It would be unthinkable that Congress intended that a product could be seized in one district and not in another for a misleading brand, according or not as the generality of persons in those districts understood or were deceived by the brand on the particular product.

[5] Language is "the expression of thought by means of spoken or written words," and words are but signs of ideas. If a person does not know English, he cannot understand the idea or conception or sign meant to be conveyed by a word. So as to a commodity term; people unfamiliar with the term or its meaning, seeing on a label the word which stands for a commodity term, would not know what it meant, and numbers of them would state, quite honestly, that, seeing the word "oat feed" on the label, they were deceived as to what it meant and thought "oat feed" meant to describe the grain of the oat, rolled, crushed, or chopped.

All words in the beginning were arbitrary signs. They became part of the language only by common usage among the people after they had generally been accepted or taken to express or stand for a particular thought or idea. When a word obtains such currency or general acceptance, the people use it to convey that particular idea to the persons to whom it is addressed, and the word continues to have that meaning and function in the language until common usage among the people accords another and different meaning to it. Language grows and changes with the growth and changes in social and economic conditions, and expressions creep into the language by a gradual process of evolution wrought by the necessity for more precise expressions and greater convenience in depicting old ideas or new conditions and things. Words are thus being constantly coined and put in circulation, and, their meaning being generally understood among the people, they become accepted parts of our speech, sometimes for years, before they are formally acknowledged and incorporated in standard dictionaries. A century ago no one would have understood what idea was meant to be conveyed by the words "chloroform," "telephone," "tele-

graph," "aeroplane," "automobile," "X-rays," and the like. Now they are common nouns, parts of common speech, and understood by all who speak our language.

The evidence satisfies the court, if that be the only means by which it can ascertain the fact, that when our people speak of the products of a particular grain or vegetable, and use the word by which that grain or vegetable is commonly called, and add the suffix "feed," they mean to convey the idea that the substance described is the by-product of that grain or vegetable—the residue after subtracting from the grain or vegetable those parts which are useful for human food. The evidence shows that this meaning has so long been understood in the dealings between persons who buy and sell feed stuffs, and from the designation given the product, in laws, trade journals, market reports, in the newspapers, and in official publications in reference to food for man or other animals, that the term "oat feed," and other like terms, have become common nouns in our vernacular, and describe by-products, and therefore ought not to lead any one, who understands English and reads the label, to reach the conclusion that the term "oat feed" means the whole, ground, or crushed grain; especially when the term "oat feed" is used in juxtaposition with the word "oats" on the label, and inevitably implies that the "oat feed" contained in the mixture is something different from the "oats" therein.

The term "oat feed" on the label is not false, but truthfully designates that portion of the constituents of the blend which consists of the "oat feed" and is correctly described by those words. The purchaser buys the product for cattle food and knows it is put upon the market for that purpose. On the label here, after giving all the elements which enter into the blend, follows a plain statement of the qualities and nutritive values of the combined product for cattle food. After naming the elements put in the blend, the purchaser is told of the proportions of protein, sugar, starch, fat, and fiber, thus giving him additional means of ascertaining and judging of the nutritive properties and values of the product for cattle food. All who interest themselves in food supplies know, for instance, that protein serves to build up new tissues, replace broken down cells, and may also serve as a source of heat and energy, and so of the properties of sugar and starch, fat, and fiber, and their relative nutritive values. It might as well be said that the stated analysis of the product in these respects was misleading, because the manufacturer did not particularly define, in the statement in reference thereto, the offices which the different elements performed in lowering or increasing the nutritive properties of a particular product—as to the charge that the use of the word "oat feed" was misleading, because it did not go further and descend to minuteness of particulars and description of the thing of which "oat feed" consists and state on this label, descriptive of stock food, that it consisted of the residue of the grain after the most valuable parts of the oat had been subtracted by the manufacturer for human food.

The great object of the statute is to prevent injury to health and deception by putting words or devices on the label which may natu-

rally lead the purchaser to believe that he is getting one thing when in reality he is getting another. Certainly the manufacturer meets all these requirements when he truthfully describes the elements of his product by the use of common nouns which fairly describe the things which enter into it, according to the English vocabulary and adds, as he is not required to do by the federal statutes, an analysis of the life-giving properties of the different elements, thus affording additional means of judging of the real value of the blend for cattle food, the use for which it is manufactured and put upon the market.

Of course, if "oat feed" meant the whole grain of the oat, either crushed, ground, or rolled, and oat hulls were packed in the blend "in excess of the amount normally present" in whole, ground or crushed oats, the label would be misleading; but there is no ground for such charge when it is ascertained that "oat feed" does not mean the whole grain of the oat in some form, but only the by-product of the oat—"oat feed." The admission as to the quantity of oat hulls "naturally and normally present" in "oat feed" relates only to the whole grain of the oats, and not to the "oat feed," which is a mere by-product, which the term on the label correctly described. If there were a greater quantity of oat hulls in the by-product, sold under this label as "oat feed," than in such feed as generally sold, the brand "oat feed" might be misleading in that respect; but no such contention was made, and, if it had been, the proof would not sustain it. The admission of the parties as to the quantity of "oat hulls" "naturally and normally present" in "oat feed" is an admission to that extent, only in case the whole ground oats had been used in lieu of the same amount of "oat feed."

[6] Under the statute compounds known as articles of food can be sold under their own distinctive names, so long as no deleterious matter is put in the product, and the label states where the product is manufactured, and it is not an imitation sold under the distinctive name of another article. The manufacturer here would have fully obeyed the statute if he had put nothing on his product but the name "Corno Horse and Mule Feed," complying with its requirements in other respects. Such a brand would not give purchasers the hundredth part of the information of the elements and value of the product which is imparted by the more elaborate brand which was put upon the product. It would be a very harsh construction of the statute to hold that it required the forfeiture of the product on the ground that the label was misleading, because some person, unfamiliar with the commodity and the common use of language in designating it, might believe he was buying the whole oat when he was getting only the by-product, in consequence of the label, which truthfully described the product as "oat feed," not descending into greater minuteness of description and telling the particulars wherein "oat feed" differs from oats.

Let the libel be dismissed.

## FISHER HYDRAULIC STONE &amp; MACHINERY CO. v. WARNER.

(Circuit Court, N. D. New York. June 22, 1911.)

**1. SALES (§ 153\*)—CONTRACT TO PURCHASE—BREACH—TENDER BY SELLER.**

Where a contract for the sale of certain patented machinery and fittings provided that defendant should order shipment before October 1, 1908, and that plaintiff should thereupon deliver the machinery, and defendant should have an opportunity for inspection, defendant's failure and refusal to order shipment within the time prescribed constituted a breach of contract and entitled plaintiff to sue therefor without shipping the machinery to destination and tendering inspection and delivery there.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 363; Dec. Dig. § 153.\*]

**2. SALES (§ 384\*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.**

Plaintiff contracted to sell defendant certain patented machinery with a license to operate the same under the patent within a specified territory. Defendant agreed, but failed and refused to order shipment of the machinery within the time prescribed. The contract provided that plaintiff should retain title to the machinery until paid for, and the machinery was such that it had only a limited market value. *Held*, that the measure of plaintiff's damages was the difference between the cost of manufacturing the machinery and its actual value at the time and place of delivery, and, in the absence of proof of either, plaintiff was only entitled to recover nominal damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.\*]

At Law. Action by the Fisher Hydraulic Stone & Machinery Company against Henry P. Warner on written contract to recover damages for breach of a contract to purchase certain concrete machinery and fittings at the price of \$5,630, less \$500, paid on the execution of the contract. Findings and judgment for plaintiff for nominal damages.

Costello, Burden, Cooney & Walters, for plaintiff.

King, Waters & Page, for defendant.

RAY, District Judge. On the 16th day of March, 1908, the plaintiff, as party of the first part, a corporation organized and doing business under the laws of the state of Maryland, by W. H. Fisher, its president, entered into a written contract with the defendant, Henry P. Warner, party of the second part, of Syracuse, N. Y., whereby it was agreed as follows:

The plaintiff agreed:

(1) To sell to the defendant the concrete machinery and fittings described in Schedule A annexed to such contract for the sum of \$5,630; same "to be sold f. o. b. cars Mt. Gilead, Ohio." Later we find this language:

"Said machinery and fittings is sold for the sum of \$5,630, and upon the following terms."

(2) Said machinery and fittings were to be put up and installed under the supervision of the party of the first part or its representative, without charge, except for hotel bill of superintendent at the city of Syracuse, N. Y.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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(3) It was mutually agreed by the parties:

"That the machinery and appliances herein mentioned and referred to (in the contract) shall be ordered by the party of the second part on or before October first, 1908, and the party of the first part will make shipment of said machinery within thirty days from and after receipt of said order."

Payment was to be made as follows:

(1) A payment of \$500 on the execution of the agreement. This payment was made.

(2) Fifty per cent. of the balance on the receipt of a bill of lading for the completed outfit of machinery and fittings mentioned in said Schedule A "upon the arrival of such outfit in the city of Syracuse, N. Y.," provided that second party was to have the privilege of examining the same on arrival in Syracuse to see if all the articles had been shipped.

(3) The balance of the purchase price was to be paid in 90 days after the receipt of such machinery, etc., in Syracuse.

While the defendant paid the \$500 on the execution of the agreement as provided, he never ordered the machinery or fittings, or any part of same, ignoring all communication by letter on the subject, and the plaintiff did not put the machinery or fittings, or any part of same, on the cars at Mt. Gilead, Ohio, or at any other place, or ship or deliver same to or at Syracuse, N. Y.

The plaintiff, under objection, was allowed to show and, I think, did show, that it caused to be made and had ready for shipment on or before October 1, 1908, the machinery, etc., in question at Mt. Gilead, Ohio, and still has same in store. It appeared that the machinery and fixtures were not made at the time the contract was entered into, but were made and completed as early as September of that year. This was not an agreement to manufacture the machinery and fittings for the defendant and deliver same to him, but an executory contract to sell and to deliver on an order being received; the defendant agreeing to order by a certain date, and the plaintiff agreeing to ship or deliver within 30 days thereafter.

The defendant, in his answer, says:

"Fifth. Defendant in further answering alleges that the plaintiff in this action has never shipped the machinery, which is the subject-matter of said contract, to this defendant, and that said plaintiff has never sent to this defendant any bill of lading for such machinery, and that such machinery has never arrived in the city of Syracuse, N. Y., and that this defendant has never had the opportunity of examining such machinery and of determining that the whole of the articles contracted for have been delivered in Syracuse, N. Y., and that said plaintiff has never installed the said machinery, never set up the same, and that said machinery has never been in successful operation for any time; and that by reason of all the facts last hereinbefore set forth this defendant has never become liable to pay to the said plaintiff any sum whatever under and by virtue of the said contract referred to in said complaint or otherwise, except said sum of \$500 already paid, and that this defendant has never become further liable to pay any part of the purchase price of said machinery under or by virtue of the terms of the said contract or otherwise."

He also says he has fully performed on his part, but that the plaintiff has not performed on its part, in that it has never shipped the machinery, etc., to Syracuse; that it has not come there and the de-



fendant has had no opportunity of examining same; that it has never been installed or in successful operation. The complaint was silent, as was the contract, on the subject of making the machinery.

[1] I think the agreement clearly, in effect, provides that the machinery and fixtures were not to be put on the cars or shipped to Syracuse until ordered shipped out by the defendant, which defendant agreed to do on or before October 1, 1908. He never gave the order. In that regard the defendant did not perform. The plaintiff kept urging the defendant to perform by ordering the property, and defendant made the excuse that his plant was not ready for the machinery. There was some talk of an extension, but no extension was in fact agreed on. An extension to January 1, 1909, was drawn up; but the defendant did not execute or deliver it. However, if there was such an extension, the defendant did not order the property shipped and remained in default.

The agreement provided that title to the property should remain in the party of the first part until fully paid for. It also contained the following:

"The second party agrees to receive such machinery and equipment; to pay all freight damage and other such expenses; to erect and equip a plant to obtain the best results in working said machinery and equipment."

It is true, of course, that defendant did not have an opportunity at Syracuse to examine the property, etc.; but he did not order it shipped or sent on.

I do not think the plaintiff was obligated to put the goods on the cars or send them to Syracuse until ordered so to do by the defendant. Clearly the defendant was guilty of a breach of his contract. He agreed to purchase the property and pay for it and to order it shipped by October 1st. This he failed and, in effect, refused to do. However, the plaintiff did not put the machinery, etc., in the cars, and hence never delivered them. The title was to remain in the plaintiff until the machinery and fittings were paid for, and as a result the title never passed to the defendant. The law does not demand idle ceremonies, and it was unnecessary for the plaintiff to put this property on the cars. It had 30 days in which to assemble and ship it after the order to ship was given. He was not to put it on the cars until ordered so to do. Not having ordered it shipped to Syracuse as he agreed to do, I do not see how the defendant can complain that he had no opportunity to examine.

[2] The question is one of damages simply. Can plaintiff recover the balance of the purchase price as damages, or is the measure of damages the difference between the price agreed to be paid on delivery and acceptance—that is, the contract price—and the market value of the articles at the time and place of delivery? There is no evidence in this case that these articles had any market value at the place of delivery or at any place. There is no evidence in this case of the actual value or cost of making this machinery. It appears from the agreement that these articles were made under a patent, and the agreement to sell also conferred the right to use such machinery in certain territory mentioned. Patented machinery for making concrete

blocks is not a staple article of commerce like cloth, clothing, food, groceries, ordinary implements, and the like. Still it would have a certain kind of market value undoubtedly, but limited. Connected with a limited right to use and operate in a circumscribed territory, it cannot be said to have the ordinary market value of articles of commerce.

In *Van Brocklen v. Smeallie*, 140 N. Y. 70, 75, 35 N. E. 415, 416, the court held:

"In this court the rule of damages for a breach by the buyer of a contract for the sale of personal property is perfectly well settled. *Dustan v. McAndrew*, 44 N. Y. 78; *Hayden v. Demets*, 53 N. Y. 426. In each of these cases it was ruled that the vendor of personal property has three remedies against the vendee in default. The seller may store the property for the buyer and sue for the purchase price; or may sell the property as agent for the vendee and recover any deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. In the second of the decisions last cited, it was further held that the rule applied, not only to cases where the title passed at once, but also to cases where the contract was executory but there had been a valid tender and refusal."

Assuming this to be the correct rule where the agreement is one of sale and purchase in præsenti, one question is whether the clause in the contract retaining title to the machinery in the vendor until paid for operates as an election on the part of the vendor to retain the property as its own (in case of a breach by the vendee) and, as damages in case of failure to perform, rely on the difference between the contract price and the market price at the time and place of delivery or the profit that would have accrued if the machinery had been accepted. Credit for a part of the purchase price was contemplated and provided for. The clause for retention of title was in the nature of security for the payment of the purchase price. This provision was not intended to have any relation to the measure of damages in case of refusal to perform by the vendee.

In *National Cash Register Co. v. Schmidt*, 48 App. Div. 472, 62 N. Y. Supp. 952, the court, per Willard Bartlett, J. (now of the Court of Appeals), held that, where a person agreed to purchase a cash register, the title not to pass until the purchase price was paid in full, but countermanded the order and refused to accept the register, that the vendor's only remedy was an action to recover damages for the vendee's refusal to accept, and that the vendor's measure of damages was the difference between the contract price and the market value of the register at the time and place of delivery, and that in the absence of proof of any such difference the vendor was entitled to only nominal damages. But in that case it is quite apparent that the cash register had a market value. In the case at bar the machinery was to be ordered shipped before shipment and on or before October 1, 1908; it was to be sold f. o. b. on the cars at Mt. Gilead, Ohio. In fact, it was not in existence. It was a special order of, I assume, special machinery. The plaintiff holds it in storage ready for delivery and shipment at the place agreed.

In *Gray v. Booth*, 64 App. Div. 231, 237, 71 N. Y. Supp. 1015, the authority of the case of *National Cash Register Co. v. Schmidt* is questioned and its holding is not followed.

In *Hayden v. Demets*, 53 N. Y. 426, and *Dustan v. McAndrew*, 44 N. Y. 78, the question was one of damages recoverable by the vendor on refusal of the vendee to accept according to the contract, and while the court laid down the rule that, where the purchaser under a contract of sale refuses to accept and pay for the property, the vendor has three remedies: (1) To hold the property for the purchaser and recover of him the entire purchase price; (2) to sell it after notice to the purchaser, as his agent for the purpose, and recover the difference between the contract price and that realized on the sale; and (3) to retain it as his own and recover the difference between the contract price and the market price at the time and place of delivery—the facts stated show that in each case there was a sale in *præsenti*, and that, while a future delivery was provided for, payment was to be made on delivery, and the possession as well as title was to vest absolutely in the vendee. In short, it was a sale and not an agreement to sell in the future, title expressly retained in the meantime and until full payment of the purchase price.

In *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225, the subject of the contract was silicate of soda to be manufactured and delivered from time to time during a year and paid for as delivered. It appeared that the article was perishable in its nature and had no real general market value; there being but a limited demand, and it being an article usually manufactured in quantities on orders by consumers. The vendee having received a part and refused to accept the remainder of the quantity bargained for, it was held the vendor could recover as damages the difference between what it would cost him to manufacture and deliver the article under the contract and the contract price. It was not suggested that the measure of damages was the contract price of the article; but the silicate of soda to fill the contract was not in fact made and hence tender could not be made and the property held in store for the vendee.

In the case at bar the machinery, etc., was in fact manufactured or caused to be manufactured by the vendor. Where there is a present absolute agreement of purchase by the one and an absolute agreement of sale by the other at a fixed price, delivery and payment to be made at a future day, it seems reasonable and just that, on tender by the vendor at the time and place of delivery and refusal by the vendee to accept, the vendor may store the property so sold and purchased for the vendee and recover the price agreed to be paid. But where there is an agreement to sell in the future and an agreement to purchase in the future, the vendor retaining title until the whole purchase price is paid, certain credit for a part of the purchase price forming a part of the agreement to purchase, we have a different case. The vendor here has retained the title, and the vendee refuses to order; that is, purchase the property as he agreed to do. The vendor has it on his hands. In this case it was a special order of specific machinery which, I think it fair to assume, had no general or real market value. The vendee has not actually purchased the property; he has only agreed to purchase. He refuses to purchase. He agreed to pay a specified sum for the property, and this he refuses to do.

In *Todd v. Gamble*, *supra*, the court quoted with approval the language of Baron Alderson in *Hadley v. Baxendale*, 9 Exch. 341, viz.:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

I think this a reasonable and a sensible rule, but the difficulty is how to apply it in this case. As the evidence shows this was a special order according to certain plans and specifications, and defendant agreed to order it on or before a certain day, and it was clearly contemplated, although not written in the contract, that it was to be made to fill the order of shipment to be given at a future day, and defendant agreed to order and pay a certain price, and plaintiff actually made the machinery and has it for the defendant, who has refused to order it and in effect refused to take it, may we not say that the damages for the defendant's breach contemplated by the parties was the value of the property as fixed by their agreement?

In 2 *Joyce on Damages*, § 1654, it is said:

"The measure of damages for refusal of the purchaser to accept and pay for goods under a contract of sale is the difference between the contract price and market price or value of the goods at the time and place of delivery; or on the day stipulated for delivery, or at the time of the breach, or at the time of the seller's offer to deliver them, or at the time and place of refusal to accept, or at the time of commencing suit, or the profit which would have been made had the goods been taken and paid for according to contract and not the balance of the purchase money, or the difference between the contract price and the actual value at the time. And the above rules exclude the recovery of the full contract price upon the breach. But the measure of damages is not necessarily the difference between the contract price and the actual value of the property. Again, the rule may be stated in another form as follows: The measure of damages in an action for nonacceptance of property sold or contracted for is the amount of the actual injury sustained by the plaintiff in consequence of such nonacceptance, which is ordinarily the difference between the price agreed to be paid for it and its value where such price exceeds its value; but, where the property is utterly worthless in the hands of the plaintiff, the whole price agreed to be paid should be recovered."

On this last proposition *Allen v. Jarvis*, 20 Conn. 38, is cited.

In *Tufts v. Bennett*, 163 Mass. 398, 40 N. E. 172, it was held that:

"Where the seller sues the purchaser for the contract price of goods he has refused to accept, which goods were to be paid for by installments, and the title to which was not to pass until the contract price was fully paid, the measure of damages is the difference between the market value at the time and place of delivery and the contract price, and, no evidence having been introduced of that difference, the court can award nominal damages only."

In view of the authorities cited, the authority of which *Joyce* in his work accepts, I am constrained to hold that the damages properly recoverable in this case would be the difference between the cost of making the machinery and its actual value at the time and place of delivery. We have no proof of the actual value at that time and place or at any time, except as we assume the agreed price to be evidence

of its value, and we have no evidence of the cost of making, or of the material and labor put into it. I confess that I see equities on both sides of the question and am not at all sure of the accuracy of my conclusions. I am pointed to no case like this in some of its important features; for instance, the limitation on use to a prescribed territory and the agreement to order in the future with the statement in the contract, in effect, that the property is "to be sold," not delivered f. o. b. on cars at Mt. Gilead, Ohio, and ordered at a future day. To give judgment for the entire purchase price in the absence of an out and out sale would seem like enforcing in a way the specific performance of an agreement to purchase personal property in a case where the vendor on receiving payment for the property is to do certain things. It is true that words importing a present sale appear in some parts of this agreement, but it is to be taken altogether and read as one whole. We find the following:

"Said machinery and fittings is sold for the sum of," etc.

Also the words:

"And upon the payment of all such purchase money, including all notes and renewals of notes that may be given as a part of the purchase price, the title to said machinery and equipment and the right to use and operate the same in said territory will at once vest in said second party, his heirs," etc.

The contract also restricts the right to assign the contract and rights under it until payment of the full purchase price.

On the whole, I am compelled to hold that, while there has been a clear breach of the contract by defendant, the true measure of damages is not the price agreed to be paid, and that plaintiff is entitled to recover under the proofs in the case nominal damages only.

There will be findings and a judgment accordingly.

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## UNITED STATES v. ONE HUNDRED BARRELS OF VINEGAR.

(District Court, D. Minnesota. Fourth Division. July 14, 1911.)

### 1. FOOD (§ 24\*)—ADULTERATION—MISBRANDING—TEST.

In a libel for forfeiture of alleged adulterated vinegar, the government is not limited to the standards mentioned in Agricultural Department bulletin No. 65 and circular 19, nor to methods of analysis adopted under regulation No. 4, but may make use of any accurate test.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.\*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

### 2. FOOD (§ 24\*)—ADULTERATION—VINEGAR—GLYCERIN TEST—ACCURACY—EVIDENCE.

Evidence held to establish the accuracy of the glycerin test for the determination of pure cider vinegar.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**8. FOOD (§ 10\*)—CIDER VINEGAR—ADULTERATION.**

Where samples of alleged pure cider vinegar showed only from .11 to .16 glycerin, it was adulterated.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 11; Dec. Dig. 10.\*]

**4. FOOD (§ 24\*)—FORFEITURE—PROCEEDINGS BEFORE SECRETARY OF AGRICULTURE.**

Investigation provided for by food and drugs act (Act June 30, 1906, c. 3915, § 4, 34 Stat. 769 [U. S. Comp. St. Supp. 1909, p. 1189]), refers to cases in which there is to be a prosecution under section 5 for the enforcement of penalties prescribed by section 2, and not to cases where forfeiture proceedings are contemplated for condemnation, as authorized by section 10, so that it was no objection to forfeiture proceedings that no prior proceedings had been instituted before the secretary, under section 4.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.\*]

**5. FOOD (§ 24\*)—ADULTERATION—FORFEITURE—SEIZURE.**

It is not ground for dismissal of a libel to forfeit adulterated food under food and drugs act (Act June 30, 1906, c. 3915, § 10, 34 Stat. 771 [U. S. Comp. St. Supp. 1909, p. 1191]), that the property was not seized before the libel was filed.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.\*]

**6. FOOD (§ 24\*)—ADULTERATION—FORFEITURE—SHIPPED FOR SALE.**

Where adulterated vinegar was proceeded against under the food and drugs act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), and it appeared that it had been the subject of interstate commerce and was seized while stored in the original unbroken packages, it was not material that the evidence showed that it had been shipped in interstate commerce for consumption, and not for sale in such unbroken packages.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.\*]

Libel by the United States against One Hundred Barrels of Vinegar. Judgment of forfeiture.

C. C. Houpt, U. S. Dist. Atty.

Thomas E. Lannen and Frank C. Brooks, for claimant.

WILLARD, District Judge. Bulletin No. 65 of the Department of Agriculture, Bureau of Chemistry, entitled "Provisional Methods for the Analysis of Foods, adopted by the Association of Official Agricultural Chemists, November 14-16, 1901," contains a statement by William Frear relating to the determination of the source of a vinegar, and gives some tests by which the genuineness of cider vinegar can be known. Circular No. 19 of the Department of Agriculture, issued on June 26, 1906, establishes a standard for vinegar. The evidence of the claimant in the case as well as that of the government establishes the fact that a compound one half of which is pure cider vinegar, and the other half something else, will answer the tests mentioned in bulletin No. 65 and meet the requirements of circular No. 19. Such an adulterated article which would not be pure cider vinegar would nevertheless have to be pronounced such if these tests and standards are the only ones to be applied. The tests and standards contained in other literature upon the subject published prior to 1906 are substantially those stated in the bulletin and in the circular. The testimony of the claimant's experts is based on such tests and standards.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It being proved that these are worthless, it follows that the opinions of such experts based on such standards to the effect that this article is pure cider vinegar are entitled to no great weight.

[1] Is there any evidence in the case which shows some other test by reference to which the genuineness of this vinegar can be determined? The government is not limited to the standards mentioned in the bulletin and circular above referred to. In the trial of litigated cases the government is not even limited to methods of analysis which may be adopted under regulation No. 4. The question in this case being whether or not the article is pure cider vinegar, the government can make use of any test which is an accurate one for deciding that question. Whether it is an accurate one or not must be decided by the court from all the evidence in the case. The testimony shows that practically all commercial vinegar is now made by the generator process. This process, however, is of recent origin, so recent that there is no literature on the subject. Most of the literature relating to cider vinegar has reference to other forms of production.

[2] Does the evidence disclose any accurate test for the determination of pure cider vinegar made by the generator process? It is claimed by the government that the testimony of the witnesses Bender and Goodnow, supplemented by that of Doolittle, does show such a test. Without discussing this evidence in detail it may be said that Bender, while in the employ of the government, operated commercial cider vinegar factories for several months in New Jersey, Massachusetts, and New York. He was there for the purpose of determining the constituents of cider vinegar. He made analyses every day of the cider stock before it entered the generator, and of the vinegar which came from the generator. Goodnow as an employé of the government was at generator factories in Michigan, New York, and New Jersey. His purpose was the same as that of Bender, and he made daily analyses extending over months, as Bender did. The result of these experiments was, so far as glycerin is concerned, as follows: The maximum quantity of glycerin found by Goodnow in any sample in Michigan was .46, the minimum .24; in New York .31 and .25. Bender's results in New Jersey were maximum .45 and minimum .32. These experiments, extended through several months in hundreds of samples, show no sample with less than .24 or more than .46 of glycerin.

Glycerin is not mentioned in any way, either in the bulletin or in the circular above referred to. The government, with these experiments as a basis, claims that it has discovered a new test, the accuracy of which has been established by the evidence. This contention is sustained. That glycerin exists in cider stock is not denied by the claimant, though one of its experts claims that it was practically destroyed in the generator process. That claim is not in any way substantiated by the evidence nor by the literature relating to wine vinegar. The evidence in fact shows that but little glycerin is lost by passing the cider through the generator and converting it into vinegar.

The claimant's objections to this test are various. It says that no such test had ever been heard of before, and that there is nothing in

the literature upon the subject of cider vinegar which in any way refers to such a test. If such an objection were to prevail it would prevent the application of any new test, no matter how thoroughly its accuracy might be established. Objections to the knowledge which Bender and Goodnow had as to the character of the stock, to the manner in which they made their experiments, and the seasons of the year when they were made, have all been considered, but they are not deemed sufficient to destroy the value of such experiments.

[3] The evidence having established the glycerin test as an accurate one for the determination of the purity of cider vinegar, it is now to be applied to the vinegar here in question. Samples B, C, and D, were taken on February 1, 1911. The smallest amount of glycerin found in any of Bender's or Goodnow's experiments being .24, these samples show respectively .13, .11, and .13. Samples E and F, known as the composite samples, were taken May 15, 1911. They are a mixture of equal quantities taken from six barrels. These samples show respectively .14 and .16 of glycerin.

The claimant objected to the method pursued in determining the amount of glycerin, and its experts characterized that method as entirely inaccurate. Such evidence does not substantially weaken that of the government chemists who testified to its accuracy. Moreover, the fact remains that using the same method in all these experiments, they always found a substance which they call glycerin. Applying precisely the same method to claimant's product, they found precisely the same substance, but in only one-half of the minimum quantity.

Claimant points out that the analyses of Bender and Goodnow were made as the vinegar came from the generator, while the samples in this case were analyzed some of them six weeks after the vinegar was received in barrels in Saint Paul, some ten weeks afterwards and some six months afterwards; but the evidence does not show that these lapses of time would materially affect the character of the vinegar stored in closed barrels. The claim that the character of that vinegar was materially changed during that time by the formation of mother in it is not borne out by the evidence. No serious objection can be made to the manner in which the samples were taken. Even if the barrel had contained solid matter at the bottom of it, and if it had been shaken so as to mix this solid matter with the whole mass, the sample then drawn off would have been filtered before analysis, in order to get rid of that matter. The experts of the government basing their opinion upon the application of the glycerin test, and upon other facts which appear in the analyses, particularly the high ratio between the ash and the nonsugar solids, testify that the claimant's product is not pure cider vinegar, but is a compound of about one-half cider vinegar and the other half distilled vinegar or diluted acetic acid, with the addition of other substances, the identity of which they could not determine. The opinion of the claimant's experts being based, as has been said, upon inadequate standards cannot outweigh the testimony of the government.

It may be worthy of remark that the evidence shows that the claimant has a cider vinegar factory in Michigan, and a distilled vinegar



factory in Chicago; it also may be noted that the claimant presented no evidence to show whether it bought this vinegar, or manufactured it, and if it manufactured it, out of what substances it was made.

[4] The motion of the claimant at the close of the evidence to dismiss the libel, because no proceedings were instituted by the Secretary of Agriculture prior to the filing of the libel, such as are provided for in section 4 of the food and drugs act is denied. The investigation provided for in section 4 seems to refer to cases in which there is to be a prosecution under section 5 for the enforcement of penalties referred to in section 2. It has no reference to proceedings for condemnation under section 10.

The amendment to regulation No. 5, issued February 6, 1911, evidently is based upon this construction of the law, for that provides that notice shall be given in every case to the party or parties against whom prosecution lies under this act. Moreover, the necessities of the proceedings under section 10 could not abide the delay caused by an investigation such as is prescribed by section 4. While that investigation is being carried on the property might disappear, or the packages be broken and become part of the general property of the state.

[5] The motion of the claimant made at the close of the testimony to dismiss the libel, because the property was not seized before the libel was filed, is denied. *United States v. Two Barrels of Desiccated Eggs* (D. C.) 185 Fed. 302; *United States v. George Spraul & Co.* (C. C. A.) 185 Fed. 405.

[6] The motion of the claimant made at the close of the testimony to dismiss the libel, on the ground that it does not appear that the vinegar seized here was shipped in interstate commerce for sale in the original unbroken packages, is denied. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. —.

The motions made by the claimant at the close of the testimony for a general finding in its favor and for special findings in its favor, are denied.

I make a general finding in this case in favor of the government, and find that the vinegar seized under this libel, to wit, 70 barrels, was both adulterated and misbranded.

Let judgment of condemnation and for the costs be entered against the 70 barrels of vinegar seized in this proceeding, as prayed for in the libel.

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In re ARDEN.

(District Court, E. D. New York. June 9, 1911.)

**1. BANKRUPTCY (§ 161\*)—LIENS—JUDGMENT—RECOVERY—TIME.**

Where a judgment recovered against a bankrupt and claimed to be a lien on the bankrupt's remainder interest in certain real estate was entered more than four months before the filing of the bankruptcy petition, it was not affected by Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), vacating liens acquired within that period.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

though the bankruptcy court had jurisdiction to control the disposition of the property subject to the lien in the interest on the entire estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.\*]

2. BANKRUPTCY (§ 206\*)—ASSETS—REMAINDER INTEREST IN LAND—SALE.

Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), regulating the jurisdiction of the bankruptcy court, such court has jurisdiction to sell a remainder interest of the bankrupt in certain real property, and pay off a judgment lien thereon if the proceeds be sufficient for that purpose, in order to preserve the equity in the property for the benefit of general creditors, but the judgment lien and all rights accruing therefrom must be respected.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 206.\*]

3. BANKRUPTCY (§ 217\*)—PROPERTY SUBJECT TO LIENS—SALE—STAY—VACATION.

Where a bankrupt owned a remainder interest in certain real property in the hands of trustees subject to a valid judgment lien on the bankrupt's interest, and it did not appear that the trustee could obtain a sufficient amount for the bankrupt's rights in the estate in remainder to justify a direction that the trustee attempt to sell such rights and pay off the undisputed lien of the judgment creditor, a stay precluding the creditor from proceeding to enforce the judgment against such remainder would be vacated subject to the right of the trustee to join in any proceeding taken by the creditor, or to protect any equity which might arise.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 217.\*]

In the matter of bankruptcy proceedings of John L. Arden. Application of judgment creditor to vacate a stay of proceedings to subject the bankrupt's remainder interest in certain real estate. Motion granted.

Gray & Hiscox (James A. Gray, of counsel), for judgment creditor.  
Walter E. Cooke, for trustee.

George N. Hamlin, for bankrupt.

CHATFIELD, District Judge. The bankrupt is the grandson of one Margaretta H. Ward, who devised by will a considerable estate to trustees, with provision that these trustees should divide the estate into shares at her death, and hold one of these shares in trust to the use for life of each of her daughters, with power of appointment to each daughter over her share. Of these daughters it is necessary to consider but two, Margaretta M. and Emily B. Ward. Margaretta M. Ward died some time since, and in her will exercised the power of appointment over the estate held in trust for her use during life, by giving, devising, and bequeathing her personal property and any property over which she had power of disposition to her executors in trust to hold, invest, etc., and to apply the income to the use of Emily B. Ward for life; and:

"Upon her death to divide said property between my nephews Thomas B. Arden and John Lorillard Arden in equal shares. If at the expiration of said trust either of my said nephews be deceased leaving issue who survive my said sister, the share intended for my nephew so deceased shall be divided by the Trustees then in office among such issue in equal shares per stirpes. But if either of my nephews die in the lifetime of my sister without leaving issue who survive her, all said property shall go and belong to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the other of my said nephews, or if he be deceased, to his issue in equal shares per stirpes to be divided among them by said Trustees."

John L. Arden and Thomas B. Arden were the sons of another daughter of Margaretta H. Ward, and both of these men were living at the time of their grandmother's death, as well as at the time of the death of their aunt, Margaretta M. Ward. Their aunt, Emily B. Ward, who is the life beneficiary of the particular property in question here, is still living, but is stated to be incompetent. The shares of the different individuals, in other portions of the estate and in the personal property, are so involved that they need not be considered on this motion, inasmuch as they do not at all affect the particular question which is raised by a judgment entered and docketed on the 27th day of April, 1910, for \$3,638.90 in favor of one Jacob Fishel against John L. Arden. This judgment resulted in an attempt to examine John L. Arden in supplementary proceedings, and upon the 6th day of December, 1910, he filed a voluntary petition in bankruptcy scheduling this judgment among his debts, but making no mention in the schedules of any interest in the estate devised under the will of his grandmother, nor under the will of his aunt Margaretta M. Ward, by whom he was given, as we have previously seen, a remainder interest, subject to the life use of the aunt Emily B. Ward.

[1] This remainder was an interest in real estate, and the creditor claims that the lien of his judgment attached thereto. This judgment was entered more than four months before the filing of the petition in bankruptcy, and is not affected by the provisions of section 67 of the bankruptcy law vacating liens acquired within that period. The jurisdiction of the bankruptcy statute, however, controls the general disposition of the estate of the bankrupt now vested in a trustee, and this court has assumed jurisdiction over all the parties and temporarily restrained the judgment creditor from proceeding except in bankruptcy, until it can be determined whether or not the trustee has title to property (including this remainder) which can be sold for the benefit of the estate generally so as to be more than sufficient to pay off the lien of the particular creditor who has secured that lien. The property in question is in the hands of the trustees under the will of Margaretta M. Ward, and the remainder interest, of whatever nature it may be, cannot be reduced to possession. No action has been instituted in the state courts in which jurisdiction over the rights and persons of the various parties and over the property itself has been acquired, such as existed in *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and yet under the state laws the creditor has rights which cannot be taken away.

[2] This court may, under section 2 of the bankruptcy statute, sell an interest such as a remainder in real property, and pay off a judgment or mortgage lien on said interest, if the proceeds be sufficient for that purpose, in order to preserve the equity in the property for the benefit of general creditors, but the lien and all rights accruing therefrom must be respected by the bankruptcy court. In the present instance it is asserted that the interest of the bankrupt, if alienable and capable of present sale, should bring much more than the amount of

this judgment, or even than his scheduled debts, and neither the judgment creditor nor the estate would be benefited by proceeding with a sale under execution if the property be salable in bankruptcy so as to create a surplus and if the judgment creditor's lien be admitted as valid against that property. Under these circumstances the judgment creditor has applied to this court to vacate the order temporarily restraining him from proceeding to collect his judgment, other than in a bankruptcy proceeding, until further order of this court, and in the meantime the trustee in bankruptcy has applied for a direction to the bankrupt to convey to him whatever interest the bankrupt may have under the devise in question, with the purpose of attempting to sell that interest for the benefit of the creditors, and to pay off the judgment upon which execution has been levied.

[3] A construction of this particular will cannot be conclusively had on this motion. Whether the remainder interest be vested or contingent and assuming that the creditors through the trustee have title such that they will ultimately obtain the remainder interest if the bankrupt survives and that the property can be sold for the benefit of those creditors whose claims shall have been proven or who were in the possession of liens which were superior to the effects of a discharge in bankruptcy, nevertheless we have the problem of dealing with a claim against real property in the hands of trustees who are not parties to the present motion and who, in so far as their position is shown, claim a title adverse to that of the bankrupt estate. The trustee in bankruptcy can certainly not now reduce this life interest to possession. An action to construe the will might give a judicial determination of the exact meaning of the devise. The trustee might attempt to sell his alleged claim to the remainder rights of the bankrupt in the estate, subject to the judgment lien above referred to and subject to the chance of survivorship if the creditors require him to do so. But inasmuch as there has been an adjudication and as the alienable rights of the bankrupt, if any, have passed to the trustee by devolution of law, no conveyance from the bankrupt is needed. The question is rather to determine what the trustee can do with the rights which he has, if any. On the other hand, there is nothing in the motion papers to indicate that the trustee can obtain a sufficient amount for the bankrupt's rights in the estate in remainder to justify a direction that the trustee attempt to sell these rights and pay off the undisputed lien of the judgment creditor. The judgment creditor is anxious to proceed to enforce his lien, admitting that his claim against the bankrupt estate or the bankrupt will be terminated by a discharge, and that if he does not appear in the bankruptcy proceedings, he can never obtain more than what is secured by the lien which he now contends exists.

The trustee in bankruptcy may apply for leave to join in any such action, if it seems advisable. He should submit to creditors, if necessary, the question of assisting the judgment creditor to enforce his lien and to follow up any equity or surplus which may result if the lien be paid, or the creditors may pay off the lien and defer the sale. There is no reason why this court should restrain the judgment creditor from attempting to collect his judgment, if he wishes so to do. If the re-

mainder interest is not such that in the state courts the judgment creditor can enforce his lien thereupon, then surely the bankruptcy court should not enjoin the judgment creditor from making the attempt, at his own peril, nor from foregoing whatever rights he may have in bankruptcy for the opportunity to pursue what, in his opinion, is a more profitable right. If the judgment creditor can enforce his lien, then the trustee in bankruptcy can protect the creditors' interest in the equity or can arrange with the creditors to pay off the lien of the judgment and dispose of the property for the estate. But under no theory can the bankruptcy court protect (for the bankrupt, and against his creditors and estate) property which the bankrupt has not surrendered and does not admit is a part of his estate, which property, if a part of the estate, should be available for creditors, but which must be disposed of by litigation, which cannot be as advantageously conducted by the estate as by the judgment creditor himself.

The motion to vacate the stay will be granted on such conditions as will allow the trustee an opportunity to join in the proceedings taken by the judgment creditor or to protect any equity which may be created.

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In re TAYLOR.

(District Court, N. D. Alabama, E. D. May 8, 1911. On Application for Rehearing, May 18, 1911.)

No. 196.

**1. BANKRUPTCY (§ 415\*)—COURTS OF BANKRUPTCY—APPLICATION FOR DISCHARGE—REFEREE—JURISDICTION.**

Under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) providing that an application for a bankrupt's discharge shall be filed in the court of bankruptcy in which the proceedings are pending, and section 1, subd. 7, defining courts of bankruptcy as the courts in which the proceedings are pending and may include the referee, a referee has no jurisdiction to hear applications for discharge except on reference to him as special master as provided by section 38, subd. 4, and general order 12, subd. 3 (89 Fed. vii, 32 C. C. A. xvi).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698-728; Dec. Dig. § 415.\*]

**2. BANKRUPTCY (§ 415\*)—APPLICATION FOR DISCHARGE—NATURE OF PROCEEDINGS.**

An application for a bankrupt's discharge is in the nature of a separate proceeding from the original cause, so that the reference of the original cause confers no jurisdiction on the referee over the application for discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698-728; Dec. Dig. § 415.\*]

**3. BANKRUPTCY (§ 411\*)—APPLICATION FOR DISCHARGE—FILING.**

Under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427) providing that an application for a bankrupt's discharge shall be filed in a court of bankruptcy, such application must be filed with the clerk of court and not with the referee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 692-708; Dec. Dig. § 411.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## On Application for Rehearing.

## 4. BANKRUPTCY (§ 411\*)—APPLICATION FOR DISCHARGE—FILING—TIME.

Where an application for a bankrupt's discharge, though erroneously filed with the referee instead of the clerk, was, with the other proceedings thereon before the referee, filed with the clerk within a year after adjudication, and no objection had been taken by the objecting creditor to the improper original filing with the referee, the petition would be regarded as properly filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 692-708; Dec. Dig. § 411.\*]

## 5. BANKRUPTCY (§ 411\*)—APPLICATION FOR DISCHARGE—VERIFICATION—"PLEADING."

An application for a bankrupt's discharge should be considered a pleading within Bankr. Act July 1, 1898, c. 541, § 18c, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), providing that all pleadings setting up matters of fact shall be verified under oath.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 692-708; Dec. Dig. § 411.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5409-5411; vol. 8, p. 7756.]

## 6. BANKRUPTCY (§ 411\*)—APPLICATION FOR DISCHARGE—VERIFICATION.

Where no objection to want of verification of a petition for a bankrupt's discharge was made until after the evidence on the application was heard before the referee, it was too late.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 692-708; Dec. Dig. § 411.\*]

## 7. BANKRUPTCY (§ 407\*)—DISCHARGE—OBJECTIONS—PURPOSE OF PROCEEDINGS.

That a bankruptcy petition was filed to defeat the claims of a judgment of an objecting creditor against the bankrupt was no ground for denying a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-761; Dec. Dig. § 407.\*]

## 8. BANKRUPTCY (§ 414\*)—DISCHARGE—OBJECTIONS—CONCEALED ASSETS—EVIDENCE.

Evidence held insufficient to warrant a denial of a bankrupt's discharge on the ground that he had concealed an interest in property, and on his examination had falsely testified that he had no property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.\*]

## 9. BANKRUPTCY (§ 414\*)—DISCHARGE—CONCEALMENT OF ASSETS—FALSE OATH.

Objection to a bankrupt's discharge because of fraudulent concealment of assets or false oath must be established by clear and convincing proof, and is not the subject of mere suspicion of inference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of H. M. Taylor. On application for discharge. Granted on rehearing.

Knox, Acker, Dixon & Sims, for objecting creditor.

Whitson & Harrison, for bankrupt.

GRUBB, District Judge. This matter comes on for hearing upon the application of the bankrupt for his discharge. The bankrupt was adjudicated on November 10, 1906. The case was closed by the referee June 7, 1907. On December 28, 1906, an application was filed by the bankrupt with the referee, to whom the case was referred, for

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his discharge. On this application notice was given and proceedings were had before the referee pursuant to District Court Rule No. 7. The application for discharge was never filed with the clerk, nor was it called to the attention of the judge until early in the year 1911. The question presented on the threshold is as to whether the application was made within the 12 months during which, alone, the court has jurisdiction to entertain and act upon the application.

[1] Section 14 of the Act of 1898 provides that the application for a discharge shall be filed "in the court of bankruptcy in which the proceedings are pending." Courts of bankruptcy are defined by the act (section 1, subd. 7) as the courts in which the proceedings are pending and "may include the referee." "Clerk" is defined as "the clerk of a court of bankruptcy." Section 1, subd. 5. The referee has no jurisdiction to hear applications for discharge except upon reference to him, as special master, Section 38, subd. 4, and General Order 12, subd. 3 (89 Fed. vii, 32 C. C. A. xvi).

[2] Applications for discharge are in the nature of a separate proceeding from the original cause which is closed upon the final distribution of the assets of the estate. Over them the reference to the referee of the original cause confers no jurisdiction, since the act itself excepts from the jurisdiction of the referee the matter of hearing and granting discharges. The cases in which the court "may include the referee" are not inclusive of the matter of discharges.

[3] The act requiring the application to be filed in the court, and the court so far as discharges are concerned being exclusive of the referee, a filing with the referee is not a filing with the court, and does not confer on it jurisdiction. The application should be filed with the clerk in order to be filed with the court. Appearance of the objecting creditor before the referee, in reference to an application with him filed, might be a waiver of the improper filing, but consent cannot confer jurisdiction, after the expiration of the 12 months, without action on the part of the court, for after that period the court loses jurisdiction of the subject-matter of the discharge. Collier on Bankruptcy, p. 260 (8th Ed.), says:

"All petitions (for discharge) should be filed with the clerk and not with the judge or referee"—citing *In re Sykes* (D. C.) 6 Am. Bankr. Rep. 264, 106 Fed. 669.

In the case of *In re Pincus* (D. C.) 17 Am. Bankr. Rep. 331, 147 Fed. 621, the court said:

"These bankrupts filed with the referee in charge, and about five months after adjudication, the petition under review. No action by the court was taken thereon, until more than a year after adjudication, and the objecting creditors now contend that the filing with the referee was insufficient to confer jurisdiction and the petition should be dismissed as not having been preferred within the statutory year. It is true that the referee as 'referee' has no power to consider the petition. But within this district and by force of District Court Rule 11 in bankruptcy the office of the referee is the office of the court."

In this district no such rule is in force. The clerk's office is the office of the bankrupt court in this district. Rule 3 of this district limits the jurisdiction of the referee over referred cases, as does the

act, excepting from it "granting discharges, as to which the jurisdiction of the judge is exclusive." Rule 7 provides that upon the filing of a petition for discharge the referee shall perform certain preliminary acts looking to the preparation of the application for hearing before the judge, and operates to dispense with a special reference in each case so far as authority to perform such preliminaries is conferred on the referee by the rule. It does not authorize the filing of the petition for discharge with the referee, but makes his jurisdiction to do the acts specified conditional upon a proper filing, viz., a filing in the bankruptcy court, i. e., with the clerk. The application, not having been filed with the clerk or called to the attention of the judge, until more than four years from the date of adjudication, came too late.

The application should be denied for the additional reason that it is a pleading, required by General Order xxxi to "state concisely in accordance with the provisions of the act and the orders of the court the proceedings in the case and the acts of the bankrupt," and therefore is a pleading setting up matters of fact, which section 18, subd. "c" requires to be verified. The case of *In re Brown*, 7 Am. Bankr. Rep. 252, 112 Fed. 49, 50 C. C. A. 118, decided by the Circuit Court of Appeals for this circuit, is in point. It is important that the bankrupt should be required to state under oath that he has surrendered all his property to his trustee and has complied with fully the act (Form 57 [89 Fed. lvii, 32 C. C. A. lxxxii]) as a condition to obtaining his discharge, especially as his discharge follows as a matter of course and without the offer of proof of these facts by him, unless objecting creditors enter appearances and file specifications of objections.

The application for discharge is for these reasons denied at the cost of the bankrupt.

#### On Application for Rehearing.

[4] Upon application for rehearing, the court's attention has been called to the fact that the application for discharge, together with all proceedings thereon before the referee, was filed with the clerk of the court on June 11, 1907, and within a year of the adjudication. No objection to the original filing with the referee was interposed by the objecting creditor. On the contrary, he joined in the proceedings before the referee and first made the point on this hearing. As the filing with the clerk within the 12 months was in time to preserve the court's jurisdiction of the application, the acquiescence of the objecting creditor in the proceedings under the petition filed with the referee was a waiver of any irregularity in the filing.

[5] The only requirement of verification is section 18c, which requires that "all pleadings setting up matters of fact shall be verified under oath." If the application for discharge is a pleading setting up matters of fact it should be verified, otherwise not. It seems to be settled by authority that specifications of objection to discharge are pleadings setting up matters of fact and are required to be verified. *In re Brown*, 112 Fed. 49, 50 C. C. A. 118; *In re Glass* (D. C.) 119 Fed. 509; *Collier* (8th Ed.) p. 622. It is said that the application is not



a pleading but a mere motion because the bankrupt is called upon to answer the objecting creditor's specifications of objection, and this is his first pleading of fact. The law is in a state of uncertainty in this respect. Collier intimates that a verification is necessary; Loveland that none is required; and Remington that it is a matter of doubt. Collier (8th Ed.) p. 260; Loveland (3d Ed.) § 273, p. 788; Remington, § 2430, p. 1468. The case of *In re Glass*, supra, contains an obiter that the application should be verified. The absence of a form of verification in the official form is without significance, as is stated by Remington, since the official form for specifications of objection has no form for verification, and yet it seems well settled that it is a pleading of fact which must be verified. Inasmuch as the official form of application for discharge contains the averment that the bankrupt has duly surrendered all his property and rights of property, and has fully complied with all the requirements of the act and the orders of the court touching his bankruptcy, and inasmuch as this averment, without further proof, in the absence of objections filed, entitles the bankrupt to his discharge, it seems to me it should be considered a pleading of fact requiring verification.

[6] Objection to want of verification was not made until after the evidence on the application was heard before the referee, and comes too late for that reason. Failure to make a timely objection on that ground amounts to a waiver. *In re Samuel Baernkopf* (D. C.) 9 Am. Bankr. Rep. 133, 117 Fed. 975; *In re Robinson* (D. C.) 10 Am. Bankr. Rep. 477, 123 Fed. 844; *Godshalk Co. v. Sterling*, 12 Am. Bankr. Rep. 302, 129 Fed. 580, 64 C. C. A. 184.

In view of the fact that the application for discharge was filed in the office of the clerk before the expiration of 12 months from the date of the adjudication, the question as to whether it may be properly filed with the referee is not material. The safer practice would be to file it with the clerk, whose duty it would be to transmit it to the referee for him to proceed under District Court Rule No. 7. Both parties having impliedly consented to the course pursued in this case, by appearing before the referee and hearing the matter without objection either to the filing or the want of verification, the filing with the clerk thereafter and within the year, together with the acquiescence of the objecting creditor in proceeding under such an application, cures whatever infirmities may exist in it.

[7] Coming to the consideration of the application upon the merits, it seems clear that the petition in bankruptcy was filed to defeat the collection of the judgment of the objecting creditor against the bankrupt, which, in view of the reduction to judgment must be held to be a just claim against him. Conceding this to be true, it affords no ground for denying to the bankrupt his discharge.

[8] The other grounds of objection are that the bankrupt concealed an interest in property, and on his examination falsely testified that he had no property. The interest alluded to was an interest in certain mules and horses, purchased by the bankrupt in Atlanta, and his interest in or claim against the firm of Lane & Taylor, based on services rendered by him. The evidence, without conflict, shows that

Taylor's mother, early in January of the year 1906, sold property for which she received \$7,500 in money, and immediately thereafter gave the bankrupt power of attorney to manage her business, and that the bankrupt had no means of his own. In February, the evidence tends to show that a partnership between Lane and Taylor's mother was formed upon terms not satisfactorily shown by the evidence but which, in a general way, provided that the partners were each to contribute money and services and to share the profits proportionately. The bankrupt was to represent his mother in the firm, under power of attorney, and his services were to stand in lieu of hers. His services were to be paid for by his mother to him and not by the firm to him. The understanding between his mother and himself as to how, when, and in what amount he was to be compensated for such services was so vague as to justify the conclusion that the purpose of the arrangement was to put the bankrupt's earnings beyond reach of his creditors. The evidence, in the record, does not, however, satisfactorily show either (1) that the bankrupt ever put any money in the business and owned any interest in it or its assets, or (2) that the firm or Mrs. Taylor herself owed the bankrupt at the time of the filing of the petition any wages. To establish the charge of concealing assets or of false denials of owning assets, the objecting creditor was bound to offer evidence of at least one of these propositions. The conduct and declarations of the bankrupt while handling the firm's business were not so inconsistent with his alleged representative capacity as to supply the place of such evidence, nor are the facts attendant upon the purchase of the mules and horses in Atlanta by the bankrupt so inconsistent with the contention that they were purchased by him for the partnership as to justify a denial of the discharge on that ground.

[9] The denial of the discharge because of fraudulent concealment of assets or of a false oath by the bankrupt must be made out by clear and convincing proof, and is not the subject of mere suspicion or inference.

The order denying the discharge is revoked, and an order granting it will be entered.

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#### UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 24, 1911.)

No. 17.

#### COMMERCE (§ 33\*)—INTERSTATE COMMERCE—CONTINUOUS SHIPMENT—VIOLATION OF ELKINS ACT.

The Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1909, p. 1138]), concerning interstate commerce, does not apply to a cargo shipped from Hamburg, Germany, destined, as stated in the bill of lading, to Philadelphia, for transportation in bond to Alberta, Canada, and taken to its destination by continuous and uninterrupted transportation at the hands of successive carriers; there being no delivery or

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

change of title, but the different carriers merely assisting in a continuous transportation from one foreign country to another.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.\*]

The Philadelphia & Reading Railway Company was indicted for violation of the Elkins act. Stipulation concerning facts submitted to the court, and verdict directed for defendant.

John C. Swartley, Asst. U. S. Dist. Atty., and J. Whitaker Thompson, U. S. Dist. Atty.

James F. Campbell and John G. Lamb, for defendant.

J. B. McPHERSON, District Judge (charging jury). The parties to this criminal proceeding have entered into a stipulation concerning the facts, and are agreed that a controlling question of law is presented thereby. They submit it for the court to decide, but I may say a few words to you in explanation of the decision. I shall not read the stipulation, as it is long, and the details might be difficult to follow; but the legal question may be stated thus: Does the Elkins act concerning interstate commerce apply to the continuous transportation of goods from a foreign country to a foreign country, if such goods are merely carried in bond across two or more states of the Union? In the case now on trial a cargo of sugar was shipped from Hamburg, Germany, destined, as the bill of lading states, "to Philadelphia for transportation in bond to Raymond, Alberta," Canada, and it was taken to its destination by continuous and uninterrupted transportation at the hands of successive carriers. A steamship company carried it across the Atlantic Ocean to Philadelphia. Here, it was loaded in bond upon railway cars and was transported over the connecting lines of successive carriers until it reached Alberta, the point of ultimate destination. The Philadelphia & Reading Railway Company carried it over part of the route at a less rate than would have been lawful if the shipment had originated at Philadelphia, and it is the charging of this rate that is alleged to be a criminal offense. In my opinion the offense has not been proved. This was an unbroken series of continuous acts of transportation, beginning at Hamburg and ending at Alberta, by which the sugar was merely moved across the United States in its transit between two foreign countries, and the Elkins act as I read it does not attempt to regulate such a transaction at all. Under the facts before the court, therefore, the defendant cannot be convicted of an offense under this indictment for taking part in the carriage. As I understand the stipulation, nothing in the facts agreed upon casts any doubt upon the entire good faith of the transaction—and especially there is nothing to justify the conclusion that when the sugar reached Philadelphia it had reached a point of destination in the proper sense of that word. Philadelphia was merely a way-station on the journey, where it became necessary to substitute inland carriage for carriage across the ocean, and the transportation was only halted long enough to enable the sugar to be loaded upon the cars and the requirements of the revenue laws to be complied with. As it seems to me, the truth and reality of this somewhat complicated

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

transaciton is not in doubt. All the parties from the beginning to the end intended to assist in a continuous transportation from one foreign country to another, and this intention was carried out in good faith and without interruption. As I have already said, the Elkins act does not regulate such shipments at all, and, as the indictment is preferred under that statute, a verdict in favor of the defendant must be rendered.

I may add a few words about a decision relied upon by the government. In my opinion, that case (*Gulf, etc., Railway Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540) rests upon a different state of facts. The corn there in question did not belong to the shipper, the Hardin Company, at all until it was delivered at Texarkana in the state of Texas. The previous owner of the corn had shipped it from South Dakota to Texarkana in order to deliver it there to the Hardin Company, and when the delivery was made the interstate shipment came to an end, and for the first time the Hardin Company became the owner of the corn. The corn was then in Texas, and the Hardin Company was not concerned with the previous transportation. Its right under the contract with the former owner was to have certain corn delivered to it at Texarkana, and it had no interest in the previous carriage. But, having received the corn in Texas, it thereupon assumed dominion over the property and proceeded to make a new contract concerning further shipment. The previous owner had only agreed to bring the corn to Texarkana, and, having fulfilled that obligation, stepped out of the transaction altogether. The new owner of the property—which was then upon the soil of Texas—the Hardin Company, and the railway company also, were each bound by the law of Texas thereafter, so far as further carriage inside the state was concerned. But here there are no such controlling facts. The sugar started in Germany, and was then and always thereafter destined, not for Philadelphia, but for Canada. The title never changed; the sugar was never delivered, but only passed along; indeed, the place of delivery was not within the United States at all, but in Canada; and whatever happened along the route was merely the carrying out by successive steps of the original contract made in Hamburg. The precise date when the Reading Railway Company came into the transaction does not seem to be vital. Whenever it came in, its purpose (like the purpose of all the other carriers) was to aid in carrying out a contract of through shipment from Germany to Canada, and in my opinion there was no violation of the Elkins act in so doing. So far as appears, such a transaction is not within the mischief which the act was intended to remedy, and it certainly does not seem to be within the language of the statute.

You will render a verdict for the defendant.

The indictment set out a departure from the legal rate of charge, a failure to observe the tariff filed with the commission, a giving and granting of a concession from the lawful rate, and a charging of less compensation than such rate. The stipulation was as follows:

"(1) That at all times mentioned in the said bill of indictment, as well before as afterwards, the Philadelphia & Reading Railway Company was and still is a common carrier by railroad from Philadelphia to Newberry Junction, in the state of Pennsylvania; the New York Central & Hudson

River Railroad Company was and still is a common carrier by railroad from Newberry Junction to Corning, in the state of New York; the Erie Railroad Company was and still is a common carrier by railroad from Corning to Buffalo, in the state of New York; the Mutual Transit Company was and still is a common carrier by water from Buffalo to Superior, in the state of Wisconsin, and in connection with the aforesaid common carriers by railroad was and still is a common carrier partly by railroad and partly by water under a common management, arrangement, or control from Philadelphia to Superior; the Great Northern Railway Company was and still is a common carrier by railroad from Superior to Sweet Grass, in the state of Montana; and the Alberta Railway & Irrigation Company was and still is a common carrier by railroad from Sweet Grass to Raymond, in the Province of Alberta, Canada, and the route of the said respective carriers formed a connecting continuous through route from Philadelphia to Raymond, Alberta.

"(2) That at all the times mentioned in said bill of indictment, the said Philadelphia & Reading Railway Company, the said New York Central Railroad Company, the said Erie Railroad Company and the said Mutual Transit Company, connecting carriers as aforesaid, had jointly established and published and filed, according to law, a joint tariff of rates, in connection with the official classification in force at such times, on freight, or property originating at Philadelphia and destined to Superior, Wis. The rate or charge in effect at said times on shipments of beet sugar between such points in accordance with such filed and published rates and classifications, being 26 cents per hundred pounds, in car load lots.

"(3) That at all the times mentioned in the said bill of indictment, the said Great Northern Railway Company and the said Alberta Railway & Irrigation Company had established, and published and filed according to law, a joint tariff or rates in connection with the official classification in force at such times, on shipments from Superior, Wis., to Raymond, Alberta. The rate or charge in effect at said times on shipments of beet sugar between such points in accordance with such filed and published rates and classification being \$1.06 for each 100 pounds in car load lots.

"(4) That upon the 5th day of September, A. D. 1908, the Waaren-Commissions-Bank at Hamburg, Germany, did enter into a contract, commonly called a 'through bill of lading,' with the Oceanic Transit Company, for the transportation and shipment of 1,113,860 pounds of beet sugar, from the city of Hamburg, Germany, on the steamship 'Albano,' bound to the port of Philadelphia, and thence in care of the Great Northern Railway Company of America, 'per railroad or other conveyance,' to the town of Raymond, in the province of Alberta, in the Dominion of Canada, there to be delivered to the order of the Bank of Montreal, at a through rate or charge from the said city of Hamburg, Germany, to the said town of Raymond, Alberta, of 65 cents for each 100 pounds thereof.

"That upon said 5th day of September, 1908, the said Oceanic Transit Company, through its agent in Hamburg, John Heckemann, received for shipment and did ship upon the said steamship 'Albano' the said quantity of beet sugar, to be delivered at said port of Philadelphia by said steamship unto the order of one W. R. Huntington, of the city of New York, the agent of Wells-Fargo & Co., who were the agents of the said Oceanic Transit Company for immediate transportation, in bond to the said town of Raymond, Canada.

"(5) That on September 8, 1908, the said Oceanic Transit Company, at its chief office, situated at London, England, did issue a through waybill for the shipment and transportation of the said quantity of beet sugar, in which it is recited, inter alia, that said shipment of sugar was to be transported from Hamburg, Germany, to Philadelphia by the said steamship 'Albano,' and from Philadelphia to Raymond, Canada, by railroad and water route over the lines of transportation of the said Philadelphia & Reading Railway Company, Erie Railroad Company, Mutual Transit Company, and Great Northern Railway Company, the route from Philadelphia to Raymond, Alberta, being the same route as set out in paragraph 1, and delivered to the order of Bank of Montreal, at said town of Raymond, Canada, at the through rate or charge of 65 cents for each 100 pounds thereof in car load lots.

"That upon September 11, 1908, the said Philadelphia & Reading Railway

Company did at Philadelphia, in the said Eastern district of Pennsylvania (at least 17 days before the arrival of said steamship 'Albano') then and there, in accordance with the aforesaid through bill of lading and waybill, issued by the said Oceanic Transit Company, agree with the said W. R. Huntington, agent of Wells-Fargo & Co., the aforesaid agent of the Oceanic Transit Company, for the shipment and transportation of the said quantity of beet sugar over the aforesaid continuous line or route of railroad and water line from Philadelphia to Raymond, Canada, as set out in paragraph 1 hereof, at a rate or charge of 55 cents for each 100 pounds thereof in car load lots; the remaining portion of the through rate of 65 cents being paid to the steamship 'Albano' as its proportion of the through rate for carriage from Hamburg to Philadelphia.

"(6) That upon September 22, 1908, William O. Hempstead, trading as O. G. Hempstead & Son, custom house brokers in the city of Philadelphia, acting for the said W. R. Huntington of Wells-Fargo & Co., the aforesaid agents of the Oceanic Transit Company, made entry of said shipment of beet sugar in the United States Custom House at the said port of Philadelphia, for immediate transportation and exportation in bond, from Philadelphia to Raymond, Canada, and he, the said William O. Hempstead, trading as O. G. Hempstead & Son, custom house brokers, did then and there enter into a bond in accordance with law, and the regulations of the Treasury Department in such cases made and provided, for the immediate transportation and exportation of the said quantity of beet sugar as aforesaid from Philadelphia to Raymond, Canada, in accordance with the through waybill and bill of lading issued by the said Oceanic Transit Company, as aforesaid.

"(7) That in accordance with the agreement with said W. R. Huntington, of Wells-Fargo & Co., aforesaid, agents of the Oceanic Transit Company, and the aforesaid through bill of lading and waybill issued by the said Oceanic Transit Company, the said Philadelphia & Reading Railway Company, did at Philadelphia, in the said Eastern district of Pennsylvania, on September 29, 1908, receive at the said port of Philadelphia, from the said steamship 'Albano' (which said steamship arrived at the port of Philadelphia on the 28th day of September, 1908), through the said William O. Hempstead, trading as O. G. Hempstead & Son, custom house brokers, the said quantity of beet sugar for shipment and transportation by the said common carriers as aforesaid over the continuous line or route as set forth in paragraph 1 from Philadelphia to Raymond, Canada, and did load the same on its freight cars and freight cars in its possession and under its control, and the same was thereupon transported by the common carriers aforesaid from Philadelphia to Raymond, Canada, by the said continuous line and steamship route as aforesaid from Philadelphia to Raymond, Canada, and through the Eastern district of Pennsylvania, at the rate or charge of 55 cents for each 100 pounds thereof, which was then and there the inland proportion of the through rate from Hamburg, Germany, aforesaid to the town of Raymond, Canada, aforesaid.

"(8) That the following papers may be offered in evidence at the trial without proof of execution:

"(a) Certified copy of Hamburg-American Line original bill of lading, dated Hamburg, September 5, 1908, recording the shipment by John Heckemann of the Oceanic Transit Company on the steamship 'Albano' of 4,996 bags of raw sugar, bound for the port of Philadelphia under the order of W. R. Huntington, New York, for transportation in bond to Raymond, Alberta, etc.

"(b) Certified copy of the original entry of the said cargo of sugar at the port of Philadelphia, dated September 22, 1908, by D. B. Hempstead, of O. G. Hempstead & Son, showing the date of importation September 23, 1908, and having a record thereon that the said cargo was laden under the supervision of Harry N. Mills, inspector, on board the Philadelphia & Reading Railway Company cars at Philadelphia, Pa.

"(c) Duplicate original records of carriers' manifest of merchandise in bond, starting with the Philadelphia & Reading Railway Company at the port of Philadelphia for transportation to the town of Raymond, in the province of Alberta, in the Dominion of Canada, by way of Buffalo, Duluth, and Sweet Grass, Mont., being 20 in number, and each bearing the entry No.

15,579, containing a record of the initials of the cars, as well as the numbers thereof, and containing also a record of the inspectors of customs at the ports of Philadelphia, Buffalo, Superior, and Sweet Grass, Mont.

"(d) Copies of original Philadelphia & Reading Railway joint through merchandise waybills showing car initials and numbers, and description of the said cargo of raw sugar, the shipper, consignee, and destination, and the rate of freight and pro rata division of the freight between the several railroads transporting the said cargo, as set forth in the said copies of the said original joint through waybills.

"(e) Shipping order O. G. Hempstead & Son to Philadelphia & Reading Railway Company, dated Port Richmond Station, September 29, 1908, consignee, order of W. R. Huntington, destination, Raymond, Alberta, Canada, giving a description of the articles, to wit, the 1,113,860 pounds of sugar, and the memorandum copy of the Philadelphia & Reading Company shipping receipt issued to O. G. Hempstead dated September 29, 1908, and signed by O. H. Hagerman, agent of the Philadelphia & Reading Railway Company.

"(f) Copy of letter dated Philadelphia, September 21, 1908, George Ziegler, controller, to O. H. Hagerman, shipping and freight agent.

"(g) Copy of letter R. L. Russell, assistant freight agent, to O. H. Hagerman, shipping and freight agent, Port Richmond, dated Philadelphia, September 21, 1908, in relation to the waybill of the said shipment of sugar at a through rate of 55 cents per 100 pounds.

"(h) Copy of statement of advance charges at Port Richmond, Philadelphia, due O. G. Hempstead & Son, dated September 29, 1908, form 75.

"(i) Copy of report of charges of freight between the Philadelphia & Reading Railway Company and O. G. Hempstead & Son, dated September 29, 1908, in relation to the transportation of the said sugar from Philadelphia to Raymond, Alberta, form 178.

"(j) Copy of letter O. H. Hagerman to George Ziegler, controller, dated October 1, 1908.

"(k) Voucher No. S. P. 1,190, Auditor's bill No. 7,650, dated October 9, 1908, Philadelphia & Reading Railway Company to O. G. Hempstead & Son, for advanced freight charges.

"(l) Copy of voucher Philadelphia & Reading Railway Company to O. G. Hempstead & Son, dated October 9, 1908, for \$1,113.93.

"(m) Letter George Ziegler, controller, to O. H. Hagerman, dated Philadelphia, November 2, 1908, in relation to credit for \$6,126.23, for account of bill of O. G. Hempstead.

"(n) Certified copy of certificate of inspection at frontier port, Sweet Grass, Mont., dated November 14, 1908, showing that the said 4,996 bags of raw sugar had been inspected out of the United States.

"(o) Through bill of lading issued by Oceanic Transit Company.

"(p) Through waybill issued by Oceanic Transit Company.

"(q) Custom house regulations of 1908.

"It is agreed that for the purposes of a motion in arrest of judgment, and all subsequent proceedings thereon, the facts set out and papers referred to in the foregoing agreement be considered as part of the record in the case with the same force and effect as though fully set out therein."

## DODGE v. TOWN OF NORTH HUDSON.

(Circuit Court, N. D. New York. June 26, 1911.)

### 1. EXECUTORS AND ADMINISTRATORS (§ 524\*)—FOREIGN ADMINISTRATOR—RIGHT TO SUE—ANCILLARY LETTERS.

A foreign administrator cannot sue in the courts of New York for the alleged wrongful killing of her intestate without obtaining ancillary letters of administration in New York.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2330; Dec. Dig. § 524.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EXECUTORS AND ADMINISTRATORS (§ 524\*)—ACTION—ANCILLARY LETTERS—NEW ACTION.

Where a demurrer was sustained to a foreign administrator's complaint in an action for wrongful death because of failure to allege the obtaining of ancillary letters of administration in the state where the suit was brought, the administrator on obtaining ancillary letters was not required to commence a new suit, but was entitled to set up such fact by amendment.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 524.\*]

3. HIGHWAYS (§ 203\*)—INJURIES FROM DEFECTS—ACTION—ANCILLARY ADMINISTRATION—NOTICE.

Code Civ. Proc. N. Y. § 1902, provides that the executor or administrator of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action for wrongful death, and section 1903 declares that the damages shall be exclusively for the benefit of decedent's husband, wife, or next of kin, and when collected shall be distributed by the plaintiff as if they were unbequeathed assets left after payment of all debts and expenses of administration. Highway Law (Laws N. Y. 1890, c. 563) § 16, provides that every town shall be liable for damages to persons sustained by defects in its highways, but that no action shall be maintained therefor unless a verified statement shall have been presented to the supervisor within six months after the cause of action accrued, etc. *Held*, that since the statute is silent as to the place of appointment of the executor or administrator authorized to sue for wrongful death, and, but for the rule requiring ancillary letters in order to authorize a suit by a foreign administrator in New York, an action for wrongful death might be maintained there by a foreign administrator, where plaintiff, after being appointed domiciliary administrator of her husband's estate, gave notice to defendant town of a claim for wrongful death of her husband because of alleged defects in its highways, the fact that she had not obtained ancillary letters at that time did not invalidate the notice or require her to give a new notice on obtaining ancillary letters.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 510-518; Dec. Dig. § 203.\*]

At Law. Action by Josephine M. Dodge, as administratrix of the estate of James E. Dodge, deceased, against the Town of North Hudson. On demurrer to complaint for want of facts. Overruled.

See, also, 177 Fed. 986.

Miller & Matterson, for plaintiff.

Salisbury & Rowe, for defendant.

RAY, District Judge. For the purposes of this case on this demurrer, the facts are as follows: On the 26th day of July, 1908, James E. Dodge, a resident and citizen of the state of Massachusetts, was rightfully traveling in his automobile upon one of the highways of the town of North Hudson, one of the towns of the county of Essex, N. Y. By reason of defects in its said highway and a bridge or its approaches forming a part of said highway existing because of the neglect of the commissioner of highways of said town, the plaintiff's intestate, James E. Dodge, with his vehicle, was thrown out of the beaten track and down an embankment, and Dodge was killed and his automobile substantially ruined. There were damages to both person and property sustained by reason of such defects existing by reason of such negligence in excess of the sum of \$2,000 exclusive of interest

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



and costs as to each cause of action. The cause of action in these regards is pleaded with all necessary particularity.

Shortly thereafter, Josephine M. Dodge, the widow of said deceased, was duly appointed administratrix of the estate, etc., of said James E. Dodge by the proper probate court of the state of Massachusetts, and on or about the 9th day of January, 1909, she, as such administratrix, caused a definite and particular verified statement of the facts, cause of action, to be served on and presented to the supervisor of said town of North Hudson, and after the lapse of 15 days commenced the above action in this court to recover such damages under the statute of the state of New York permitting a recovery in such cases.

[1] The defendant demurred to the complaint on the ground, with others, that, not having taken out ancillary letters of administration in the state of New York, she could not maintain the action in this jurisdiction, the United States Circuit Court for the Northern District of New York. This court sustained the demurrer on that ground—that an executor or administrator appointed by the probate court of one state cannot maintain an action upon a cause of action existing in favor of the estate she represents in the courts, state or federal, of another state without taking ancillary letters in the state where the action is brought. 177 Fed. 986. This court followed *J. B. & J. M. Cornell Co. v. Ward*, 168 Fed. 51, 52, 93 C. C. A. 473; *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260, 35 C. C. A. 282; *Hodges v. Kimball et al.*, 91 Fed. 845, 34 C. C. A. 103; and *Stewart v. Baltimore & Ohio Railway Co.*, 168 U. S. 445, 449, 18 Sup. Ct. 105, 106, 42 L. Ed. 537.

[2] Following the cases mentioned, this court also held that a new action was not necessary, and permitted an amendment to the complaint after ancillary letters should be obtained. The plaintiff then took out ancillary letters of administration in the state of New York and amended her complaint by alleging the grant thereof in the state of New York, but, we infer, did not serve a new or amended notice of claim as none is alleged. The defendant claims that such a cause of action accrues when the notice of claim is presented to the supervisor of the town, and that in this case no one could serve or present the claim except an administratrix of the estate of said James E. Dodge appointed by the probate or surrogate's court of one of the counties of the state of New York to whom and to whom alone the cause of action is given; that the complaint does not allege the presentation of any such claim to the supervisor of the defendant town or to any one, but, on the other hand, shows the presentation of a claim by the administratrix appointed by the Massachusetts court long before the issue of such ancillary letters, and that such notice of claim is void and wholly ineffectual. The defendant also claims that, as the cause of action could not accrue until the presentation of a claim by the ancillary administratrix to whom alone the right of action is given, and she could not present same before her appointment, and no suit could be commenced until 15 days after the presentation of a legal statement or claim by the proper person, no cause of action is stated and no cause of action has accrued.

[3] The statute in force at the time Dodge was killed provided (Highway Law, c. 568, § 16, Laws 1890) as follows:

"Every town shall be liable for all damages to person or property, sustained by reason of any defect in its highways or bridges, existing because of the neglect of any commissioner of highways of such town. No action shall be maintained against any town to recover such damages, unless a verified statement of the cause of action shall have been presented to the supervisor of the town, within six months after the cause of action accrued; and no such action shall be commenced until fifteen days after the service of such statement."

This statute required the presentation of the claim "within six months after the cause of action accrued." I think the cause of action "accrued" when Dodge was killed and his property was damaged. It cannot be that a party injured by such negligence may wait 10 or 20 years before filing the claim. I think the purpose of the statute was to give speedy information to the town of the accident, injury, and consequent damage and intention to make a claim against the town. My opinion is that the presentation of the claim relates to procedure and the mode and manner of enforcing the remedy and the time within which notice shall be given after the injury. The cause of action for damages for the death is perfect and accrues when death occurs; but the liability imposed by the first part of the section quoted cannot be enforced until the notice is given, and then suit cannot be brought until 15 days have elapsed so as to afford suitable time for investigation by the officers of the town. In case of death caused by such negligence, the right of action is conferred or the common-law obstacle to recovery is removed by sections 1902 and 1903 of the New York Code of Civil Procedure, which read as follows:

"Sec. 1902. Action for death by negligence. The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death.

"Sec. 1903. For whose benefit recovery had. The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

The recovery is for the benefit of the widow, children, etc.; but the action is prosecuted by the executor or administrator of the deceased. The statute is silent as to the place of appointment of such executor or administrator, and but for the rule that only ancillary administrators appointed in the state where the action is to be prosecuted, if such action is not prosecuted in the state of principal administration, are recognized, the right to prosecute the action would vest in the administrator appointed by the probate court of the decedent's domicile. The administrator as such has no interest in the recovery. It is not

necessary that the action in such cases be brought by the person named in the statute as the one who is to bring it, as the plaintiff is but a nominal plaintiff. *Stewart v. Baltimore & Ohio Railroad Co.*, 168 U. S. 445, 449, 18 Sup. Ct. 105, 106, 42 L. Ed. 537.

"This statute is a remedial one enacted for the purpose of compelling those who negligently cause the death of persons to compensate the surviving husband, widow, or next of kin of the person so killed, and, like all such statutes, should be so construed as to give instead of withholding the remedy intended to be provided. *Lamphear v. Buckingham*, 33 Conn. 237; *Haggerty v. Central R. Co.*, 31 N. J. Law, 349. The important portion of the section is that which gives a right of action, and not that part which provides who may enforce it; the latter is an incidental provision." *Lang v. Houston, etc., R. Co.*, 75 Hun, 151, 27 N. Y. Supp. 90, affirmed 144 N. Y. 717, 39 N. E. 858.

See, also *Hodges v. Kimball*, 91 Fed. 847, 34 C. C. A. 103.

Here the defendant had due and specific notice and information of the negligence, time, and place of injury and consequences, and of the claim made. It was presented by Josephine M. Dodge, the widow of the deceased and one of the persons for whose benefit recovery may be had. She was administratrix of the estate of the deceased and gave the notice as such. She could not sue in New York as such and prosecute the action until she took ancillary letters, but this was technical, and subsequently she did take such letters. I think it too technical to say that a new notice or claim was essential. I think a substantial compliance with the statute, one which fully answers its purpose, is sufficient. In the *Stewart Case*, *supra*, the statute giving the right of action, or, more properly speaking, removing the common-law obstacle to recovery, the action being to recover for the tort or negligence, required the action to be brought in the name of the state of Maryland; but it was brought in the District of Columbia in the name of the personal representative, and this was sustained by the Supreme Court. I might cite a multitude of cases bearing on the question, but think *Sheehy v. City of New York*, 160 N. Y. 139, 143, 54 N. E. 749, and *Missano v. Mayor*, 160 N. Y. 133, 54 N. E. 744, sufficient. The defendant had a full and a specific notice in writing from the actual administratrix of the estate of the deceased, later the ancillary administratrix, and a repetition of such notice would have been entirely unnecessary so far as serving the purpose of the statute was concerned.

The cases decided in the Circuit Court of Appeals, one in this circuit and the others cited and approved by it, hold that this action was not prematurely or even improperly brought; that ancillary letters subsequently issued to the same person who obtained principal administration entitles such person to continue and prosecute the action already brought by the domiciliary administrator in the foreign state. This is equivalent to holding that the cause of action had accrued when the action was commenced.

Demurrer overruled, with costs. Defendant may answer within 30 days on payment of such costs.

## HAZLETT v. POLLACK STOGIE CO. et al.

(Circuit Court, W. D. Pennsylvania. June 20, 1911.)

**1. TRADE-MARKS AND TRADE-NAMES (§ 85\*)—INFRINGEMENT—RIGHT TO SUE—DECEIT OF PUBLIC.**

Decedent during his lifetime had built up a large and profitable business in stogies, which were sold under his name and became known as "Pollack's Stogies"; the word "Pollack" alone becoming generally connected with cigars made by him. Among other distinctive marks used on his packages was a guaranty signed in script over his reproduced signature and the factory certificate which also stated that decedent was the manufacturer, and on the front of his factory, which constituted his principal trade-mark, was decedent's name as manufacturer. Two years after his death, complainant, who succeeded him, sent out a letter to the trade printed in script and purported to be signed by decedent, calling attention to the development of the business and soliciting continued favorable consideration; the business being continued by complainant as agent of decedent's wife and children. *Held*, that complainant's continuance of the use of decedent's trade-marks and dress of package, without anything to show that the goods were no longer made under the personal supervision of decedent, tended to mislead the public, and therefore precluded him from maintaining a bill for infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.\*]

**2. TRADE-MARKS AND TRADE-NAMES (§ 101\*)—COMPLAINT—DISMISSAL—COSTS.**

Where complainant's bill to restrain infringement of certain trade-marks was dismissed because complainant's use of the trade-marks was calculated to deceive the public, but the proof showed a flagrant and shameless case of pirating on defendants' part, no costs would be allowed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 115; Dec. Dig. § 101.\*]

In Equity. Bill by Howard Hazlett, as administrator of Augustus Pollack, deceased, against the Pollack Stogie Company and others to restrain alleged infringement of complainant's trade-marks and for unfair competition. Bill dismissed.

Brown & Stewart, for plaintiff.

Ivory, Kiskaddon & Moore (Frank F. Reed and Edward S. Rogers of counsel), for defendants.

BUFFINGTON, Circuit Judge. This is a bill in equity brought by Howard Hazlett, administrator of Augustus Pollack, deceased, against the Pollack Stogie Company and others. It is alleged respondents infringe complainant's trade-marks and charges them with unfair competition. The case is on final hearing.

[1] The proofs show that for some 35 years prior to his death, in 1906, Augustus Pollack, the decedent, had built up a large and profitable interstate trade in a species of cigars called "stogies." He used high-grade tobacco and placed on the packages containing his goods marks and labels that gave them a distinct and recognizable dress and appearance. Indeed, so extensively and favorably did his goods become known that the name "Pollack's Stogies," and indeed the word "Pollack" alone, came to be generally connected with the cigars made by him. Among other distinctive marks was his guaranty, signed in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

script over his reproduced signature, viz., "The best and largest natural leaf handmade long Havana seed filler cigar in the world at the price. Each cigar guaranteed perfect by." Then follows the script signature, "Augustus Pollack." The manufacturer's factory certificate on the package also stated that Augustus Pollack was the manufacturer in factory No. 88, First district, state of West Virginia, and on the front of his factory, which constituted his principal trademark, was the name of Augustus Pollack as manufacturer. The proofs in testimony, correspondence, etc., undoubtedly show that the personality of Pollack, his thorough knowledge of his business, his deep personal interest in it, and his integrity of purpose in a careful and scrupulous use of high-grade material were the important factors in creating and maintaining the trade good will of his product. So thoroughly were the name and personal guaranty of Pollack recognized that those who succeeded him in business and who bring this present suit, in 1908, two years after his death, sent out to the trade a letter, printed in script and purporting to be signed by Augustus Pollack, in which, after calling attention to the development of his business, Mr. Pollack is made to say that he "gratefully acknowledges his indebtedness to American encouragement, and requesting a continuance of approval and favorable consideration, avails himself of this occasion to tender his assurance of appreciation and high esteem. Yours truly. Augustus Pollack."

It will thus be seen that the personality of Pollack was a factor in the creation and the retention of the trade good will which his product enjoyed. The fact, however, is that after the death of Mr. Pollack, and up to the filing of this bill, these marks, labels, and statements as made by Mr. Pollack were used on the packages in precisely the same way they had been used by him in his lifetime and in spite of the fact that his business was being carried on by Howard Hazlett, as the agent of his wife and children, and not for the benefit of his estate or in pursuance of the usual duties of an administrator, as noted below.

The will of Augustus Pollack was inoperative because not properly executed. Letters of administration on his estate were granted Howard Hazlett, the complainant. By written agreement of Mr. Pollack's wife and children, approved and confirmed in a chancery proceeding in the circuit court of Ohio county, W. Va., brought by Howard Hazlett, administrator, against the estate, the widow and children agreed the administrator should carry out the will, with certain exceptions, as though such will were in force, and by such instrument they further empowered Mr. Hazlett to conduct the business of Mr. Pollack, not for the benefit of the estate, but for themselves by these provisions, *inter alia*:

"That the said complainant, as administrator aforesaid, is empowered to continue the business for a limited time under the testator's name. \* \* \* It is further adjudged, ordered, and decreed that the capital and property used in such business are not to be included in the semiannual divisions to be made by the said complainant as directed in said will, but the whole of such capital and property used in such business are to remain in the said business until the end of the last-mentioned period of 10 years and then be

distributed. \* \* \* It is further adjudged, ordered, and decreed that, under the twenty-fifth section of the said will, the said complainant, as administrator as aforesaid, is empowered to sell and dispose of the factories, good will, equipments, and materials and stock on hand, and that in doing so he is not to consider or be controlled in any way by the provisions in the said twenty-fifth section of the will relating to the integrity of the firm name and of the product and the recognition of organized labor and the wage scale."

The public by such unchanged marking of the goods was led to believe that the goods were being made and guaranteed by Mr. Pollack. It is true that sometime after this bill was filed an inconspicuous label was placed on packages stating the goods were made by Pollack's administrator; but even this statement continued still to be accompanied by prominent labels stating: "None genuine without my signature. Augustus Pollack." And that the goods are "manufactured of select air cured and fermented Pennsylvania tobaccos and packed in good shipping order by Augustus Pollack, Wheeling, W. Va."

In view of these facts, can the present bill be maintained by the complainant? Without imputing to complainant any bad faith or intent to deceive the public, we are of opinion that under the facts stated the law forbids the maintenance of his bill. One of the essentials of an enforceable trade-mark right is that the goods it represents shall in no way mislead the public. When a manufacturer has by his personal skill or character built up a reputation or good will for his goods which gives them a higher value than those of other makers, it is quite clear that he cannot transfer to others the right to affix his name to those goods when he has ceased to manufacture them, and his transferee mislead the public into the belief that the skill and character which gave the product distinctive merit still continue to do so. Under such circumstances, fairness to the public demands that he who succeeds to the manufacture of a product of earned personal repute must in some appropriate manner apprise the public of the changed condition. Thus in *Manhattan Co. v. Wood*, 108 U. S. 223, 2 Sup. Ct. 439 (27 L. Ed. 706), it is said:

"The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public, and the very fraud accomplished, to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance."

So, also, in *Leather Co. v. American Company*, *postea*, it is said:

"When the owner of the trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or

in the business connected with it, be himself guilty of any false or misleading representation; for, if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. \* \* \* Where a symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or, in other words, the right to the exclusive use of it cannot be maintained."

The facts of the present case bring it within these rulings. The right of Augustus Pollack has been transferred by operation of law to his wife and children, and they have empowered Hazlett as their representative to continue the business. But unfortunately it has been continued, not according to existing facts and conditions and with appropriate notice of the succession, but precisely as if the personal service and skill of Augustus Pollack were still directing it, and indeed his name and signature have been actively used as if he were still living. On the authority of these cases, and in view of the facts referred to, it is clear that this bill cannot be sustained.

[2] We deem it proper to expressly say that the absence of conditions to warrant sustaining the complainant's bill, and not the existence of any merit on the part of respondents' case, leads to our dismissal; for it should be added that the proofs of the case show such a flagrant and shameless case of pirating an established business that, in dismissing the bill, we follow the course pursued in the *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G., J. & S. 137, affirmed in 11 H. L. C. 521, where Lord Chancellor Westbury said:

"As I do not approve of the conduct of the defendants, I dismiss it without costs."

Let a decree be prepared accordingly.

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## HILL v. PULLMAN CO.

(Circuit Court, E. D. Pennsylvania. June 13, 1911.)

No. 1,274.

### 1. CARRIERS (§ 413\*)—SLEEPING CARS—THEFT FROM PASSENGER.

A passenger on a sleeping car may recover damages for money and personal effects stolen from him through the negligence of the sleeping car company in failing to keep such constant watch over passengers asleep as will protect them from robbery or unwarranted intrusion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1583–1588; Dec. Dig. § 413.\*]

Duties and liabilities of sleeping car companies, see notes to *Duval v. Pullman Palace Car Co.*, 10 C. C. A. 335; *Edmunson v. Pullman Palace Car Co.*, 34 C. C. A. 386; *Bacon v. Pullman Co.*, 89 C. C. A. 10.]

### 2. CARRIERS (§ 417\*)—SLEEPING CARS—THEFT FROM PASSENGER—EVIDENCE.

In an action against a sleeping car company for theft of a passenger's personal property while sleeping in a car, evidence held to sustain a finding that the company was negligent in failing to keep a sufficient watch to secure passengers against intrusion.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 417.\*]

3. CARRIERS (§ 411\*)—SLEEPING CAR PASSENGERS—ROBBERY—ASSAULT—PERSONAL INJURY.

Since violence is often a concomitant of sneak thieving or robbery of a sleeping victim, a sleeping car company bound to keep watch over its passengers to prevent robbery was bound to take notice of the fact that violence was liable to accompany the robbery of passengers while asleep, and hence the company was liable for personal injuries to a passenger caused by a robber inflicting a blow on him while he was asleep in order to effect the robbery, all of which was due to the sleeping car company's negligence in failing to keep a sufficient watch.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1579, 1581; Dec. Dig. § 411.\*]

4. EVIDENCE (§ 244\*)—DECLARATIONS OF SERVANT.

Where a sleeping car porter was the sole agent and representative of the sleeping car company and was in charge of the car in which plaintiff was riding at the time he was assaulted and robbed, the porter's declarations were admissible against the company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

At Law. Action by Chester L. Hill against the Pullman Company. Verdict for plaintiff. On motion for new trial and for judgment non obstante veredicto. Denied.

S. R. Zimmerman, Henry P. Brown, and W. U. Hensel, for plaintiff.

Faunce & Andrade, for defendant.

BUFFINGTON, Circuit Judge. In this case Chester L. Hill brought suit against the Pullman Company to recover damages for alleged negligence of the latter while he was occupying a berth on one of its sleeping cars. The jury rendered a verdict in his favor for \$180, being for money and personal effects stolen from him while asleep in the berth, and for \$1,200 damages for personal injuries inflicted on him by the robber who struck him while thus asleep and rendered him unconscious in order to effect the robbery. The defendant now moves for a new trial and for judgment non obstante veredicto.

In support of the motion for a new trial, five reasons are set forth, which we now dispose of seriatim. The first reason, "because the verdict was against the law"; the second, "because the verdict was against the evidence"; the third, "because the verdict was against the weight of the evidence"; and the fourth, "because the verdict was excessive"—we answer by saying that under the law as laid down by the court the jury were warranted in finding a verdict in favor of the plaintiff, that a verdict in favor of the plaintiff was justified by the weight of the evidence, and that the damages were not excessive. Furthermore, being of opinion, as stated hereafter in our refusal of the defendant's motion for judgment non obstante veredicto, that its third point was rightfully denied, we are of opinion that its fifth reason for a new trial, "because the learned judge erred in refusing the defendant's third point, which was as follows, 'Under all the evidence your verdict must be for the defendant,'" is without merit, its motion for a new trial is refused.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



It remains, therefore, to dispose of the motion for judgment non obstante veredicto. That motion is in effect a demurrer to the evidence, and, as the motion questions the verdict as a whole and in no way seeks to differentiate the part based on personal injuries from that based on loss of money and personal effects, it would seem that, if a recovery for the latter items was warranted, the defendant's motion for judgment non obstante veredicto should be denied.

[1] The question of whether a passenger on a sleeping car can recover damages for money and personal effects stolen from him through the negligence of the sleeping car company is too firmly established to be questioned. It suffices to refer to *Pullman v. Gardner*, 3 Penny. (Pa.) 81; *Carpenter v. Railroad*, 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep 644; *Blum v. Southern Co.*, Fed. Cas. No. 1,574; *Lewis v. Sleeping Car Co.*, 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135; *Campbell v. Pullman Co.* (C. C.) 42 Fed. 484; 2 Cooley on Torts, 1380; *Hutchinson on Carriers*, § 60, note 2. These citations in effect hold that a sleeping car company invites passengers to pay it for the opportunity of enjoying rest and sleep, and that its berths are so unprotected that a sleeping car company must keep such a constant watch over them as will protect the sleeper from robbery and unwarranted intrusion. Thus in *Campbell v. Pullman Co.*, supra, a verdict was sustained for a criminal assault by a porter on a female passenger, and in *Lewis v. Sleeping Car Co.*, supra, for negligence in a porter failing to keep watch, whereby thieves got access to a sleeping passenger's vest under his pillow and slit open with a knife an inside pocket in which he had sewed up his money. Indeed, in an early and leading case on the subject, *Pullman v. Gardner*, supra, decided in 1883, it was assigned for error that the trial court had charged:

"If he (the porter) went out of that aisle, even for a very few minutes, and during that time this robbery occurred, and the jury believe that if he had been in his place of observation it would not and could not have occurred without detection, the company is liable, because he failed to do his duty to that extent that it allowed this robbery to be done."

But the Supreme Court of Pennsylvania affirmed the judgment, saying:

"Unless a watchman be kept constantly in view of the center aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act."

In 1891 the Court of Appeals of New York, in *Carpenter v. Railroad Co.*, supra, following the *Gardner Case*, said:

"The negligence complained of is that none of the defendant's employes were continually on guard in the car in a position to observe the movements of all persons in the passageway between the sections. A corporation engaged in running sleeping coaches with sections separated from the aisle only by curtains is bound to have an employé charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. *Pullman Car Co. v. Gardner*, 3 Penny. [Pa.] 78. These cars are used by both sexes of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and, though such companies are not insurers, they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has

the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his persons from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services and the hazards to which unguarded and sleeping passengers are exposed, the rule of diligence above declared is not too onerous."

[2] Now the facts in the present case tended to show the defendant company's negligence. The car in question ran on a slow night train from Philadelphia to New York. The car behind it was the last one on the train, was an empty baggage car, and was not visited by the regular trainmen. These were all circumstances known to the representatives of the defendant and were proper to be considered by a jury in determining whether a due watch was maintained. And it was shown the porter was not keeping watch, but was otherwise engaged at a place in the forward end of the car from which he could not see the aisle. The jury was therefore justified in finding the defendant company was negligent in failing to keep a proper watch over the car, and that plaintiff's property was lost as a direct result of that negligence. We are satisfied the verdict, in so far as the personal property—which was such only as a traveler ordinarily carries—must be sustained.

[3] It remains to consider whether the company was liable for the injury to the plaintiff's person. On behalf of the Pullman Company, it is contended an assault is an injury of such an unusual and unexpected nature that a sleeping car company is not bound to provide against it. Touching the alleged unusual character of the injury, it will be observed the finding of the jury takes it out of that category, for it was charged as follows:

"Now, I may say to you, gentlemen, that the duty of the Pullman Company towards the sleeping occupants of its cars consists in taking due care on its part to prevent injuries which, in the ordinary experience of travelers, are liable to happen, and which, therefore, the company is bound to guard against. As we stated here in the argument on these law points, if a man should take a pistol and shoot another person in the car, we would at once see that the company is not bound to foresee the likelihood of any such thing as that, and they are not, therefore, bound to protect against it. I only instance that as indicating the things which a sleeping car company is not bound to anticipate, and, therefore, is not bound to guard against. It is only bound to exercise care against those things, which, in the ordinary course of travel, as things happen on trains situated such as this, might happen to a person who is sleeping on one of its cars. It will therefore be for you to determine, gentlemen, whether, under all the circumstances of this case, the proofs of the case, the character of the train, stopping at stations along the road, the rear car door being unsecured, and access to the sleeping persons being simply through curtains—no doors to protect them—whether the injury that happened to Mr. Hill was one which the company, exercising due care and due precautions and due observation of care on its part, had reason to and was bound to anticipate might happen, and which it was bound to protect him against. If you find that that was so, that this was a danger of that character, and that the Pullman Company, either through the failure to have a proper fastening on the door or through the inattention of the porter, if there was inattention, or from his lack of care in any respect in that way—if the Pullman Company was guilty of a lack of care in any of those respects, and the result of it was the injury to the plaintiff, then he is entitled to recover in this case. If this accident was one which was so unusual in its character that the Pullman Company had no reason to anticipate it, then the plaintiff would not be en-

titled to recover, because the Pullman Company would not be bound to protect against injuries of that character."

But, apart from such finding by the jury, we think the court could not, as a question of law, have instructed the jury that the car company was not answerable in damages for this assault. It will be observed that the duty of the car company was to maintain a vigilant watch in the car. If it had done so by its porter, or if it had even provided a lock on the rear door, the plaintiff could not have been stealthily robbed, for it will be observed this is a case of sneak thieving, and not of open, overpowering violence. The sleeping car company's negligence, therefore, made the robbery possible in failing to keep watch. Such being the fact, can it be said as a matter of law that personal violence is so unusual and foreign even to stealthy robbery as to be wholly disassociated therefrom? On the contrary, experience shows that violence is often a concomitant of that character of robbery; that it is an incident to it; that if necessary to overcome a victim to accomplish the theft, to prevent outcry and alarm, and to effect escape, violence is the usual accompaniment of theft. A thief who would make his way to the bedside of a sleeper to rob, and who did not have an instrument of violence at hand to silence the sleeper if necessary to perpetuate the crime, would be a tyro in his line. And so correlated and coupled in the eyes of the law are robbery and personal injury that, if one in attempting to rob should undesignedly kill his victim, he is held guilty of murder. "If one intends to do another felony and undesignedly kills a man, this also is murder." 4 Blackstone, 200. If the criminal law has thus coupled violence even to the point of murder with robbery, how can it be contended that this car company, which kept such a negligent watch that a robbery accompanied by violence was effected in its car without its knowledge, was not bound to foresee that violence might accompany such robbery? When the criminal side of the law couples murder as a consequence to robbery, should not the civil side at least refrain from saying, as a matter of law, that they are so remote that one who is bound to keep watch against robbery can shut his eyes to the possibility of violence accompanying that robbery?

We have not overlooked *Connell v. Railroad*, 93 Va. 44, 24 S. E. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786. There the question decided was based wholly on the pleadings, and we have been able to get no report of the case showing the facts and circumstances. In our case we have the facts, and they show that robbery was not only intended, but committed, and that the violence committed was a means to effect the theft, and the two were blended in the one act of robbery, which act was only possible through the negligence of the Pullman Company. When such is the case, and where, as here, the act is brought about by the negligence of a sleeping car company, the law should hold it to a due measure of responsibility. Its duty is plain. It is simply one of watchful oversight of a long, straight aisle. The safety of the sleeping passengers from dangers of fire, an attendant at hand to answer their summons, a person alert and prepared to render assistance in case of collision or sudden emergencies, are all matters which naturally call

for the presence of some company servant on the car, and, if to this we superadd the legal duty to watch the aisle and prevent either theft of property and the protection of women on the cars, we are not holding the sleeping car company to any higher standard of duty than common sense, reason, and security demand. We believe an enforcement of this judgment and holding the company to this measure of responsibility will tend to the comfort, safety, and peace of mind of the traveling public, which pays a sleeping car company for these things.

[4] It remains to notice another assignment, which is not, however, made grounds for a new trial, namely, that the declarations of the porter, who was in charge of the car, were not admissible. We fail to see why they were not. The porter was the sole agent and representative of the company and was in charge of the car. The declarations of conductors and porters in such cases seem to have been given without objection in several of the cases cited, notably in Pullman Co. v. Gardner and Lewis v. New York Sleeping Car Co. Obviously they are admissible on the ground that they were made by the agent of the company in charge of the car.

On the whole, therefore, we are of opinion the defendant's motion for judgment non obstante veredicto should be refused, and judgment entered for the plaintiff on the verdict. It is therefore so ordered.

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In re GEHRIS-HERBINE CO.

(District Court, E. D. Pennsylvania. July 1, 1911.)

No. 3,844.

1. BANKRUPTCY (§ 140\*)—CONDITIONAL SALE—VALIDITY—WHAT LAW GOVERNS.

Where a bankrupt in operating a knitting mill in Pennsylvania purchased certain knitting machines from claimant, a Rhode Island corporation, pursuant to a contract of conditional sale in the form of a lease reserving title in claimant until the machines were paid for, whether such contract, though made in Rhode Island, was valid as against the bankrupt's trustee, was to be determined by the law of Pennsylvania.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

2. BANKRUPTCY (§ 140\*)—PROPERTY VESTING IN TRUSTEE—CONDITIONAL SALE OR BAILMENT—CONSTRUCTION OF CONTRACT.

A bankrupt operated a knitting mill in Pennsylvania, and for this purpose purchased certain knitting machines from claimant, to be paid for one-third cash 30 days from date of shipment, and the balance in three notes payable three, six, and nine months from date at 6 per cent. Prior to the delivery of the machines, the bankrupt executed an agreement in the form of a lease, reciting that it had leased the machines from claimant and agreed to pay for the use and rental of the machines \$1,963.20, \$654.40 in cash, and the balance in subsequent installments. It also agreed to keep the machines insured for claimant's benefit, and not to remove or suffer them to be attached, mortgaged, or damaged, and, in case they were, the bankrupt should forfeit all rights to the machines and to the further use and possession thereof with the right to the claimant to enter the premises and remove the machines on default. Nothing was ever paid on the machines, and the bankrupt did not keep them insured. Hearing that the bankrupt was in failing circumstances, claim-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant procured a declaration from it that the machines should remain temporarily in storage on the bankrupt's premises as the seller's property. *Held*, that such arrangement constituted a conditional sale and not a bailment of the machines which under the Pennsylvania law was invalid as against execution creditors of the buyer and was therefore invalid as against the bankrupt's trustee under Bankruptcy Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840, giving to the trustee all rights, remedies, and powers of a judgment creditor holding an execution returned unsatisfied.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Gehris-Herbine Company. On certificate of referee for review of an order denying petition to reclaim property. Affirmed.

John H. Bridenbaugh, for trustee.

Isaac Hiester, for Jenckes Knitting Machine Co.

J. B. McPHERSON, District Judge. [1] The petition and adjudication in this case were filed and entered in September, 1910, and therefore the right of the trustee to the property now in question is governed by section 8 of the amending act of June 25, 1910 (chapter 412, 36 Stat. 840), which provides that:

"Trustees \* \* \* as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Decisions holding that a trustee has no other right than belongs to the bankrupt are no longer controlling. It seems also to be conceded by the claimant, the Jenckes Knitting Machine Company, that, although the contract may have been made in Rhode Island, the right of the trustee is to be tested by the law of Pennsylvania.

[2] Tested therefore by that law, what is the true character of the contract in question? Is it a bailment, or a conditional sale? If it is really and in good faith a bailment, it is valid not only between the parties but against creditors also; for a man does not lose the title to his property by hiring it to another, although he may have parted with the possession and the other may have acquired it. But, if he has really sold it and has also parted with the possession, he will find in numerous jurisdictions—in Pennsylvania, for example—that he cannot enforce against execution creditors a condition that he is to retain the title until the price is paid. These rules are too well known to need the support of citation. The facts of the present case, as set forth in the careful report of the learned referee, are in substance as follows:

The bankrupt manufactured hosiery in Reading, Pa., and the claimant manufactures knitting machines in Pawtucket, R. I. In March, 1910, the claimant's Pennsylvania agent visited Reading in the effort to sell machines. The best terms the bankrupt would offer were one-third cash in 30 days from shipment, and two-thirds in notes at three, six, and nine months, respectively. The agent and the bankrupt agreed upon these terms, but the bankrupt also agreed to sign the contract hereinafter set forth, of which a copy was then

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shown and read. Thereupon two orders were signed by the bankrupt; one being as follows:

Jenckes Knitting Machine Co., Pawtucket, R. I.

Reading, March 24, 1910.

Order No. 226.

For Gehris-Herbine Co.

City, Reading, Pa.....Street, Pearl & Kerper.

State, Penna.

Ship via Reading Ry.

No. Machines, 10.

(Then follows technical description of machines.)

Price, \$160.00 F. O. B. Pawtucket, R. I.

Terms,  $\frac{1}{3}$  Cash 30 days from date of shipment.

Balance in 3 notes, 3-6-9-month notes.

Date, from date of shipment at 6%.

Deliveries, as soon as possible on receipt of this order.

Remarks: Want these machines as soon as possible to go in the new mill and will pay \$30.00 additional for 3-C attachment if perfected, &c.

[Signed] The Gehris-Herbine Co.,

L. Howard Gehris, Sec. & Treas.

The claimant acknowledged receipt of these orders in the following letter:

Pawtucket, R. I., March 29, 1910.

Gehris-Herbine Co., 45 Reed St., Reading, Pa.—Gentlemen:

We beg to acknowledge receipt through our Mr. Morningstar of your order for machinery, and have entered same for ten 200 needle  $3\frac{1}{2}$  Invincible Machines, &c., at \$150.00 each, and ten 220 needle  $3\frac{1}{2}$  Invincible Machines, &c., at \$181.50 each, f. o. b. Pawtucket; terms, one-third cash 30 days from date of shipment, balance in three equal notes of three, six, and nine months from date of shipment, to bear interest at 6%.

These machines to be on our lease plan.

We thank you for the order and will do all we can to hurry the machines along to you.

Very truly yours,

Jenckes Knitting Mach. Co.

The machines were shipped in May and June, 1910, but were not put to use until the notes and two agreements or leases were signed. A sample note is as follows:

\$436.25

Reading, Pa., May 28, 1910.

For value received, without defalcation three months after date we promise to pay to the order of the Jenckes Knitting Machine Co., four hundred and thirty-six and  $\frac{25}{100}$  dollars.

The consideration of this and other notes is the rent of the following described Invincible Knitting Machines, 7519-7528, 7114-7115, which we have received and bired of the Jenckes Knitting Machine Co., who shall have the right in case of nonpayment at maturity of any of said notes, without process of law, to enter and retake, and may enter and retake immediate possession of the said property wherever it may be, and remove the same. Reference being made for details to the lease by the Jenckes Knitting Machine Co. to us of said machines.

Payable at R. I. Hospital Trust Co., Providence, R. I.

Due with int. at 6%.

The Gehris-Herbine Co., Inc.

Chas. W. Herbine, President.

L. Howard Gehris, Treasurer.

At the same time the following agreement was signed (the other being of similar tenor):

This is to certify that the Gehris-Herbine Co. of Reading, Pennsylvania, has this day hired and received of the Jenckes Knitting Machine Company,

a corporation duly incorporated under the laws of the state of Rhode Island, and located and doing business in the city of Pawtucket, county of Providence in said state, twelve Invincible Automatic Knitting Machines Nos. 7519-7528, 7114-7115 valued at nineteen hundred sixty-three &  $\frac{20}{100}$  dollars (\$1,963.20) delivered by said Jenckes Knitting Machine Company to said the Gehris-Herbine Co., f, o. b. at said Pawtucket; said machines to be used at their mill in Reading, county of Berks, state of Penna., and not to be removed therefrom without permission of said Jenckes Knitting Machine Company in writing first obtained, and hereby agree to pay said Jenckes Knitting Machine Company as follows: Six hundred fifty-four &  $\frac{40}{100}$  dollars (\$654.40) in cash on June 28th, 1910, and three notes, all dated May 28th, 1910, payable at R. I. Hospital Trust Co., Providence, R. I., with interest at 6%, as follows: two due 3 & 6 months for four hundred thirty-six &  $\frac{25}{100}$  dollars (\$436.25) each and one due 9 months for four hundred thirty-six &  $\frac{30}{100}$  dollars (\$436.30) for the use and rental of said machines until the sum so paid for use and rental as aforesaid shall equal said sum of nineteen hundred sixty-three and  $\frac{20}{100}$  dollars (\$1,963.20) and to keep said machines insured to the full amount of nineteen hundred sixty-three &  $\frac{20}{100}$  dollars (\$1,963.20) and to deliver the insurance policy to said Jenckes Knitting Machine Company, and to keep said machines in good repair during the continuance of this lease, and that if we fail to pay said rent as above stipulated, or if we remove said machines from one place to another without written permission of said Jenckes Knitting Machine Company first obtained or sell or suffer said machines to be attached, mortgaged, damaged or injured or fail to keep said machines insured to the full value of nineteen hundred sixty-three dollars &  $\frac{20}{100}$  (\$1,963.20), we hereby forfeit all right to said machines and to the further use and possession of the same, and to all moneys paid by us hereunder.

And further agree and consent that said Jenckes Knitting Machine Company, its agents and servants, may at any and all times enter upon any premises or into any building or room occupied by us or any tenant under us and view and examine said machines and to remove the same without notice or demand for any violation of this agreement, and without being deemed guilty of any trespass or wrong; and in case of such removal, said Jenckes Knitting Machine Company may sell and appropriate said machines as it may see fit, and in case it sells and appropriates such machines it may apply the proceeds, after the payment of all costs and expenses of recovery including the expense of shipping said machines back to said Jenckes Knitting Machine Company at said Pawtucket, and all costs of keeping and selling said machines to the payment of any moneys or rent due said Jenckes Knitting Machine Company under this lease, and in case such net proceeds are not sufficient to pay said Jenckes Knitting Machine Company all rents or money due hereunder, we remain liable for such balance or sums still remaining due, and hereby promise and agree to pay such balance to the said Jenckes Knitting Machine Company.

And it is expressly understood and agreed that the title to said machines shall be and remain in said Jenckes Knitting Machine Company, until the full sum aforesaid shall be paid; and that upon such payment in full, together with all the expenses, said Jenckes Knitting Machine Company will thereupon release all title and ownership in said machine to the Gehris-Herbine Co.

In witness whereof said parties lessor and lessee, have hereunto set their hands and seals at Reading this 17th day of June A. D. 1910.

Jenckes Knitting Machine Co., J. W. Baker, Secy., Lessor.

The Gehris-Herbine Co., Inc., L. Howard Gehris, Treasurer, Lessee.

Witness:

A. T. Burns.

R. J. Morningstar.

The notes were antedated, to correspond with the dates of shipment. The machines were then set up, and went into operation. Nothing was paid either of the first installment or on the notes, and the bankrupt did not keep the machines insured. Hearing that

the bankrupt was in failing circumstances, the claimant notified the bankrupt in August to stop using the machines, and this notice seems to have been complied with. The claimant's agent also demanded either money, the return of the machines, or the signing of some paper showing to whom the machines belonged, and obtained the following declaration:

Articles of agreement made and concluded this 22d day of August, 1910, between the Jenckes Knitting Machine Company of Rhode Island, hereinafter called the lessor, and the Gehris-Herbine Company of Reading, Pennsylvania, hereinafter called the lessee:

Whereas by lease dated June 17, 1910, the lessor leased to the lessee twelve (12) Invincible Automatic Knitting Machines Nos. 7519, 7520, 7521, 7522, 7523, 7524, 7525, 7526, 7527, 7528, 7114, 7115, and by lease dated June 29th, 1910, eight (8) Invincible Automatic Knitting Machines Nos. 7529, 7530, 7531, 7532, 7533, 7534, 7535, 7536, according to the terms and conditions contained in said leases, it being expressly understood and agreed therein that the title to said machines should be and remain in the lessor.

And whereas the lessee is in failing circumstances and may shortly become insolvent or bankrupt, or be obliged to make an assignment for the benefit of creditors, and the said twenty (20) knitting machines are now on the premises occupied by the lessee:

Now in consideration of the premises and of other mutually valuable considerations it is hereby agreed between the lessor and the lessee that the said twenty (20) machines shall remain temporarily in storage on the said premises as the property of the lessor, subject to the right of removal thereby at any time without notice, without payment of storage or any other charge whatever by the lessor; and it is expressly understood and agreed between the parties hereto that the lessor shall retain all its rights under said leases of June 17th, 1910, and June 29th, 1910, and shall waive no rights thereunder whatever on account of this agreement.

In witness whereof we have hereunto set our hands and seals this 22d day of August, 1910.

The Gehris-Herbine Co., Inc. [Seal.]

L. Howard Gehris, Treasurer [Seal.]

Signed, sealed and delivered in the presence of:

R. J. Morningstar, Witness.

This being the situation, a petition in bankruptcy was filed on September 2d, and adjudication followed three weeks later. A trustee was afterwards elected and took possession of the machines. In November the claimant filed the petition now before the court.

Upon these facts the referee decided the transaction to be a conditional sale, and refused the petition to reclaim. I agree with this conclusion. If the claimant had really hired its machines to the bankrupt, it would not have transferred its ownership; but it chose to sell, attempting to retain the title as security, and it makes no difference therefore (except as the language used may throw some light on the real intention of the parties) that in some of its terms the transaction may bear the *prima facie* aspect of a bailment. In truth, however, it was in my opinion a sale with a condition as to title annexed; and, if this construction be correct, the controversy is at an end, for the Pennsylvania law refuses to enforce such a condition against execution creditors. The numerous cases in this state are concerned mainly with the effort to decide what the parties really intended. As soon as this intention is discovered, one conclusion or the other inevitably follows.

The order of the referee is affirmed.



ODHNER v. NORTHERN PAC. RY. CO.

(Circuit Court, S. D. New York. November 11, 1910.)

REMOVAL OF CAUSES (§ 11\*)—FEDERAL COURTS—JURISDICTION—PARTIES.

Plaintiff, an alien residing in New York, sued defendant, a Wisconsin corporation, in the Supreme Court of New York on a cause of action which arose in Minnesota. *Held* that, since plaintiff could not have brought the action originally in the Circuit Court for the Southern District of New York, defendant was not entitled to remove the cause to such court over plaintiff's objection.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 11.\*]

At Law. Action by Victor Odhner against the Northern Pacific Railway Company. Motion to remand. Granted.

Robert H. Griffin, for plaintiff.

Stetson, Jennings & Russell, for defendant.

COXE, Circuit Judge. This action was brought in the Supreme Court of the state of New York, the venue being laid in the county of New York.

The defendant removed it to this court on the ground of diversity of citizenship. The plaintiff moves to remand. The plaintiff resides in New York, but is an alien and a subject of the King of Sweden. The defendant is a Wisconsin corporation.

The action is to recover damages alleged to have been sustained by the plaintiff at Minneapolis, Minnesota. We have, then, in the Southern District of New York, an action brought by an alien against a Wisconsin corporation upon a cause of action which arose in Minnesota.

The defendant concedes as follows:

"It follows, therefore, that while the alien plaintiff in the present suit could not originally have brought and maintained this suit in this court against the objection of the citizen defendant, nevertheless such right of the defendant to object was a personal privilege which might be waived by the defendant, and was in fact waived by removing the cause to this court."

But the plaintiff has waived none of his rights and has never consented to present his controversy to this court.

Has this court jurisdiction? In *ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, the Supreme Court in December, 1906 granted a writ of mandamus directing the Circuit Court to remand to the state court an action brought therein by a citizen of another state against a non-resident defendant who was a citizen of a state other than that of the plaintiff. The cause was elaborately argued and the Chief Justice delivered a carefully prepared opinion dealing with all the questions involved. He says, *inter alia*,

"And it is settled that no suit is removable under section 2 [Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 509)] unless it be one that plaintiff could have brought originally in the circuit court. \* \* \* In the present case neither of the parties was a citizen of the state of Missouri, in which state the suit was brought, and, therefore, it could not have been brought in the circuit court in the first instance. \* \* \* When, then,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Beardsley filed his petition for removal, he sought affirmative relief in another district than his own. But plaintiff, in resisting the application and moving to remand denied the jurisdiction of the circuit court. \* \* \* Our conclusion is that the case should have been remanded, and as the circuit court had no jurisdiction to proceed, that mandamus is the proper remedy."

In the Matter of Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, Mr. Justice Brewer adopts the syllabus of the Wisner Case as a concise statement of the conclusion of the court and says:

"It was held in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, that: 'Under sections 1, 2, 3 of the act of March 3, 1875, c. 137, 18 Stat. 470, 471, as amended by the act of March 1, 1887, c. 373, § 1, 24 Stat. 552, 553, corrected by the act of August 13, 1888, c. 866, § 1, 25 Stat. 433-435 [U. S. Comp. St. 1901, pp. 508-510] an action commenced in a state court, by a citizen of another state, against a nonresident defendant, who is a citizen of a state other than that of the plaintiff, cannot be removed by the defendant into the Circuit Court of the United States.' \* \* \* But in that case the plaintiff never consented to accept the jurisdiction of the United States court, while in this case it is contended that both parties did so consent, and that therefore the decision in that case is not controlling."

The court then holds that both parties did consent, the defendant by filing a petition for removal, and the plaintiff by filing an amended petition in the United States Circuit Court and giving time, by stipulation, to the defendant to answer.

I cannot avoid the conclusion that the Wisner decision disposes of the case at bar. The only important distinction upon the facts is that the plaintiff in the Wisner Case was a citizen and in this case he is an alien—a fact which certainly does not help the contention that this court has jurisdiction.

In the Matter of Tobin, 214 U. S. 508, 29 Sup. Ct. 702, 53 L. Ed. 1061, the Supreme Court, in May, 1909, denied a motion for leave to file a petition for a mandamus directing the circuit court to remand a cause to the state court, the plaintiff being an alien and the defendant a New Jersey corporation. The defendant removed the cause to the United States Circuit Court for the District of Minnesota and the plaintiff moved to remand to the state court, which was denied.

The writ was refused by the Supreme Court without a word of comment. What reason operated upon the mind of the court can only be conjectured. The facts, as in the Wisner Case, are similar to those in the case at bar. But we must assume that the court was thoroughly familiar with the facts in the Wisner Case and that had they intended to overrule it they would have given their reasons at length. It is inconceivable that upon such an important question they would have made so radical a decision without a word of explanation.

The decisions of the circuit courts are diametrically opposed to each other on this question. The view of the law which I am inclined to think is the correct one is clearly stated in *Mahopoulus v. Chicago R. R. Co.* (C. C.) 167 Fed. 165. It may be conceded that a question which has provoked so much discussion and upon which the courts are divided is not free from doubt. In such circumstances, however, the safer course is to leave the controversy in a tribunal regarding whose jurisdiction there can be no question. I cannot believe that it was the intention of Congress to require this court to take cognizance of

an action between an alien and a Wisconsin corporation. If the plaintiff were a citizen of New York the defendant might, at least theoretically, have some cause to apprehend that local influences might favor the citizen, but surely a domestic corporation has nothing to dread from an alien in this regard. In other words, the reasons which induced the removal act are wholly inapplicable to the case in hand. Again, there can be no doubt as to the jurisdiction of the state court, there is doubt as to the jurisdiction of the Circuit Court and to retain the cause here may lead to the unfortunate result illustrated by *Newcomb v. Burbank*, 181 Fed. 334, 104 C. C. A. 164, and cases cited.

The motion to remand is granted.

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JACKSON v. HOOPER.

(Circuit Court, S. D. New York. January 4, 1911.)

**REMOVAL OF CAUSES (§ 11\*)—JURISDICTION—FEDERAL COURTS—RESIDENCE.**

Plaintiff, a citizen of Massachusetts, sued defendant, a citizen of New York, in the New York Supreme Court, whereupon defendant removed the suit to the Circuit Court for the Southern District of New York. *Held* that, since neither plaintiff nor defendant had a residence in the United States, both being residents of England, the jurisdiction of the Circuit Court was doubtful, and hence the case would be remanded to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.\*]

In Equity. Bill by Walter Montgomery Jackson against Horace Everett Hooper. On motion to remand to state court. Granted.

Joseph H. Choate, Jr., for plaintiff.

Samuel Untermeyer (Abraham Benedict, on the brief), for defendant.

COXE, Circuit Judge. This action is based upon an alleged agreement between the parties. The relief demanded is—First, for specific performance. Second, for an injunction in the meantime. Third, that the defendant return certain sums of money which it is alleged he has received. Fourth, that if specific performance be not decreed the defendant pay to the plaintiff \$1,250,000 as damages.

The action was commenced October 3, 1910, in the Supreme Court of the state of New York by service of the summons upon the defendant within the state. The defendant appeared and the complaint was served upon his attorney November 9, 1910. An answer has not as yet been interposed.

The action was removed to this court by the defendant upon the ground that the amount in dispute exceeds the sum of \$2,000 and that the controversy is wholly between citizens of different states, the plaintiff being a citizen of Massachusetts and the defendant a citizen of New York. The plaintiff now moves to remand on the ground that this court has no jurisdiction of the action. It appears that at the time the action was commenced and long prior thereto, both parties were residents of England.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

We have, then, an action in the Circuit Court for the Southern District of New York between a citizen of Massachusetts and a citizen of New York, both of them residing in England and neither having a residence in the United States. The question is—has this court jurisdiction?

It must be conceded that the question of jurisdiction is, at least, doubtful. In such circumstances, the safer course for all parties concerned is to remand the cause to the state court, which unquestionably has jurisdiction. If a citizen of Massachusetts is willing to present his controversy to the courts of New York, a citizen of New York should not complain.

Under section 5 of the act of March 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 511), it is made the duty of the court to dismiss the cause at any time if it appears that it does not involve a controversy properly within its jurisdiction. The unfortunate results which follow the retention of a cause in a court where the jurisdiction is not clear are well illustrated by the case of *Newcomb v. Burbank*, 181 Fed. 334, 104 C. C. A. 164, decided by the Circuit Court of Appeals on June 14, 1910, and the case of *Rubber Tire Co. v. Ferguson*, 183 Fed. 756, decided December 12, 1910.

The case at bar is *sui generis* because, so far as I am informed, it presents for the first time a controversy where the parties are citizens but neither resides in the United States. The venue could not have been laid either in the district of the residence of the plaintiff or defendant for neither had such a residence. Being citizens of the United States, it may be that the parties could consent to jurisdiction in this court, but there is no pretense that the plaintiff has consented to the jurisdiction; on the contrary, he has protested against it. I think the case is ruled by *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and *Matter of Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904. This court has occasion to examine these cases in *Odhner v. Northern Pacific Co.*, 188 Fed. 507, decision filed November 11, 1910.

The motion to remand is granted.

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DANCIGER et al. v. STONE et al.

(Circuit Court, E. D. Oklahoma. January 18, 1910.)

No. 1,232.

1. INTOXICATING LIQUORS (§ 147\*)—SALE—PLACE OF COMMERCE.

Where complainants, liquor dealers in Missouri, received orders for liquor by mail from customers in Oklahoma and delivered the liquor to carriers in Missouri for transportation to the purchasers receiving a bill of lading which was thereupon forwarded to a bank or other collecting agent in the place where the customer resided, who collected the purchase price and then delivered the bill of lading to the purchaser, who obtained the liquor from the carrier, such transaction constituted a sale

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of liquor in Missouri, and the transportation thereof interstate commerce, and was not therefore a violation of the Oklahoma prohibitory law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. § 147.\*]

**2. INTOXICATING LIQUORS (§ 138\*)—TRANSPORTATION—COLLECTING AGENT FOR SELLER—STATUTES.**

Act March 4, 1909, c. 321, § 239, 35 Stat. 1136,<sup>1</sup> provides that any railroad company, express company, or other common carrier or any other person, who, in connection with the transportation of liquors from one state to another, shall collect the purchase price or any part thereof before, on, or after delivery, from the consignee or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, save only in the actual transportation and delivery thereof will be fined. *Held*, that the acts referred to were condemned only when connected with the interstate transportation of liquor, and that the act of a bank in collecting a draft attached to a bill of lading for liquor transported in interstate commerce from the purchaser was not in connection with the interstate transportation of the liquor, and it was therefore not within the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

In Equity. Bill by Dan Danciger and others against S. W. Stone and others. On demurrer to complainants' application for temporary application and temporary injunction. Demurrer overruled, and injunction granted.

See, also, 187 Fed. 853.

E. H. Busiek, for complainants.

Fred S. Caldwell, for respondents.

CAMPBELL, District Judge. At the hearing, respondent's demurrer and the complainant's application for temporary injunction were heard together. At the completion of the hearing, the court announced that, unless the demurrer should be sustained, the complainants were entitled to the temporary injunction prayed for, upon the showing made; it appearing that, since the decision of this court in a former case (187 Fed. 853) in which they were complainants, they have not solicited the purchase of liquors within this district, and are not now doing so. The demurrer was taken under advisement, and the parties given time within which to file briefs in support of their respective contentions, which they have now done.

The complainants allege in their bill that their principal method and custom of making shipments into other states, including the state of Oklahoma, is to receive mail orders for shipments from customers outside of the state of Missouri for sales and shipments of liquors to be made in Missouri, and directed to other states; that, after said orders are accepted by complainants, the liquors are delivered at Kansas City, Mo., to various railroad companies and other common carriers, transporting freight from said state of Missouri to such other states; that in all cases where goods are sold and delivered to the carrier in Kansas City, Mo., the said sales are made outside of the state of Oklahoma, and the goods are delivered to the carrier for the purpose of making

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

<sup>1</sup> U. S. Comp. St. Supp. 1909, p. 1464.

delivery to the consignee only. Complainants further allege: That after delivering said liquors to carriers for shipment, as aforesaid, in the state of Missouri, they receive from the carrier a bill of lading and forward said bill of lading to a bank, or some responsible person, at the home of the consignee, attached to which is a sight draft for the purchase price of the liquor. The customer pays the draft and receives the bill of lading, and presents the same to the railroad company and receives the shipment. That this method is what is known to the railroad, and to the public generally, as "shipper's order," "order notify," or "sight draft and bill of lading" method.

[1] Respondents contend that complainants are not entitled to the protection of the commerce clause of the Constitution, for the reason that their method of business, as stated in their bill, amounts to a sale of liquor within the state of Oklahoma, and is, therefore, a violation of the state prohibitory law. In the opinion of the court, this question is determined adverse to respondent's contention by the ruling of the Supreme Court of the United States in *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417.

[2] It is further and especially urged by respondents that complainants cannot invoke the aid of a court of equity because it appears from their bill that their business is carried on and conducted in direct violation of section 239 of an act of Congress approved March 4, 1909, c. 321, 35 Stat. 1136, which reads as follows:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars."

It is urged that under this statute any bank which collects one of complainant's drafts with bill of lading attached violates the foregoing statute, and that, as complainant confesses that it is procuring banks so to do, it is not in position to seek aid of this court of equity. Unless under this statute a bank in this state may be criminally prosecuted for collecting one of the complainant's drafts, there is no force in respondent's contention. Let us analyze the statute and see against whom it is directed. The law applies to "any railroad company, express company, or other common carrier, or any other person" whose acts shall bring him within its terms. The acts at which the statute is leveled are: First, the collection of the purchase price, or any part thereof before, on, or after delivery, from the consignee, or from any other person; and, second, in any manner acting as the agent of the buyer, or seller, of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transpor-

tation and delivery of the same. But such acts are only condemned by this section when they are committed in connection with the interstate transportation of such liquor. It is true the bank, when it collects the draft, collects the purchase price of the liquor; but can such collection be said to be in any way in connection with the interstate transportation of the same? The transportation is effected by the railroad company, or other common carrier, entirely independent of the bank. The transportation of the liquor and the collection of the draft are two separate and distinct acts, performed by separate and distinct individuals or corporations, and the fact that the carrier, under its contract, cannot deliver the shipment until the consignee first goes to the bank and pays the draft, to secure the bill of lading, and then presents it to the carrier, cannot be said to in any way connect the bank with the transportation. Its act cannot therefore be said to be in violation of the terms of the statute. To my mind, there is nothing obscure about this section of the statute. Its manifest purpose is to provide that common carriers, or any other persons, engaged in or connected with the interstate transportation of intoxicating liquors, shall confine themselves wholly to such carriage and transportation, and shall not act as agent of the buyer or seller of liquor, for the purposes of the collection of the purchase price, or for any other purpose, "saving only in the actual transportation and delivery of the same." This construction of the statute is clearly sustained by the report of the congressional committee, relative to this legislation while the same was pending in Congress, an extract of which is quoted in complainant's brief, and reads as follows:

"The principal cause of difficulty in restricting the liquor traffic in the states prohibiting such traffic, has been the misuse of the facilities furnished by railroad companies, express companies, and other common carriers in bringing in liquors from outside states to be paid for on delivery. To meet this evil, your committee report the substitute.

"By the proposed substitute, if it be enacted into law, Congress will, under its constitutional authority, bring its power to bear directly upon the common carriers, prohibiting them from acting as agents of the vendors of liquors in other states. Further, by requiring that all interstate shipments of liquors shall be plainly marked as to their contents, the substitute hereby submitted will enable the several states to trace and to control the disposition and use of such liquors under their own police powers."

It follows that the demurrer must be overruled, and the temporary injunction granted.

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JAMES et al. v. CITY INVESTING CO. et al.

(Circuit Court, S. D. New York. May 4, 1911.)

1. EQUITY (§ 148\*)—PLEADING—BILL—MULTIFARIOUSNESS.

A bill to set aside deeds by complainants on the grounds that they were obtained by fraud and are forgeries in whole or in part, and to set aside subsequent conveyances by the grantee as clouds on the title of complainant, is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. CANCELLATION OF INSTRUMENTS (§ 37\*)—PLEADING—DEMURRER—SPECIAL DEMURRER.**

On special demurrer to a bill to set aside conveyances on the ground that they were obtained by fraud and are forgeries in whole or in part, the complainant will be required to make the bill more definite and certain by showing whether the fraudulent representations or forgery is relied on, and, if forgery, whether forgery of the instrument as a whole, or of the signature, or of what particular part of the body of the instrument.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 37.\*]

In Equity. Bill by Cornelia A. James and another against the City Investing Company and others. Heard on amended bill and special demurrer thereto. Demurrer sustained, with leave to amend the bill.

Atwater & Cruikshank, for complainant.

Philip S. Dean, for defendants City Investing Co. and others.

Blandy, Mooney & Shipman, for defendant Morgenthau & Morgenthau Co.

COXE, Circuit Judge. [1] The amended bill is filed to have a deed made by complainants to one Charles H. Dow and an alleged ratification thereof made, respectively, September 1, 1903, and October 30, 1903, declared null and void. The bill also prays that subsequent conveyances to the defendants be declared invalid as clouds upon the complainants' title. The deeds in question cover the property at the corner of Fifty-Sixth street and Broadway known as the "Rockingham" property and purport to cover the two-thirds interest of the complainants therein. These deeds have been put on record and the property has been conveyed several times since and is now claimed by the defendants, who succeeded to the title conveyed to said Dow. The complainants contend that the conveyances by them to Dow were obtained by fraud and are forgeries in whole or in part. It is not pretended that the defendants, other than Dow, had any knowledge of the fraud and it was stated on the argument that Dow had disappeared. The bill is not multifarious.

[2] The principal object of the special demurrer is to have paragraphs viii, x and xiii of the bill made more definite and certain. As the testimony in equity actions in the federal courts is usually taken out of court with frequent adjournments for the convenience of parties, it is altogether probable that the defendants will be informed fully as to the precise nature of the complainants' contention long before they will be required to produce their testimony. No great hardship would follow, therefore, if the defendants were to join issue on the bill in its present form. However, they are entitled to definite information as to the nature of the complainants' cause of action in order that they may meet it by their answers and proofs. It is said that the complainants are advanced in age and it may well be that their memories are defective as to the conversations and transactions with Dow and the inducements held out by him which resulted in the execution of the deeds. But, on the other hand, they are not, for this

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



reason, relieved of the obligation to present a more definite statement of the cause or causes of action than appears by the bill in its present form. The allegations are inconsistent, indefinite and contradictory. If the complainants' names were forged to the deeds a precise averment to that effect should be made. If the signatures are genuine and the contents of the deeds was altered or the description of the "Rockingham" property subsequently added, these facts should be stated. If, on the other hand, the complainants were induced to sign the deeds by the false representations of Dow as to their contents or the purposes for which they were to be used, the bill should state this cause of action with clearness and precision.

It is manifest that there are alleged at least three separate grounds for avoiding the deeds, each proceeding upon a distinct theory. I think it is not too much to require the complainants to determine upon what theory they intend to attack the deeds. If upon the ground that these instruments are forgeries, in toto, a simple allegation to that effect will, probably, make further averments unnecessary. If it be contended that parts of the instruments are genuine and other parts forged, the bill should point out what is genuine and what is spurious. If the theory of forgery be abandoned and the complainants decide to proceed upon the theory that the deeds were obtained by fraud, they should allege what the fraudulent representations were which induced them to sign the deeds and what artifices, pretenses and devices were practised upon them by Dow to produce this result. The defendants should also be informed whether Dow fraudulently concealed from the complainants the fact that the deeds contained a description of the "Rockingham" property or whether he fraudulently misrepresented the purpose of the instruments which he induced the complainants to sign.

I do not, of course, intend to intimate that the pleader should state his evidence, but he should make his cause of action so plain that the defendants can answer and prepare for trial intelligently.

It will not, I think, be necessary to set out in detail the amendments required, as the complainants' counsel will, no doubt, be able to make the bill definite and certain in the particulars mentioned, without specific directions.

The preliminary statement in the brief for the complainants makes clear the theory upon which they rely. Though some of the allegations are broad enough to justify the contention that the complainants intend to prove that the deeds, including the signatures and acknowledgments, are forgeries, I do not understand this to be the theory of their action. It seems to me sufficiently clear that they propose to show that Dow, who at the time had the entire confidence of the complainants, presented the instruments to them and induced them to sign by representing that they related to property other than the "Rockingham" property and that they signed them relying upon this information.

It is also their contention that if the deeds did contain such a description, it was concealed from the complainants and if it did not, then the description was fraudulently inserted afterwards by Dow. If

the foregoing be a correct statement of the cause of action, there should be no difficulty in making it definite and certain in the bill.

The demurrers are sustained with costs (consisting of a single docket fee of \$20) and the necessary disbursements to which the defendants have been subjected by reason thereof. The complainants have leave on paying said \$20 and disbursements to amend their bill within twenty days from the date of the order to be entered.

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CAMPBELL v. SPOKANE & I. E. R. CO.

(Circuit Court, E. D. Washington. April 17, 1911.)

No. 1,471.

1. MASTER AND SERVANT (§ 111\*)—INJURY TO SERVANT—ELECTRIC RAILWAY CARS.

Independent of statute, an electric railway company is not bound to supply drawbars, heavy base framework, or buffers on the front end of its motors on the same line to protect motormen from injury by collisions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217; Dec. Dig. § 111.\*]

2. MASTER AND SERVANT (§ 94\*)—STATUTES—VIOLATION—NEGLIGENCE PER SE.

Where a statute is designed to protect a particular class of servants against a particular class of injuries, a violation of the statute is negligence per se only when one of the protected class is injured from a cause against which the statute was designed to protect him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 159; Dec. Dig. § 94.\*]

3. MASTER AND SERVANT (§ 111\*)—INJURIES TO SERVANT—ELECTRIC RAILWAY MOTORMAN—SAFETY APPLIANCE ACT.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and acts amendatory thereof requiring all cars used in interstate commerce to be equipped with certain safety appliances, so that they could be coupled automatically by impact without the necessity of men going between them, was not intended to protect and did not protect employes from injuries received as the result of collision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217; Dec. Dig. § 111.\*]

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

4. MASTER AND SERVANT (§ 111\*)—INJURIES TO SERVANT—ELECTRIC CARS.

An electric railway company is under no obligation to maintain drawbars, heavy base framework, or buffers on the front end of its motors or cars unless it intends to couple or uncouple cars to that end.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217; Dec. Dig. § 111.\*]

5. MASTER AND SERVANT (§ 210\*)—INJURIES TO SERVANT—MOTORMEN—ASSUMED RISK.

Where an electric railway motorman was injured in a collision, he assumed the risk of danger arising from the fact that the car he was operating was old and of an antiquated type, and that it was so full of pas-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sengers that no avenue of escape was open to him when collision became imminent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554-556; Dec. Dig. § 210.\*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

**6. MASTER AND SERVANT (§ 111\*)—INJURIES TO SERVANT—RAILROADS—COLLISION—WAY OF ESCAPE.**

An electric railway company is not bound to provide a special avenue of escape for motormen in the event of a collision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217; Dec. Dig. § 111.\*]

**7. MASTER AND SERVANT (§ 258\*)—INJURIES TO SERVANT—PLEADING.**

In an action for injuries to an electric railway motorman in a collision, plaintiff was required to state in his complaint the particular act or acts of negligence relied on.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

At Law. Action by Edgar E. Campbell against the Spokane & Inland Electric Railroad Company. On exceptions to the complaint. Motion to strike and to make more definite and certain granted.

Belden & Losey, for plaintiff.

Graves, Kizer & Graves, for defendant.

RUDKIN, District Judge. The defendant company owns and operates a line of electric railway between the city of Spokane, in the state of Washington, and the city of Cœur d'Alene, in the state of Idaho, and at the time of receiving the injury complained of in this action the plaintiff was a motorman in its employ. While the plaintiff was thus employed, on the 31st day of July, 1909, his train collided with another train operated by the defendant company over the same line, and running in the opposite direction, causing the injuries for which a recovery is here sought. The third and seventh paragraphs of the complaint allege that the drawbars on the front end of the motor car operated by the plaintiff, and the heavy base framework to which the drawbars are attached, were six inches lower than the like appliances on the front end of the motor car with which the plaintiff's car collided, and that the accident would not have happened had the drawbars and heavy framework on the two colliding cars been of the same height.

[1] Independently of statute, an electric railway company is under no obligation to supply drawbars, heavy base framework, or buffers, on the front end of its motors to guard and protect the motormen against injuries resulting from collisions with other cars or trains on the same line or track. *Durkee v. Hudson Valley Ry. Co.*, 193 N. Y. 555, 86 N. E. 537; *Filbert v. New York, N. H. Business Hr. Co.*, 95 App. Div. 199, 88 N. Y. Supp. 438.

[2] Nor does the complaint charge any violation of the safety appliance act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and the acts amendatory thereof, of which the plaintiff can complain. When a statute is designed to protect a particular class

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of persons against a particular class of injuries, a violation of the statutory duty constitutes negligence per se, whenever one of the protected class is injured from a cause against which the statute was designed to protect him. [3] The purpose of the safety appliance act was to require all cars, regularly used on any railroad engaged in interstate commerce, and all other cars used in connection therewith, to couple automatically by impact and to be coupled and uncoupled *without the necessity of men going between them*, whether they are loaded or empty, and although not actually engaged in such commerce at the time. *Hohenleitner v. Southern Pac. Co.* (C. C.) 177 Fed. 796. The design of the act was, therefore, to protect employes from injuries received in going between cars to couple or uncouple them, not from injuries received in collisions.

Waiving the question whether the defendant violated the act by maintaining drawbars on its different cars at different heights, as between itself and the government, the plaintiff in this case has no ground of complaint, because he was not injured from the use of the defective drawbars, but as the result of a collision.

[4] A railway company is under no obligation to maintain drawbars, framework, or buffers on the front end of its engines or electric cars, unless it intends to couple or uncouple cars to that end; and if it is not required to supply such appliances at all, it is not responsible for the kind supplied, unless an employe is injured through their use. The third and seventh paragraphs of the complaint will therefore be stricken.

The ninth paragraph of the complaint alleges, in substance, that the motor car upon which the plaintiff was employed was of an old and antiquated type; that there was but one way of ingress and egress to and from the motorman's department, and that the car was so crowded with passengers that no avenue of escape was open to the plaintiff when the collision became imminent.

[5] The make of the car and its crowded condition were fully known to the plaintiff, and he assumed all risk arising from these causes.

[6] Furthermore, I am not aware that it is the duty of an electric railway company to provide any special avenue of escape for the motorman in the event of a collision, or that it violates any of its legal duties if it fails so to do. This paragraph will also be stricken.

[7] The defendant has further moved the court to require the plaintiff to make his complaint more definite and certain in certain particulars. The complaint alleges that the defendant disregarded its rules, gave improper orders, and so forth, but these charges are entirely too general in their nature. If the plaintiff has a cause of action he should be afforded every opportunity to prove it, but the defendant should likewise be afforded every opportunity to defend against it. This collision was doubtless caused by negligence on the part of some officer or employe of the defendant company, but the particular act of negligence nowhere appears in the complaint. The collision must have resulted from one of three causes. First, the giving of improper orders to the crew of one or both of the colliding trains; or, second, the

failure to give proper orders to the crew of one or both of the colliding trains; or, third, disobedience of orders by one or both of such crews. If the collision resulted from one or more of these acts of negligence the plaintiff should set them forth in ordinary and concise language so that the defendant and the court may know the particular act of negligence relied on.

The foregoing, I apprehend, will be a sufficient guidance to the plaintiff in drafting an amended complaint, which he is permitted to file under the rules.

The motion to strike and the motion to make more definite and certain are granted.

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In re WOLF.

(Circuit Court, M. D. Tennessee, Nashville Division. April 13, 1911.)

1. ALIENS (§ 67\*)—NATURALIZATION—"COURTS OF COMMON-LAW JURISDICTION."

A court of common-law jurisdiction authorized by Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), to admit aliens as citizens, need not possess a general common-law jurisdiction, but if any part of its jurisdiction answers that designation it is sufficient. Courts with this jurisdiction are those which have the power to punish offenses, enforce rights, or redress wrongs recognized by the common law, or which, in the determination of the causes they decide, are governed by the principles, rules, and usages of that law. The term "having common-law jurisdiction" is used to distinguish these courts from those which have no jurisdiction save in equity, admiralty, or in matters not involving offenses or rights under the common law. Within this meaning and under the decisions of the state of Tennessee the county courts of that state are not "courts of common-law jurisdiction," having authority to admit aliens to citizenship.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 131-137; Dec. Dig. § 67.\*]

2. ALIENS (§ 68\*)—NATURALIZATION—PROCEEDINGS.

A petition for naturalization not verified by affidavits of two citizens will be dismissed, with costs, but without prejudice to the right of the petitioner to file a new application.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 142; Dec. Dig. § 68.\*]

Application by Max Wolf for naturalization. Dismissed, without prejudice.

A. M. Tillman, U. S. Atty., for the United States.

On Final Hearing.

SANFORD, District Judge. The petitioner appears to be a person of good moral character and otherwise qualified to be admitted as a citizen of the United States, but the government insists that while this is true he is yet not entitled to naturalization because one of the two affiants who verified his petition for naturalization is not, it is urged, a citizen of the United States.

Section 4 of the naturalization act of June 29, 1906, c. 3592, 34 Stat.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

596 (U. S. Comp. St. Supp. 1909, p. 479), requires that the petition for naturalization "be verified by the affidavits of at least two credible witnesses, who are citizens of the United States." The objection raised is that one of these affiants, the witness Goldstein, is shown not to be a citizen of the United States, because he is alien born and has not, as the government insists, become a naturalized citizen of the United States. It appears from the proof that this witness was naturalized before the passage of the act of 1906 by the county court of Davidson county; and the contention is that the said county court was not a court which was authorized to naturalize aliens under the law as it then existed.

By section 2165 of the Revised Statutes (U. S. Comp. St. 1901, p. 1329), which was in force at the time these naturalization proceedings were had in the county court, it was provided that aliens might be admitted as citizens of the United States by "a court of record of any of the states having common-law jurisdiction, and a seal and clerk." The government contends that the county court of Davidson county, while a court of record having a seal and clerk, is not a court of "common-law jurisdiction" within the meaning of this statute, and hence had no jurisdiction to naturalize the witness.

[1] It is well settled that to constitute a court one of common-law jurisdiction within the meaning of this section of the Revised Statutes, it is not necessary that it should be one possessing a general common-law jurisdiction, but that if any part of its jurisdiction answers that designation the requirement of the statute is fulfilled. *United States v. Power*, 14 Blatchf. 223, Fed. Cas. No. 16,080; *Ex parte Tweedy* (D. C., W. D. Tenn.) 22 Fed. 84; *United States v. Lehman* (D. C.) 39 Fed. 49; *Levin v. United States* (8th Circuit) 128 Fed. 826, 63 C. C. A. 476. In the last-named case the Circuit Court of Appeals for the Eighth Circuit said:

"Courts having common-law jurisdiction, within the meaning of this section, are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or which, in the determination of the causes which they decide, are governed by the principles, rules, and usages of that law. The term 'having common-law jurisdiction' is used to distinguish these courts from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law. *U. S. v. Lehman* (D. C.) 39 Fed. 49, 50; *Parsons v. Bedford*, 3 Pet. 446, 447, 7 L. Ed. 732; In the *Matter of Martin Conner*, 39 Cal. 98, 101, 2 Am. Rep. 427; *People ex rel. v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254. Courts which have some common-law jurisdiction are courts having common-law jurisdiction, and it is not indispensable to the qualification of a court under this act of Congress that it should have all the common-law jurisdiction, or even that it should have general common-law jurisdiction. *Ex parte Tweedy*, 22 Fed. 84; In the *Matter of Martin Conner*, 39 Cal. 98, 101, 2 Am. Rep. 427; *U. S. v. Power*, 14 Blatchf. 223, Fed. Cas. No. 16,080, 27 Fed. Cas. 607, 608; *Ex parte Gladhill*, 8 Metc. (Mass.) 168, 170."

Applying this test to the jurisdiction of the county court of Davidson county, I am of the opinion that it cannot properly be said to be a court of common-law jurisdiction.

It is well settled that in Tennessee the county court is one of very limited jurisdiction, restricted to the express provisions of the statutes. *Young v. Shumate*, 3 Sneed, 369; *Dean v. Snelling*, 2 Heisk.

484. Without setting out all the powers conferred by statute upon the county court—under which it is given original jurisdiction in the probate of wills, the granting of letters testamentary and of administration, the appointment and removal of guardians, the allotment of dower and over bastardy and bastards, and other matters, and concurrent jurisdiction with the circuit and chancery courts in the partition and distribution of the estates of decedents and the settlement of insolvent estates (Code, § 4201, Shannon's [Tenn.] § 6027)—it may be said, generally, that none of the matters in which it is given jurisdiction are matters coming within the jurisdiction of common-law courts as they existed at the common law, and, further, that in the exercise of its jurisdiction in these matters it does not follow the common-law procedure, but proceeds as a court of equity.

In *Young v. Shumate*, supra (3 Sneed, 369, 371) the Supreme Court of Tennessee stated that the jurisdiction of the county court was very limited in its extent and "of an equitable nature"; this statement being cited with approval in *Dean v. Snelling*, supra (2 Heisk. 484, 487). And in *Caruthers' History of a Lawsuit* (4th Ed.) 11, it is said that the county court in Tennessee "is not a court of common-law jurisdiction," and "can only exercise such jurisdictional powers as are expressly given by statute."

In *Ex parte Tweedy*, supra ([D. C.] 84 Fed. 84), it was held by Judge Hammond that the probate court of Shelby county, Tenn., although having jurisdiction to allot dower and partition estates and over bastardy and bastards, was not a court having common-law jurisdiction within the meaning of section 2165 of the Revised Statutes. And while in the matter of *Martin Conner*, supra (39 Cal. 98, 2 Am. Rep. 427), it was held that the county courts of California were courts of common-law jurisdiction within the meaning of the naturalization acts, this decision is inapplicable to the present case, since under the statutes of California the county courts were specifically given jurisdiction in various matters of common-law cognizance, both of a civil and criminal nature.

Under these authorities, and for these reasons, I am therefore constrained to hold that the county court of Davidson county is not a court of common-law jurisdiction, within the meaning of section 2165 of the Revised Statutes, and that hence the naturalization of the witness Goldstein was void for want of jurisdiction in the court.

[2] It therefore follows that the petition for naturalization in this case was not verified by the affidavits of two citizens of the United States, as required by the naturalization act, and must therefore be dismissed, with costs; but this dismissal will be without prejudice to the right of the petitioner to file a new application for naturalization.

## In re SALVATOR BREWING CO.

(District Court, S. D. New York. April 22, 1911.)

No. 10,631.

**1. BANKRUPTCY (§ 331\*)—CLAIMS—PROOF—TRUSTS.**

Directors of a corporation in order to furnish money for S. indorsed two notes which were discounted at a bank. The corporation executed an assignment of certain securities to M., one of the directors, to be held by him as trustee for all, as security for the indorsements. The corporation became a bankrupt, before the notes matured, and on maturity the directors equally contributed an amount necessary to pay the notes, and delivered it to M., paid the notes, and then claimed to hold the securities as trustee for the directors. The instrument by which the securities were transferred to M. in terms authorized him to do whatever was necessary to make the securities available. *Held*, that M. was thereby authorized to take any steps necessary to reimburse the directors out of the assets of the bankrupt, and his claim to the securities having failed he was authorized to file proof of claim on the indorsements as trustee for the contributing directors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 520; Dec. Dig. § 331.\*]

**2. BANKRUPTCY (§ 328\*)—CLAIMS—FILING—TIME—"LIQUIDATED BY LITIGATION."**

The term "liquidated by litigation," as used in Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), permitting proof of claims after a year if liquidated by litigation, applies to a case where the creditor has claimed to hold security, and has litigated that question and been defeated and thereafter attempts to prove as a general creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4175.]

**3. BANKRUPTCY (§ 336\*)—PROOF OF CLAIM—AMENDMENT.**

Where a director of a bankrupt corporation as trustee for himself and other contributing directors, unsuccessfully prosecuted his claim to certain security for notes paid by such directors as indorsers, the evidence given in such proceeding amounted substantially to proof of the indorsers' claim against the bankrupt's estate, and was sufficient to sustain an amendment by adding the formal proofs of claim by the directors as general creditors after the expiration of a year from adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 523, 524; Dec. Dig. § 336.\*]

In the matter of bankruptcy proceedings of the Salvator Brewing Company. On petition of John H. Meyer to review a referee's order denying a motion for leave to amend proof of claim. Reversed, and claim allowed.

See, also, 183 Fed. 910.

Holm, Whitlock & Scarff (Victor E. Whitlock, of counsel), for claimant John H. Meyer.

Henry A. Rubino, for trustee.

HOLT, District Judge. This is a petition to review an order of the referee denying a motion for leave to amend a proof of claim. The bankrupt company had nine directors, among whom was John

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



H. Meyer. Before the bankruptcy each of the directors indorsed two notes, one for \$4,500, and one for \$18,000, which were discounted at a bank. At the same time, the company executed an assignment to Meyer of certain securities owned by the company, to be held by Meyer, as trustee for all the directors, as security for the indorsements. The notes came due after the bankruptcy, and were paid by Meyer, the money for such payment having been contributed equally by the nine directors. The trustee in bankruptcy having contested the validity of the assignment of the securities, a reference was ordered to pass upon that question. In that proceeding it was held that the assignment was invalid. Evidence was given in that proceeding proving the indorsements by the nine directors and the payment of the notes, which evidence was not contradicted, and which clearly showed the validity of the claim of the indorsers for reimbursement. No formal proof of claim, however, was filed. After the termination of the litigation in respect to the validity of the assignment of the securities, a formal proof of claim was filed by Meyer, as trustee for the directors, for the amount which had been paid upon the indorsements. The proof of claim was objected to on the ground that it had not been filed within a year, and the claim was disallowed by the referee on that ground. Thereupon this motion was made, on the ground that the evidence given in the proceeding to establish the validity of the assignment amounted to a proof of claim, and that it could be amended by annexing to it the formal proof of claim subsequently filed. This motion was denied by the referee, and from that order this review is taken.

[1] The claim which is attempted to be proved in this case is entirely just. The company needed money. The directors obtained it by their individual indorsements. It increased by so much the assets of the brewery, and there is no just reason why the directors should not be permitted as general creditors to share in the distribution of the assets of the bankrupt. The sole grounds upon which their claim has been disallowed are (1) that Meyer could only prove for the one-ninth of the money paid which he contributed individually, and (2) that more than a year having passed after the adjudication, no proof of any kind could be filed. The trustee claims that Meyer, when he paid the notes, was a mere messenger to carry the money contributed by the nine directors; but the nine directors had previously, by an instrument of assignment, created him their trustee in respect to the securities transferred for their protection under their indorsements. Under this instrument Meyer was in terms authorized to do whatever was necessary to make the security available, and that authority carried with it, in my opinion, by implication, authority to Meyer to take any steps which might bring about the reimbursement of the directors out of the assets of the bankrupt for their payments as indorsers of the bankrupt's paper. When the notes came due, Meyer obtained the contributions of money from the indorsers, and was the person who paid the notes, and I think he paid them under his authority as trustee of the securities. The notes having been paid, he claimed to hold the securities for the reimbursement of the directors. That claim

failed, but the fact that the court held that the transfer of the securities was invalid did not affect the position of the directors as general creditors, and admittedly they had a right to share in dividends. Having that right, in my opinion, in view of the formal creation of Meyer as trustee under the instrument of assignment, and of his having acted in behalf of his fellow directors in making the payment of the notes, he was entitled to file proof of claim as trustee for such directors.

[2] But it is claimed that the proof cannot be allowed because it was not filed within a year. But in the first place the provision of the Bankrupt Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444) permits claims to be proved after a year if they are liquidated by litigation. This provision has been held to apply to a case where a creditor has claimed to hold security, and has litigated that question and been defeated. It is held that in such a case the creditor may thereafter prove as a general creditor. *In re Keyes* (D. C.) 20 Am. Bankr. Rep. 183, 160 Fed. 763; *In re Strobel* (D. C.) 20 Am. Bankr. Rep. 884, 163 Fed. 787; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332.

[3] It is also claimed in this case that the evidence given on the hearing, in relation to the validity of the assignment of the securities, amounted substantially to a proof of the claim. Such evidence, of course, is not what is commonly known as a formal proof of claim, but it did prove facts which were essential to establish the claim, and indeed it was necessary, as a part of the claimant's proof in that proceeding, to establish that the notes had been paid by the indorsers, in order to show any ground for claiming to enforce the securities. I think, under the authorities, that the claim was proved in that proceeding, and that the motion made to amend the proof by adding the formal proofs of claim should be allowed. *Buckingham v. Estes*, 128 Fed. 584, 63 C. C. A. 20; *Matter of Roeber*, 127 Fed. 122, 62 C. C. A. 122.

My conclusion is that the order under review should be reversed, and the claim of Meyer as trustee be allowed.

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#### UNITED STATES v. WALDMAN et al.

(Circuit Court, S. D. New York. May 15, 1911.)

##### 1. BANKRUPTCY (§ 485\*)—OFFENSES—CONSPIRACY—CONCEALED ASSETS.

Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3434), makes it a criminal offense for a person to have knowingly and fraudulently concealed while a bankrupt, or after his discharge, from the trustee, any of his property belonging to his estate in bankruptcy. *Held* that, since the act does not make it a criminal offense for a person not a bankrupt to conceal the bankrupt's property from the trustee, an indictment charging that defendants, who were in no manner officially connected either as directors or stockholders with the bankrupt corporation, conspired to conceal assets of the corporation from the trustee in bankruptcy, and in pursuance of such conspiracy they removed the corpo-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ration's stock of goods from its place of business and caused the same to be sold and concealed the proceeds, did not state an offense.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906-908; Dec. Dig. § 485.\*]

**2. BANKRUPTCY (§ 494\*)—OFFENSES—INDICTMENT.**

Where an indictment for conspiracy to conceal the assets of a bankrupt corporation from its trustees alleged as the overt act, that defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the bankrupt's receiver and trustee, but did not allege any of the circumstances under which the goods were removed, so as to show that such removal was illegal, and not under legal process, it was insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.\*]

**3. BANKRUPTCY (§ 494\*)—OFFENSES—INDICTMENT—CERTAINTY—FALSE OATHS IN BANKRUPTCY PROCEEDINGS.**

An indictment charging conspiracy to give false oaths in a bankruptcy proceeding which failed to allege what false oaths were to be given, or what the subject of the oaths was, with such reasonable particularity as would advise defendant of the charge against him, was insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.\*]

Philip Waldman and others were indicted for conspiracy to induce a bankrupt corporation to knowingly conceal its assets from its creditors, and they demur. Sustained.

Henry A. Wise, U. S. Atty., and Isaac H. Levy, Asst. U. S. Atty. Charles L. Hoffman (Ernest E. Baldwin, of counsel), for defendants Waldman, Kline and Ordovery.

Archibald Palmer, for defendants Kopelman, Finkelstein, and Rubin.

HOLT, District Judge. This is a demurrer to an indictment against Philip Waldman, Barnett Kopelman, Sam Kline, Paul Finkelstein, Morris Ordovery and Morris Rubin. The indictment contains two counts.

[1] The first count charges that on December 26, 1910, S. Fineman Company was a corporation dealing in dry goods at New York; that it had belonging to it a stock of merchandise of the value of about \$8,000; that on said date the defendants "did contemplate, anticipate, and expect that the said S. Fineman Company should be there-after adjudged a bankrupt," and that a trustee of the estate would be elected; that on December 26, 1910, application was duly made to this court to have S. Fineman Company adjudged a bankrupt; that it was so adjudged on January 20, 1911, and that on March 28, 1911, a trustee was duly elected and qualified; that the defendants on December 26, 1910, and thence continuously on all other days to April 5, 1911, conspired together to commit an offense against the United States, "the said offense being the concealment, knowingly and fraudulently, by S. Fineman Company, while the said S. Fineman Company was a bankrupt, from the trustee in bankruptcy of the said S. Fineman Company, of property belonging to the estate in bankruptcy of the said corporation"; that in pursuance of the conspiracy the de-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fendants on December 27, 1910, removed from the place of business of S. Fineman Company the entire stock of goods, and thereafter caused the merchandise to be sold, and did willfully and wrongfully conceal the proceeds and the books of account from the receiver and trustee in bankruptcy of the said corporation. The second count charges the same preliminary facts, and, as an overt act, that the defendants conspired to make false oaths in the said bankruptcy proceedings, and to testify falsely concerning the amount, location and disposition of the property of the corporation, and that the defendant Waldman did, on January 12, 1911, pursuant to the conspiracy, testify falsely under oath concerning the acts, conduct, and property of the said S. Fineman Company before a Commissioner duly appointed to take the testimony on oath of the said Philip Waldman and other persons.

There is no allegation in this indictment that any of the defendants were officers of or connected in any way with the corporation of S. Fineman Company. The allegation is, in substance, that the defendants conspired together to have the bankrupt conceal from its trustee, when he was appointed, its property. By section 29b of the bankruptcy act it is made a criminal offense for a person to have knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. The bankrupt act does not make it a criminal offense for a person who is not a bankrupt to conceal the bankrupt's property from the trustee. The charge, therefore, in this case is that persons who were not the bankrupt, and who are not alleged to have been connected in any way with the bankrupt, or to sustain any such relation to the bankrupt as to confer upon them any authority over the bankrupt, conspired to have the bankrupt conceal its property; but presumably they had no power to carry out the object of the conspiracy. They were not the bankrupt, or officers of the bankrupt. They might conspire as much as they chose, but there is nothing to indicate that they could thereby compel or induce the bankrupt to conceal its property, and there can be no presumption that a bankrupt would commit a crime simply because outside parties conspired to have it done. If the indictment alleged that the defendants conspired with the officers of the bankrupt or with stockholders or any persons able to influence the officers of the bankrupt, a different question would be presented; but, in my opinion, the conspiracy alleged in the first count of the indictment has nothing to feed on, to use the expression of Judge Dillon in the case of *United States v. Crafton*, 4 Dill. 145, Fed. Cas. No. 14,881.

[2] The overt act in aid of the conspiracy alleged in the first count is that the defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the receiver and trustee. There is no allegation of the circumstances under which the goods were removed. It may have been under legal process issued in a suit on a just claim, or under legal process in a suit on an unjust claim, or the goods may have been removed by force without authority under circumstances constituting conversion or larceny. Whatever may have

been the circumstances under which the goods were removed, if the trustee is entitled to recover them, there are appropriate legal proceedings for that purpose; but, in my opinion, an indictment of the persons removing them, on the theory that they had conspired to make the bankrupt conceal the goods or their proceeds from the trustee, is not an appropriate proceeding for that purpose. The fact that the bankrupt's goods were removed by persons having no connection with the bankrupt has no tendency to show a conspiracy to induce the bankrupt to conceal the goods from the trustee. The two things inherently have no connection. The circumstances of the transaction, if stated, might show some connection; but, unless stated, no connection is apparent.

[3] The second count charges a conspiracy to give false oaths in the bankruptcy proceeding. This is an offense if committed by persons other than the bankrupt. But the trouble with the second count is that it does not state what false oaths were to be given, or what the subject of the false oaths was, with any such reasonable particularity as would apprise the defendants of the nature of the charge against them. Without requiring extreme detail in the allegations, it is not enough to allege that the defendants conspired to give false oaths, which is, in substance, all that the second count alleges.

In my opinion, both counts of the indictment are bad, and the demurrer to the entire indictment should be sustained.

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In re BURTIS.

(District Court, E. D. New York. June 9, 1911.)

**BANKRUPTCY (§ 143\*)—ASSETS—ANNUITY—RIGHTS OF TRUSTEE—STATUTES.**

The bankrupt's husband bequeathed to her the income from a trust fund to be created by the executors to amount to \$600 per annum in lieu of dower, etc. This the widow rejected, and settled her dower and other claims against the estate by an agreement with the other beneficiaries, by which they agreed to pay to her \$300 a quarter so long as she remained a widow and unmarried, and \$150 a quarter for life in case of remarriage. The annuity was paid to her until bankruptcy intervened. *Held*, that the widow's annuity was a right which she could assign and which could have been followed by creditors; and hence her trustee in bankruptcy was entitled to sell the bankrupt's right for its present value or collect 10 per cent. of the excess over \$12 a week under Code Civ. Proc. § 1391, as amended by Laws 1908, c. 148, providing for a continuing execution against income from trust funds or profits to become due to a judgment debtor to the amount of \$12 or more a week for the collection of 10 per cent. of such income.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.\*]

In the matter of bankruptcy proceedings of Fannie Betts Burtis. On petition to review a referee's determination as to the right of the trustee to an annuity belonging to the bankrupt.

William G. Philipeau, for petitioner.

Oscar A. Lewis, for bankrupt.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CHATFIELD, District Judge. The bankrupt filed a voluntary petition on October 14, 1910, with schedules showing claims of less than \$2,500, of which one for \$469.76 is based upon a judgment docketed a few days previous to the bankruptcy petition.

The bankrupt is a widow, who by the will of her late husband, probated October 29, 1896, was given an income from a trust fund to be created by the executors, of \$600 per annum, in lieu of dower and all claims against the estate.

This was rejected by the widow, who, on January 6, 1897, settled her dower and other claims against the estate upon the execution of an agreement secured by a mortgage on real estate for \$24,000, by which agreement the heirs of the deceased husband undertook to pay to a trustee for the use of the widow \$300 per quarter, so long as she remained a widow and unmarried, and \$150 a quarter during her life in case of her remarriage.

These payments were made until 1907, when a partition suit of the mortgaged property caused the substitution and deposit of \$24,000 in the place of said mortgage, as security for the payment of the annuity previously agreed upon.

The bankrupt claims the annuity to be "the right of a beneficiary of an express trust to receive rents and profits of real estate," and hence to be unassignable under section 103 of the real property law (chapter 52, Laws of 1909 of New York [Consol. Laws 1909, c. 50]), citing *Lent v. Howard*, 89 N. Y. 169; *Cuthbert v. Chauvet*, 136 N. Y. 326, 32 N. E. 1088, 18 L. R. A. 745, and other cases.

In order to meet the suggestion that under the agreement referred to the income provided for the bankrupt for life was to be the proceeds of a trust of personal property rather than real estate, the bankrupt calls attention to section 15, c. 45, Laws 1909 (Consol. Laws 1909, c. 41), making the right to compel the performance of a trust to apply income from personal property to the use of a person untransferable, and under this section cites *Greer v. Chester*, 62 Hun, 329, 17 N. Y. Supp. 238, affirmed 131 N. Y. 629, 30 N. E. 863, and *Williams v. Thorn*, 70 N. Y. 270, to the effect that an income of this nature cannot be applied to the payment of debts, unless it has been affirmatively shown that the income is more than sufficient for the fair support of the beneficiary or that there is a surplus.

It must be held that, whether or not such a trust in real estate as was created by the will referred to could have been assigned, the widow did have the right to assign her rights as widow if the trust were not actually carried into effect. Her dower rights would have been liable for her debts, and her statutory share in her husband's estate would also have been liable for the payment of her debts. It must follow, therefore, that when Mrs. Burtis refused to accept the beneficiary interest under the trust, and compelled the transfer to her of rights by which she received an income of \$1,200 from certain individuals, the payment of which was secured by a mortgage, she did not rely upon an inalienable trust, but insisted and agreed upon receiving for her support the proceeds of a larger amount of property

than would have been secured to her, beyond the power of attack by her creditors, under the provisions of the will.

It would also follow, therefore, that the income to be paid by these individuals to Mrs. Burtis and secured first by a mortgage and then by the deposit of money with the Hamilton Trust Company, can be reached by creditors of Mrs. Burtis to the same extent (and no more) that any such income or annuity could have been followed up by her creditors, if she had created the trust fund herself from cash paid to her in release of her dower rights. The income is an annuity and not a trust of realty or personalty.

Her creditors, under the cases previously cited, and under such authorities as *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752, and *Mills v. Husson*, 140 N. Y. 99, 35 N. E. 422, might avail themselves of any rights which they can have against an income in the form of an annuity purchased by the annuitant herself.

It has been held in the case of *In re Tiffany* (D. C.) 133 Fed. 799, that a trustee in bankruptcy may bring a suit in equity to obtain the surplus of income from a trust fund, if that income be more than sufficient for the support of the bankrupt. Section 1391 of the Code of Civil Procedure of New York, as amended by chapter 148 of the Laws of 1908, provides for the levying of a continuing execution against wages, debt, earnings, salary, income from trust funds, or profits, to thereafter become due to a judgment debtor to the amount of \$12 or more a week, and for the collection of 10 per cent. of such income under the continuing execution.

Inasmuch as it has been held herein that the quarterly payment to the bankrupt is not paid from the proceeds of a trust fund, it would not seem to come within the provisions of section 1391 unless the annuity be considered as a contract debt coming due and owing to the bankrupt quarterly as long as she shall live.

It is apparent that \$1,200 per annum is more than \$12 a week, and it also appears from the record that the judgment creditor, inasmuch as his judgment was obtained within less than four months prior to the filing of petition, cannot maintain his lien upon the fund against the general creditors. Hence the trustee in bankruptcy, if execution be levied and any collection made, would be entitled to the proceeds of the levy, that is, 10 per cent. of the debt or of the income, if it be an income of that nature, until the judgment be paid. On the other hand, the trustee in bankruptcy might proceed in equity against the annuity or income, if he has no remedy at law; but it would seem that neither the garnishee proceeding nor the bill in equity is necessary. The bankrupt has purchased for herself the right to receive a certain sum of money at regular intervals. The consideration for this was the relinquishment of rights in her deceased husband's estate. The amount of money deposited as security does not form in any way a part of the consideration for the annuity, and the annuity is the property of the bankrupt just as much as if she had paid a certain amount in cash to an authorized company and purchased there-

with an out-and-out annuity, which would be subject at any time to levy and sale for the payment of debts.

In the present instance the trustee has the right to sell the property which the bankrupt had capable of transfer and not exempt from levy upon the day of filing her petition, and a part of that property would be the present value, as of that date, of the future rights to the annuity or fixed payment which she had contracted for. Whether the trustee will attempt to collect 10 per cent. of the obligation from time to time by an application under the Code, or whether he will attempt to have sold at public auction the right to receive the annuity, cannot be determined upon this motion; but, so far as the bankrupt and the Hamilton Trust Company are concerned, the estate in bankruptcy is entitled to the interest of the bankrupt in this fund as of the date of the petition.

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In re BRYANT.

(District Court, M. D. Pennsylvania. July 7, 1911.)

No. 1,575.

1. BANKRUPTCY (§ 236\*)—EXAMINATION OF BANKRUPT—EFFECT OF ADJOURNMENT—FURTHER EXAMINATION.

Under Bankr. Act July 1, 1898, c. 541, § 7 (9), 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), providing that a bankrupt, when present at the first meeting of his creditors and at such other times as the court shall order, will submit to an examination, and under section 21a, providing that a court of bankruptcy may require any designated person, including the bankrupt and his wife, to be examined, it is intended to require the bankrupt to submit freely to examination, and applications may be granted at any time before final disposition of the case, and the fact that an adjournment at an examination was without day does not prevent granting of an application for further examination.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 236.\*]

2. BANKRUPTCY (§ 235\*)—EXAMINATION OF BANKRUPT—FORM OF APPLICATION.

The application of a trustee to be allowed an examination of a bankrupt to ascertain whether he had made a full disclosure of assets need not set forth the nature and character of the testimony intended to be adduced.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 235.\*]

In the matter of Jonas B. Bryant, bankrupt. On exceptions to order of referee allowing further examination of the bankrupt. Exceptions overruled, and order affirmed.

Abram Salsburg, for bankrupt.

Wm. S. McLean, for trustee.

WITMER, District Judge. The proceedings in this case arose upon an application of the trustee to be allowed to have an examination of the bankrupt to ascertain whether he had made a full disclosure of his assets. It appears that the first meeting of creditors was held February 7, 1911, which the bankrupt did not attend. The hearing was adjourned to February 15th, and again to the 17th, and again to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



May 23d, when the bankrupt appeared and was examined. No other witnesses were examined, and the adjournment was without a day. On June 19th the trustee presented a petition to the referee, alleging that "certain assets belonging to the bankrupt had been concealed and not included in the schedules filed by the bankrupt, and that for the purpose of recovering the same it will be necessary to examine the bankrupt, his wife," and certain other witnesses named, requesting an order to that effect. The bankrupt demurred to the petition of the trustee, and assigns for reasons that, when the bankrupt was examined, "no request having been made for his further examination, or any other witnesses, the meeting adjourned" without a day for such further examination; "that the petition, being in the nature of a request to turn over alleged concealed assets, fails to disclose what assets, if any, are concealed, the cause of such belief, or any facts which justify the taking of testimony." The referee having overruled the demurrer of the bankrupt and granted the order, to which the latter excepted, the matter was certified for review.

[1] The right to examine the bankrupt fully and whenever it appears necessary is very essential to the due administration of the law. The right of examination of the bankrupt has come down to us with the bankrupt law from the early English practice. It is provided for in the law under which we operate, first in section 7 (9) of the act, as follows:

"The bankrupt when present at the first meeting of his creditors, and at such other times as the court shall order, shall submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate."

The intent of the subdivision seems to be that creditors may have an examination of the bankrupt at any time during the pendency of the proceedings. If it should be argued that the bankrupt, having been examined as provided, without adjournment, could not again be called for further examination under this provision, to which we by no means assent, the other and further provision of the act affords the remedy in section 21a, to wit:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

Collier says that:

"Where the first meetings are kept alive by continuances, as is customary, his examination can be had or resumed so long as the meeting lasts. If the meeting had been adjourned, an examination can, under section 7 (9), still be had at such times as the court shall order, or it can be required under section 21a."

That it is the intention of the law to require a bankrupt to submit freely to examination concerning his estate is very apparent. Applications may be granted at any time before final disposition of the estate, in the exercise of a sound discretion of the judge or his referee.

Surely the bankrupt should not be unnecessarily harassed, vexed, or annoyed; but where it appears that the creditors may be benefited by further examination, or for any other good reason appearing, the order should be allowed. The vigorous and skillful use of examinations of insolvent bankrupts is often the only means by which creditors are enabled to prevent the bankruptcy act being turned into a shield for dishonesty. If hardship and inconvenience results from such examination, as it sometimes may, it should be remembered that a discharge of the bankrupt from his debts is a great privilege and a prize that will reward the honest debtor amply for such inconvenience.

[2] Nor was the trustee required to set forth the nature and character of the testimony in detail intended to be adduced. The very purpose of an examination under section 21a is to discover property of the bankrupt, or to learn of its whereabouts, and as to the acts of the bankrupt with respect thereto. Such an examination is in its very nature an investigation intended to satisfy the minds of the suspicious, whose judgment, it is true, is frequently not well founded, by which the honest debtor has all to gain.

It does not appear that the discretion vested in the referee has not been soundly exercised in the granting of the order; hence the exceptions are overruled, and the order of the referee is affirmed.

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**S. F. MYERS CO. v. TUTTLE.**

**TUTTLE v. S. F. MYERS CO.**

(Circuit Court, S. D. New York. June 14, 1911.)

**1. GOOD WILL (§ 6\*)—DOING BUSINESS IN INDIVIDUAL NAME—PURCHASE OF GOOD WILL.**

Though an individual cannot be prevented from carrying on business in his own name, and the purchase of the good will of the business carried on in the name of an individual will not in general prevent the individual from carrying on business in his own name thereafter, yet, if he does so, his business must be conducted in such a way as not to produce confusion with the business the good will of which has been sold.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6.\*]

**2. BANKRUPTCY (§ 268\*)—SALE OF ASSETS—CORPORATE NAME—RIGHT TO USE.**

The S. F. Myers Company, doing a mail order jewelry business, became bankrupt, and its assets, including its good will and corporate name, were purchased by T. Thereafter the sons of Myers formed a corporation called the "S. F. Myers' Sons' Company," and undertook to carry on a similar business at the same place occupied by the bankrupt corporation. This was enjoined at the suit of T. and the new corporation ordered either to change its name, so as not to produce confusion, or change its place of business; it being also enjoined from interfering with the business carried on by T. under the name of the old corporation. *Held*, that the old corporation, having obtained a discharge in bankruptcy but having no assets, was not entitled to enjoin T. from continuing to use the name of the old corporation; but such corporation could be restrained from interfering with the business of T. which he was carrying on under such name.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 268.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suits by the S. F. Myers Company, complainant, against Arthur W. Tuttle, defendant, and by Arthur W. Tuttle, cross-complainant, against the S. F. Myers Company, cross-defendant. Application by the S. F. Myers Company to enjoin Tuttle from doing business under its name, and motion by Tuttle to restrain the S. F. Myers Company from interfering with the business which he is conducting under such name. Motion of defendant Tuttle granted, and motion of the S. F. Myers Company denied.

See, also, 183 Fed. 235.

Samuel J. Siegel (Martin A. Ryan, of counsel), for S. F. Myers Co.

Martin Charles Ansorge and Elbert C. Ferguson (Richard J. Cronan, of counsel), for Arthur W. Tuttle.

HOLT, District Judge. These are two motions. One is made by the S. F. Myers Company, in its suit against Arthur W. Tuttle, for an injunction restraining the defendant from doing business under the corporate name of the complainant, or, in the alternative, restraining the defendant from using the complainant's name except in conjunction with his own name and the words "successor to," or other words properly indicating that the defendant is the successor to the business of the complainant. The other is a motion in the suit of Tuttle against S. F. Myers Company for an injunction restraining the Myers Company from interfering with the good will of the bankrupt S. F. Myers Company, purchased by Tuttle, or from using its name in its business. The S. F. Myers Company became a bankrupt. A sale of its assets, including its good will and corporate name, was ordered by this court. Upon such sale, a large portion of such assets and the good will and corporate name were purchased by Arthur W. Tuttle for a large sum of money. Thereafter the sons of S. F. Myers, who had originally founded the business which was incorporated under the name of the S. F. Myers Company, formed a corporation called "S. F. Myers' Sons' Co.," and undertook to carry on, at the same place, a similar business to that which had theretofore been carried on in the name of the S. F. Myers Company. This court enjoined S. F. Myers' Sons' Company from carrying on a similar business at the same place, and ordered that it either change its name, so as not to produce confusion, or change its place of doing business, and enjoined it from interfering with the business carried on by Mr. Tuttle under the name of the S. F. Myers Company. Thereafter the S. F. Myers Company applied for and received a discharge in bankruptcy, and now makes a motion to enjoin Tuttle from doing business under its name, on the ground that, having received a discharge in bankruptcy, it has a right to resume business under its original name, and Mr. Tuttle moves to restrain it from interfering with the business which he is carrying on under the same name.

[1] It is well settled that an individual cannot be prevented from carrying on business in his own name, and that a purchase of the good will of a business carried on in the name of an individual will not, as a general rule, prevent that individual from carrying on business in

his own name thereafter. But in such a case the courts usually require that the later business should be carried on in such a way as not to produce confusion with the business the good will of which has been sold.

[2] It is urged that the situation of this corporation is analogous to that of an individual bankrupt who has received a discharge; but in my opinion it is not. This is an ordinary business corporation, organized by filing a certificate. Its assets in bankruptcy are only enough to pay about 25 per cent. on its indebtedness. Although it has received its discharge in bankruptcy, it has no assets, and never will have any unless its stockholders contribute further cash. The instances are very rare in which corporations take the trouble to apply for a discharge under such circumstances. I have no doubt that the application was made in this case for the purpose of making this motion, and of endeavoring, by a sort of trick, to evade the injunction previously issued. In my opinion, the scheme should not be permitted to succeed. Mr. Tuttle bought the good will and the trade-name of this business, and gave for it a large amount of cash. It is the duty of this court to protect him in the ownership of his property. If the Myerses want to engage in the mail order business by means of a corporation, they can organize a new corporation under a different name by simply filing a certificate. They ought not to be permitted, by using the old corporate name, to interfere with the business being conducted by Mr. Tuttle.

The motion made by Tuttle is granted, and the motion made by S. F. Myers Co. is denied.

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LOVELL v. ISIDORE NEWMAN & SON.

(Circuit Court, E. D. Louisiana. June 27, 1911.)

No. 13,839.

**BANKRUPTCY (§ 140\*)—SALE OF PROPERTY—APPLICATION—FORGED BILLS OF LADING—DELIVERY OF PROPERTY UNDER GENUINE LAW.**

Bankrupts, having sold a quantity of cotton through their broker to various Italian spinners, forged certain bills of lading purporting to show shipment of the entire quantity to be carried to New Orleans and thence to Genoa by the line specified in the contract, consigned to the shippers' order, with instructions to notify the broker. They then drew drafts for the value of the cotton at the price for which it had been sold, and annexed the fraudulent bills of lading, together with the insurance certificates and invoices, the whole apparently in strict conformity to the contract, discounted the drafts, and received the money. The spinners ultimately paid the drafts. More than two months after the time the cotton should have been delivered under the contract, the bankrupts did ship an identical quantity of cotton, consigned according to the forged bills, and after obtaining bills of lading for this cotton held the same in their hands, but, before the cotton had cleared the port, bankruptcy intervened, and a quantity of it was claimed by the receivers from the steamship on which it had been placed. *Held* that, the contracts of sale being valid, they were fulfilled and became executed when the cotton was actually delivered to the carriers, the stipulations as to time of delivery,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time and manner of payment being accidental merely, and that the bankrupts and their trustee were estopped to deny that the cotton shipped belonged to the buyers.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

Action by W. S. Lovell, as trustee in bankruptcy of Knight, Yancey & Co., against Isidore Newman & Son. Judgment for defendants.

Dufour & Dufour and Percy, Benners & Burr, for plaintiff.

Dart, Kernan & Dart and Wheeler, Cortis & Haight, for defendants.

FOSTER, District Judge. This suit is by W. S. Lovell, trustee of Knight, Yancey & Co., bankrupts, against Isidore Newman & Son, sureties on a bond given by the master of the steamship Ingelfingen. Certain parties in interest have intervened and joined the defendant, setting up the same defense.

The parties by stipulation have waived the jury and submitted the matter to me on an agreed statement of facts.

It appears that between December 15, 1909, and January 29, 1910, Knight, Yancey & Co., through their agent at Genoa, Gino Gavarati, entered into eight written contracts for the sale of 1,400 bales of cotton to various Italian spinners; the contracts reading substantially as follows:

Messrs. ———

We beg to confirm that we have sold to you to-day for the account of Messrs. Knight, Yancey & Company, Decatur (Alabama) quantity, 200 bales (two hundred)

quality, fully low middling white number 8 type, sealed.

price, 7.50 per pound (seven pence and fifty-one-hundredths)

terms, C. i. f. & 6% Genoa. Allowance on weight 1%.

Shipment, January/February (by Catoniera Line)

Conference bill. Contract—Arbitration Liverpool.

Reimbursement 90 days sight draft Banca Commerciale Italiana, Milan, payable in London.

Gino Gavarati.

[Translated.]

During January and February, 1910, without shipping any cotton at all, Knight, Yancey & Co. counterfeited and forged 13 bills of lading, purporting to show the receipt of 1,400 bales of cotton by the Southern Railway at points in Alabama, to be carried by the said railway to New Orleans and thence to Genoa by the Catoniera Line, consigned to their own order, with instructions to notify Gino Gavarati. They then drew drafts for the value of the cotton at the price for which they had sold it and, annexing the fraudulent bills of lading, together with insurance certificates and invoices, the whole apparently in strict conformity to the contract, discounted the drafts and obtained the money. The spinners ultimately paid the drafts.

Thereafter, on March 16 and 17 and April 1, 6, 7, and 11, 1910, Knight, Yancey & Co. did ship 1,400 bales of cotton precisely as they had pretended by the forged bills of lading; the grade, weights, and marks of the cotton, the points of shipment and destination, the carriers, the form of the bill of lading, and everything to the most minute particular being exactly as shown by the said documents.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On April 20, 1910, Knight, Yancey & Co. were adjudicated bankrupts, and receivers were appointed to take charge of their assets. The cotton had been transported to New Orleans. 89 bales had gone forward, but 1,311 bales were then on board the steamship Ingelfingen. Before the Ingelfingen cleared, the receivers proceeded against her in the district court of this district, and, claiming the cotton, asked for an injunction to prevent its removal out of the United States pending the suit. The injunction issued, but the vessel was permitted to give bond and sail with the cotton. The condition of the bond is that the trustee shall establish his right, title, and interest in and to the said cotton, or any part thereof, and it stipulates that suit may be brought against the surety alone.

Knight, Yancey & Co. had the genuine bills of lading in their possession when adjudicated bankrupts, and plaintiff relies upon his possession of them, indorsed over to him by the bankrupts, and claims the absolute title to the cotton, disclaiming any intention to avoid a preference.

Defendants contend that Knight, Yancey & Co., by marking the exact amount of cotton, of the right grade, identically as shown in the forged bills of lading and other documents, and shipping it by the same carriers in the same way, appropriated it to the said contracts; that delivery to the railroad was delivery to them; that Knight, Yancey & Co. had no intention to retain title in themselves, but intended to suppress the genuine bills of lading and permit the cotton to be claimed by the spinners on the forged bills of lading; that the trustee is estopped to contest their ownership of the cotton or the genuineness of the forged bills of lading.

To this plaintiff responds that the contracts called for January and February delivery, which was not complied with; that, as the buyer could not have been compelled to accept delivery, there was no appropriation; that delivery could only be made by indorsing and turning over the bills of lading; that Knight, Yancey & Co., by holding the genuine bills of lading, to their own order, retained the legal ownership of the cotton, and it passed to him on their adjudication as bankrupts and his election as trustee; and that, as trustee, there is no estoppel against him.

The able arguments and exhaustive citations of authority by both sides have been of great aid, and I regret that I have not the time to discuss them fully. However, in my opinion, the problem here presented is readily solved by the application of well-settled principles of law; the ultimate facts, which I am bound to find from the evidence before me, being once determined.

It is certain that Knight, Yancey & Co. and the spinners entered into valid contracts of sale, and thereby Knight, Yancey & Co. obligated themselves to deliver the goods, and the spinners to pay the price. By the contract, Knight, Yancey & Co. were to make delivery not later than February 28, 1910, to a carrier at such point in the United States as they might select; the goods to be transported from the United States to Genoa by the Catoniera Line. They were also obligated to insure the goods for the benefit of the purchasers and

to allow for the freight to destination. The purchasers were obligated to accept drafts when presented with bills of lading and other documents attached, showing compliance as to delivery, and to ultimately pay the drafts. I understand this to be the well-settled meaning given to the contracts by commercial usage, and, even if this were not so, it is certainly the interpretation of the parties.

By false representations Knight, Yancey & Co. obtained payment before it was due, as they made no delivery, but they did subsequently make delivery of the cotton in exactly the manner contemplated. The delivery was accepted by the spinners, and the contracts thereby became executed, as each party had discharged his obligation. This was before bankruptcy.

The stipulations as to the time of delivery, time and manner of payment, et cetera, were merely accidental, and the parties for whose benefit they were inserted could waive them without affecting the contract. Delivery was complete when the cotton was given into the custody of the carrier, and it belonged to the buyer, subject, of course, to the lien of the bona fide holder of the bill of lading. Necessarily it was appropriated to the contract before delivery. The bill of lading to the order of Knight, Yancey & Co. was solely to enable them to collect the purchase price as if a cash transaction, according to the usage of the trade. When they had received payment in advance, no matter how, their retention of the bill of lading gave them no right in or control over the cotton as against these defendants. No doubt, Knight, Yancey & Co. intended to suppress the genuine bills of lading and to let the cotton be claimed on the forged ones; but it is useless to speculate as to what their intentions were, or what they might or could have done in the premises, as the fact is that after receiving the bills of lading they did nothing, and no rights of innocent third persons are involved. At the moment of adjudication, the cotton formed no part of the assets of Knight, Yancey & Co., and they had no lien on it or right to retain the bills of lading. The trustee stands in no better position towards these defendants than did the bankrupts. He is subject to any equity that would have estopped them. It is clear that Knight, Yancey & Co. could have asserted no claim to this cotton as against the buyers.

There will be judgment for the defendants and interveners, rejecting the plaintiff's demand. And for costs.

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#### VANDERBILT v. KERR et al.

(Circuit Court, S. D. New York. April 7, 1911.)

#### 1. REMOVAL OF CAUSES (§ 19\*)—NATURE OF CONTROVERSY—CASES ARISING UNDER FEDERAL CONSTITUTION.

That, in a suit by the owner of bonds against trustees, who were to hold securities in trust for the benefit of the owners of said bonds, a receiver appointed by United States court had begun a suit against the defendants, was not ground for removal, as presenting a controversy arising under the Constitution and laws of the United States; the receiver

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not being a party, no relief being demanded against him, and the principal relief demanded being the removal of defendants and the appointment of another trustee.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46; Dec. Dig. § 19.\*]

**2. REMOVAL OF CAUSES (§ 107\*)—MOTION TO REMAND—HEARING.**

Where, on a motion to remand a cause to the state court, the jurisdiction of the federal court is doubtful, the verdict should be resolved in favor of the state court having jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 225-234; Dec. Dig. § 107.\*]

In Equity. Suit by Edmund A. Vanderbilt against Lawrence R. Kerr and another. On motion to remand to the New York Supreme Court, County of New York. Motion granted.

J. Noble Emley, for plaintiff.  
Shattuck & Glenn, for defendants.

COXE, Circuit Judge. The asserted jurisdiction of this court rests solely upon the contention that the cause of action arises under the constitution and laws of the United States.

The plaintiff, who is the owner of four \$100 bonds of the Intercity Realty Company, brings this action on behalf of himself and all other bondholders, alleging the misconduct of the defendants and asking for their removal as trustees under a trust agreement pursuant to which they were to hold securities in trust for the benefit of the owners of the said bonds. The complaint also demands judgment for an accounting and that the defendants turn over the property in their hands to a substituted trustee, and for other similar relief.

In short, the bill seeks the removal of the defendants as trustees, for alleged misconduct, and the appointment of another trustee in their place, to whom the property in their hands is, after an accounting, to be turned over.

It appears by the bill that in a statement of assets and liabilities made by the defendants September 1, 1910, there is a cash item of \$127,804 which is in dispute, and that the receiver appointed in an equity suit in the United States Circuit Court has begun an action against the defendants herein for the recovery of the said \$127,804.

Based upon these allegations of the complaint the defendants assume that the controversy in this suit "centers around" this cash item. On this assumption they contend that a "federal question" is presented.

[1] I am not at all persuaded that this assumption, limiting the controversy to the item aforesaid, is correct, but assuming that it is, it by no means follows that this suit presents a controversy arising under the constitution and laws of the United States. The fact that a receiver appointed by a United States court has begun a suit against these defendants does not raise a federal question in this action in which the principal relief demanded is the removal of the defendants for alleged misconduct and the appointment of another trustee in their place.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



[2] The United States receiver is not a party to this action and no relief is demanded against him. The only defendants are the two persons whom the plaintiff seeks to remove as trustees. I am not convinced by the defendants' argument, but in the most favorable view which can be taken of their contention, it must be conceded that the question is involved in doubt and that this doubt should be resolved in favor of a court which unquestionably has jurisdiction.

The lack of jurisdiction can be raised at any stage of the litigation and it is for the interest of both parties that after their controversy has proceeded to trial the action shall not be thrown out of court and the labor, perhaps of years, be rendered nugatory.

Motion granted.

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M. T. MOLLISON CO. v. O'BRIEN et al.

(Circuit Court, D. Connecticut. May 11, 1911.)

No. 767.

1. CONTRACTS (§ 332\*)—BREACH—PLEADING.

A complaint charging that plaintiff and defendants contracted that plaintiff should do certain work, for which it was to receive a specified price, and was to do certain other work for a reasonable compensation, that plaintiff performed all the agreements on its part to be performed, so far as it was possible to perform them, and was ready and willing to perform all its agreements under the contract, but was prevented by the defendants without just reason, who by so doing breached the contract, stated a cause of action.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.\*]

2. ACTION (§ 38\*)—JOINDER—TORT AND CONTRACT.

Where a complaint for breach of contract alleged that plaintiff was to furnish labor, materials, tools, and appliances in the construction of a certain building at agreed and reasonable prices, and that after plaintiff had performed a part of the work defendants broke the contract by preventing plaintiff from proceeding without just reason, and converted to his own use plaintiff's materials and appliances, the complaint was not demurrable because of joinder of a cause of action for breach of contract and for tort in a single count.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.\*]

At Law. Action by M. T. Mollison Company against Dennis O'Brien and others. On demurrer by defendant O'Brien to the complaint. Overruled.

G. B. Carlson, for plaintiff.

F. D. Haines, for defendant Wadsworth.

W. U. Pearne, for defendant O'Brien.

PLATT, District Judge. The complaint in this action is almost as voluminous as the moral law; but, after digestion, the issues are fairly simple.

The causes of demurrer are not made as specific as they ought to be, and might be disposed of on that ground; but such action would

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

probably lead to amendments, and it may be better, if I can understand the situation from the arguments, to decide them on the merits.

The most serious ground of criticism is that the action is prematurely brought, and that the decision of any issues which can now be framed would embarrass later causes of action which might result favorably to the demurrant.

[1] The complaint, in a general way, shows that the plaintiff and defendants entered into a contract, set forth as Exhibit A, under which certain work was performed by the plaintiff, for which he was to receive compensation at a price specified, and for certain things to be done a reasonable compensation; that the plaintiff performed all the agreements on its part to be performed, so far as it was possible to perform them; that it was ready and willing to perform all its agreements under the contract, but was prevented by the defendants without just reason, who by so doing breached their contract. This seems to be the statement of a good cause of action.

[2] Another criticism is that the complaint joins causes of action on contract and tort in one count. The complaint sets forth that under the contract plaintiff was to furnish labor, materials, tools, and appliances in the construction of a certain building at agreed and reasonable prices, and that after plaintiff had gone part way, and done what it could, the defendants broke the contract by preventing, without just reason, the plaintiff from going on, and converted to its own use plaintiff's materials and appliances. That is good pleading under our practice act as construed by our highest state court.

As to the criticism presented in the last cause of demurrer, that the complaint leaves it uncertain whether it is intended to hold defendants jointly liable, or to hold one or both of defendants separately, it is understood that the plaintiff expects to drop Wadsworth, which will leave the defendants free from doubt in that respect.

Let the demurrer be overruled. Plaintiff should then drop Wadsworth, and defendant O'Brien should proceed in the usual way.

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#### In re URZUA.

(Circuit Court, S. D. New York. June 20, 1911.)

**1. EXTRADITION (§ 14\*)—REQUISITION—CERTIFIED COPY—FAILURE TO PRODUCE—CURING ERROR.**

Failure to produce a certified copy of a requisition from a foreign country before the commissioner in extradition proceedings was cured, where a properly certified copy of the requisition on file in the office of the Secretary of State was submitted to the court at the hearing of a writ of habeas corpus.

[Ed. Note.—For other cases, see Extradition, Dec. Dig. § 14.\*]

**2. HABEAS CORPUS (§ 112\*)—DISMISSAL—ORDER—CAPTION.**

It was no objection to an order dismissing a writ of habeas corpus that it was entitled in the Circuit Court of the Southern District of New York, without naming any particular term in the caption; the court being always open to issue and dispose of such writs.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 101; Dec. Dig. § 112.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. EXTRADITION (§ 14\*)—WARRANT OF ARREST—PROOF.**

Where, in extradition proceedings on a requisition from Mexico, depositions, properly authenticated, stated that sufficient evidence having been forthcoming to proceed against petitioner as the presumed slayer of R. in accordance with specified articles of the Code of Penal Procedure, that the order be issued from headquarters, signed, and affirmed, etc., and that on the same day with the above decree the order of arrest was issued in accordance with the provisions of the decree duly signed, there was sufficient proof of the issuance of a warrant of arrest to sustain the proceedings.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 16; Dec. Dig. § 14.\*]

**4. EXTRADITION (§ 14\*)—COMMISSION OF OFFENSE—EVIDENCE.**

Where, in extradition proceedings for murder, the evidence, though circumstantial, was so strong that, if produced before a committing magistrate in the state where petitioner was arrested and applied for habeas corpus, as proof of an assassination committed there, it would have been the commissioner's duty to hold accused to await subsequent proceedings, it was sufficient to sustain an order for his return.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 16; Dec. Dig. § 14.\*]

In the matter of application for extradition of Roberto Urzua, alias Deinhart. Habeas corpus and certiorari to review the action of the United States commissioner in holding petitioner for extradition to Mexico on charge of murder. Finding of commissioner affirmed, and habeas corpus dismissed.

See, also, *Ex parte Dinehart*, 188 Fed. 858.

Henry A. Wise, U. S. Atty.

Richard Krause, for petitioner.

Edward L. Tinker, for Mexican Consul.

LACOMBE, Circuit Judge. [1] The first point raised is that there was not produced before the commissioner a certified copy of the requisition from the republic of Mexico which is on file in the office of the Secretary of State. It is not necessary to discuss the effect of the letter of the Mexican ambassador, which was submitted as proof of the making of the requisition, because a copy of the original document, duly certified by the State Department, has been submitted to this court. The objection is technical merely, and the production here of the proper document sufficiently cures it.

[2] 2. The objection that an earlier proceeding by habeas corpus had not terminated is not well taken. The order dismissing the writ was entitled in the Circuit Court of the Southern District of New York, and is manifestly a court order. It was not necessary to name any particular term in the caption. For the purposes of issuing and disposing of writs of habeas corpus the court is always open.

[3] 3. As to issuing of a warrant of arrest as a perquisite to a requisition, it is not necessary to discuss section 5270 of the Revised Statutes (U. S. Comp. St. 1901, p. 3591), nor *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130. The depositions from Mexico, properly authenticated, state that:

"Sufficient evidence having been forthcoming to proceed against Roberto Urzua as the presumed slayer of Jose Ruesga, in accordance with articles 244,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

245, and 246, subsec. 4, of the Code of Penal Procedure, let the order be issued from headquarters. The judge of the Third criminal district so decrees.

"[Signed] Francisco S. Palafox.  
"C. Gonzalez Madrid.

"Affirmed by the Public Minister.

"[Signed] Jose A. Aguyo.  
"C. Gonzalez Madrid.

"On the same day with the above decree the order of arrest was issued in accordance with the provisions of that decree.

"[Signed] Gonzalez Madrid."

This was sufficient proof of the issuance of a warrant of arrest. The days when federal courts were astute to defeat requisitions, where the evidence indicated quite clearly that an extraditable offense had been committed, on highly technical grounds, have long since passed, and the earlier authorities on the procedure in extradition are not as persuasive as they once were.

4. There is no force in the contention that the requisition charges petitioner, not with murder, but with homicide. Reference to the treaty, whose clauses are printed in parallel columns in English and Spanish, shows that the word "homocidio" was considered by the two governments as the equivalent of "murder," including among other crimes "asesinato," or "assassination." The proofs show that it is that variety of "homocidio" which is known as "asesinato" with which petitioner is charged.

[4] 5. It is unnecessary to discuss the evidence. Although circumstantial, it is so strong that, were it produced before a committing magistrate in this state as proof of an assassination committed here, it would be his duty to hold the accused by imprisonment or under bail to await subsequent proceedings. Ex parte Glaser, 176 Fed. 702, 100 C. C. A. 254.

The findings of the United States commissioner are affirmed, and the writ of habeas corpus is dismissed.

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#### UNITED STATES v. ONE STRADIVARIUS VIOLIN.

(District Court, S. D. New York. May 8, 1911.)

#### CUSTOMS DUTIES (§ 133\*)—WRONGFUL IMPORTATION—FORFEITURE—LIMITATION—"CONCEALMENT."

H., in January 1906, purchased a violin in London, to be delivered in New York or Boston free of all expense. It was delivered shortly thereafter without duty being paid thereon. H. thereafter habitually kept it in his drawing-room where it was used, displayed and admired by various artists at Sunday afternoon concerts held by H. It was never absent but always present in the house of H., though the revenue officers acquired no information concerning its wrongful importation until July, 1910. *Held*, that such lack of information by government officers, and the fact that H. knew or had reason to believe the instrument had been imported without paying duty, did not constitute "concealment" so as to bar limitations prescribed by Act Cong. June 22, 1874, c. 391, § 22, 18 Stat. 190 (U. S. Comp. St. 1901, p. 2023), requiring an action to forfeit merchandise unlawfully imported, within three years, provided that the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

time of the absence from the United States or concealment of property shall not be a part of the period of limitation.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 133.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

Information by the United States against one Stradivarius violin. On claimant's demurrer to information. Sustained.

Henry A. Wise, U. S. Atty., and Addison S. Pratt and Carl E. Whitney, Asst. U. S. Attys.

Parsons, Closson & McIlvaine (H. B. Closson, of counsel), for claimants.

HOLT, District Judge. This is an information filed to obtain the forfeiture of a violin on the ground that it was imported into this country without payment of the duty. The violin was made by the great violin maker Antonio Stradivari early in the eighteenth century. It was at one time owned by Kiesewetter, a celebrated player, and is known as the Kiesewetter Stradivarius. It was purchased in January, 1906, by Mr. Henry O. Havemeyer from George Hart, of Hart & Son, violin dealers in London, for £1,550, to be delivered in New York or Boston, free of all expense whatever. The collector, having received information about July, 1910, that the violin had been brought into this country without payment of duty, seized the violin as forfeited upon that ground, in August, 1910. The substantial question in this case is whether the suit is barred by the statute of limitations. It is conceded by the counsel in the case that section 22 of the act of June 22, 1874, c. 391, 18 Stat. 190 (U. S. Comp. St. 1901, p. 2023), is the statute which applies. That statute is as follows:

"That no suit or action to recover any pecuniary penalty or forfeiture to property accruing under the Customs Revenue Laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued; provided, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation."

This action was not commenced within three years of the time the penalty of forfeiture accrued, and the sole question, therefore, in this case is whether there was any concealment or absence of the property within the meaning of the act, which would prevent the application of the statute. The government claims that there is evidence tending to show that Mr. Havemeyer knew or had reason to believe that the violin was imported without the payment of duty. I think the evidence is insufficient to establish such claim; but the question is immaterial, because, if the defense of the statute of limitations is valid, it is immaterial whether he knew or suspected that the duty had not been paid.

The evidence shows that the violin in question is one of unusual celebrity; that after Mr. Havemeyer purchased it he kept it habitually in his drawing-room; that he was accustomed to give musical

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

parties at his residence on Sunday afternoons, at which large numbers of persons were usually present; that on such occasions the violin was frequently examined and was generally an object of interest to musicians as a famous specimen of a great violin maker's art. It was on one occasion played on at a public concert, and it was habitually played on by different artists at Mr. Havemeyer's Sunday afternoon musical parties. Not only is there no evidence of any concealment or absence of the property, but the evidence shows that it was always kept in Mr. Havemeyer's drawing-room, and was shown to and known by musicians and all people interested in music, to an unusual extent.

Counsel for the government argues that, as the collector did not know that it had been imported without the payment of duty until the summer of 1910, it was concealed during that period within the meaning of the statute. But it seems to me that this suggestion is entirely untenable. This violin was never absent; it was always present at the owner's house. It was never concealed. A concealment of property implies some active intention on the part of somebody to secrete it. If the government's contention in this case is sound, any purchaser of property which had been imported, having no knowledge or ground for suspicion that there had been any violation of the customs laws in its importation, would be liable to have the property seized 20 or 30 years after its purchase. I think that the statute of limitations is a complete bar to this suit, and I direct a verdict for the claimants, dismissing the information on the merits.

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KAUFMAN v. I. RHEINSTROM SONS CO.

(Circuit Court, S. D. New York. January 4, 1911.)

REMOVAL OF CAUSES (§ 72\*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Under the federal statute authorizing removal of a case involving an amount which exceeds \$2,000, a suit involving exactly \$2,000 is not removable.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 72.\*]

Action by Henry F. Kaufman against I. Rheinstrom Sons Company. Motion to remand. Granted.

Nathan G. Goldberger, for plaintiff.

Harry M. Lewy, for defendant.

COXE, Circuit Judge. The question here involved is an exceedingly simple one. The federal statute provides that a suit may be removed to this court when the amount involved exceeds \$2,000. The amount here involved is exactly \$2,000. Such a suit cannot be removed to this court for the obvious reason that the amount does not exceed (is not more than) \$2,000. To assert that \$2,000 is more than \$2,000 is an absurdity.

The motion to remand is granted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## WILSON COAL CO. v. UNITED STATES et al. (2 cases).

(Circuit Court of Appeals, Ninth Circuit. July 3, 1911.)

Nos. 1,935, 1,936.

**1. PUBLIC LANDS (§ 120\*)—SUIT BY UNITED STATES FOR CANCELLATION OF PATENTS—FRAUDULENT ENTRY OF COAL LANDS.**

Where a number of persons joined in a conspiracy to obtain title for the benefit of themselves as an association to public coal lands in excess of the quantity allowed by law, by means of individual entries, and united with others in forming a corporation to which it was agreed the title should be conveyed by the entrymen when obtained from the government, the transaction was not purged of its fraudulent character by the fact that, after using the funds of the corporation to pay for the lands, the entrymen repudiated the agreement and retained the title in themselves, and the United States may maintain a suit to cancel the patents for such lands.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.\*]

**2. PUBLIC LANDS (§ 120\*)—SUIT BY UNITED STATES FOR CANCELLATION OF PATENTS—DEFENSES—BONA FIDE PURCHASER.**

Where one who has notice of the infirmity of his own title to land obtained from the government unites with others to form a corporation and subscribes for nearly all of the stock, conveying the land in payment of his subscription, the corporation is affected with notice of the circumstances impairing the title and cannot claim protection against a suit for cancellation of the patents as a bona fide purchaser without notice.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.\*]

Bona fide purchasers of public lands, see note to *United States v. Detroit Timber & Lumber Co.*, 67 C. C. A. 13.]

**3. PUBLIC LANDS (§ 120\*)—SUIT BY UNITED STATES FOR CANCELLATION OF PATENTS—DEFENSES BY CORPORATION.**

A corporation, which has taken land obtained by entry from the United States with notice of fraud in its acquisition, cannot defend a suit by the government for cancellation of the patents by showing that stockholders purchased its stock in good faith and in ignorance of the defect in the title to the land.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.\*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Suit in equity by the United States against the Wilson Coal Company, Watson Allen and Jane Doe Allen, his wife, Helen Pack Wilson, and the Sterling Coal Company. Same against the Wilson Coal Company, Watson Allen and Jane Doe Allen, his wife, Minn Marie Wilson, Virgil R. Wilson and Malvina Benton Wilson, his wife, Helen Pack Wilson, Sterling Coal Company, and Medardo Garcia and Charles McGinni. Decrees for complainant, and defendant Wilson Coal Company brings error. Affirmed.

In February, 1905, the United States brought two suits for the purpose of setting aside and canceling two patents for coal lands, one issued to Helen Pack Wilson and the other two to Virgil R. Wilson. The facts in the case, as stipulated by the parties to the appeal, are substantially the following: In February and March, 1901, filings were made by Helen Pack Wilson, Katie Roberts Wilson, Minn Marie Wilson, James R. Winston, and Solomon Lauridsen on certain public coal lands situate in Lewis county, Wash. In making their declaratory statements and in doing the assessment work on said lands,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
188 F.—35

these persons acted in concert for the purpose of acquiring for themselves as an association 1,040 acres of said coal lands. R. A. Wilson was the author of the scheme. Helen Pack Wilson and Minn Marie Wilson were his daughters. Neither R. A. Wilson nor any of his associates had sufficient means to make payment for the land at the Land Office, or to provide for the development work. For that purpose, R. A. Wilson induced P. C. Richardson to advance \$8,300 and organized a company, known as the Sterling Coal Company, in which the title of the coal lands was to vest after issuance of the patents therefor. Helen Pack Wilson and her father defrauded the Sterling Coal Company of all the money in the treasury, and with \$3,200 thereof Helen Pack Wilson paid for her coal claim, and the deed which she had previous to her entry executed and delivered conveying the land to the Sterling Coal Company, afterwards coming into her possession, was destroyed. Virgil Wilson was to make an entry on the southwest quarter of section 10, and turn the same over to the Sterling Coal Company or to R. A. Wilson and his associates for a consideration of \$500. His claim was paid for by \$3,200 of money which had been so placed in the treasury of the Sterling Coal Company, and on the day of making his final proof he deeded the property to Minn Marie Wilson. In the meantime the officers of the Sterling Coal Company endeavored to recover the money that had been thus diverted from the treasury, and brought a civil action for that purpose. Patent was issued to Helen Pack Wilson on June 26, 1903, and a patent was issued to Virgil R. Wilson on September 26, 1902. Neither of the patentees ever conveyed to the Sterling Coal Company the title so acquired. On September 15, 1903, the Sterling Coal Company brought a suit in equity against the patentees and the holders thereunder, to obtain a conveyance of the lands to the Sterling Coal Company; but the bill was dismissed for want of equity on the ground that the plaintiff was party to a fraudulent scheme to obtain land of the United States. The title which Virgil R. Wilson conveyed to Minn Marie Wilson thereafter was conveyed to Helen Pack Wilson so that early in the year 1904 title to both claims was vested in her. Upon the issues and the testimony the court found that the patents were obtained as the result of fraudulent conspiracy made and carried out with the intent to evade the provisions of the statutes of the United States and to obtain title to coal lands contrary to law, and ordered that the patents be canceled and set aside.

J. B. Bridges, James B. Murphy, Theo. B. Bruener, and Murphy & Winders, for plaintiff in error.

Elmer E. Todd, U. S. Atty., and W. G. McLaren, Asst. U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is contended that the evidence in the case contains no proof of fraud against the government by either Helen Pack Wilson or Virgil R. Wilson; that, although these persons were involved in the unlawful conspiracy and entered into the scheme to obtain these lands in violation of the law, yet at the last moment they abandoned the scheme, repudiated their co-conspirators, and entered the land and paid for the same for their own use and benefit. And it is urged that, at the time when this was done, there is no evidence that the entrymen were actuated by unlawful motives, and that the government was not defrauded inasmuch as the entries were not made for the use and benefit of the Sterling Coal Company, but solely for the use and benefit of the entrymen. The bill alleges, and the evidence proves, a conspiracy to obtain for an association coal lands in excess of the amount permitted by law, an agreement between all the entrymen on the one part, and R. A. Wilson and George D. Wilson on the other, whereby the



latter were to have an interest in the lands when acquired and the right to require that all the lands or an interest therein be conveyed to such person or corporation as might be induced to furnish the purchase price therefor. In carrying out this unlawful agreement, Virgil Wilson promptly conveyed his land to Minn Marie Wilson. The stipulation as to the facts contains the following:

"These several persons in making their declaratory statements and in doing the assessment work in said lands all acted in concert for the purpose of acquiring for themselves as an association said 1,040 acres of coal lands, and R. A. Wilson was their joint representative and the author of the scheme to acquire these coal lands."

The scheme thus admittedly had its inception in fraud. At what point in the proceedings was the transaction purged of the fraud? It was not purged of fraud by the fact that the Sterling Coal Company was unable to recover from the entrymen money which the latter had fraudulently diverted for the purchase of the lands, nor was it relieved of its fraudulent character by the fact that the government received for the lands the purchase price at which all coal lands are offered for sale. The government does not offer its coal lands for the purpose of selling them for money, but for the purpose of administering a trust, and carrying out its policy for the benefit of its citizens. The restrictions in the statutes which provide for the sale of the coal lands of the United States are for the purpose of preventing monopolies in such lands. Undoubtedly those who acquire coal lands in pursuance of the statute and obtain patents therefor are at liberty thereafter to dispose of the same as they may see fit. But in the present case it is clear that the lands were not obtained in compliance with the statutes. *United States v. Trinidad Coal Company*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640; *United States v. Keitel*, 211 U. S. 370, 20 Sup. Ct. 123, 53 L. Ed. 230.

[2] It is earnestly contended that the title of the Wilson Coal Company should be protected as that of an innocent purchaser for value without notice. In August, 1904, one Kirkpatrick, with a view to investing in the lands, obtained from Helen Pack Wilson and Minn Marie Wilson an option, whereby it was provided that, upon his forming a corporation to take over the lands and obtaining bona fide subscriptions of stock of a certain amount thereto, the owners of the lands would convey the same to the corporation and receive certain amounts of capital stock in payment therefor. Kirkpatrick organized the corporation on September 21, 1904. The capital stock was \$65,000, consisting of 6,500 shares. Helen Pack Wilson subscribed for all the stock except four shares. She transferred the coal lands to the corporation for a stated consideration of \$64,960, and thereby paid her stock subscription. She was one of the incorporators of the company. She placed 2,500 shares of the capital stock in the treasury, to be the property of the corporation, and to be used to raise money to develop the mines and carry on the coal business. The stock book was not offered in evidence; but there was testimony to show that before the commencement of the suit one subscriber to stock paid \$1,000 for 100 shares, and another subscribed to 50 shares, for which he was to pay in work for the company, and that thereafter 200 shares were issued

in part payment for a road which was constructed for the company. But, at the time when the suit was brought, Helen Pack Wilson was the holder of more than nine-tenths of the stock. It has been held that where one who has notice of the infirmity of his own title to land unites with others to form a corporation to which he subscribes for nearly all of the stock, and to which corporation he conveys the land in payment of his subscription to stock, the corporation is affected with notice of the circumstances impairing the title, and cannot claim to be a bona fide purchaser without notice. 10 Cyc. 1059; Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456, 77 Am. Dec. 311; Simmons Creek Coal Company v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; California Consol. Min. Co. v. Manley, 10 Idaho, 786, 81 Pac. 50; McCaskill Co. v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590.

In Simmons Creek Coal Company v. Doran, where the incorporators subscribed to the stock, and through the incorporators the company claimed title, the record disclosing that one of them became its president, the court said:

"Associated together to carry forward a common enterprise, the knowledge or actual notice of all these corporators and the president was the knowledge or notice of the company, and, if constructive notice bound them, it bound the company."

Helen Pack Wilson, as we have seen, subscribed to all of the capital stock of the appellant company, leaving only four shares to be held by others in order to qualify them to act as directors, and she paid for her subscription by conveying the real estate. Kirkpatrick, who was an active promotor of the corporation, and who subsequently furnished money therefor and became a stockholder, had, before the corporation was formed and before investing money therein, actual notice of the suit of the Sterling Coal Company, and knew the ground on which that company sought the recovery of the land. He was also informed by Richardson, who had furnished the money which had been used for the purchase of the lands, of his claim of right in the premises. These facts, which came to his notice before he invested his money in the lands or in the corporation, were sufficient to put him upon notice to ascertain the nature and the disposition of the Sterling Company's suit. Had he pursued the inquiry, he would have learned that the suit was dismissed on the ground that the coal lands had been obtained as the result of a conspiracy to defraud the United States. Those who subscribed to the stock of the new corporation and paid for the same must be held to stand in no better position than the persons through whose original subscription their stock was subsequently acquired. Cases are cited which hold that knowledge possessed by an officer of a corporation who is selling property to the corporation is not imputed to the corporation itself; but they are cases where the officer does not act as the agent of the corporation in making the sale, but where the corporation is represented by others. Shareholders are not co-owners of the property in any sense. The title to the property rests in the legal entity called the corporation.

[3] It has never been held, so far as we know, and we think it not sustainable on principle, that a corporation which has taken property with notice of defects of title can defend an action to recover it by showing that its stockholders subscribed to or purchased their stock in good faith and in ignorance of the defect.

The decree is affirmed.

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KNICKERBOCKER TRUST CO. v. EVANS.

(Circuit Court of Appeals, First Circuit. May 19, 1911.)

Nos. 888-893.

1. CORPORATIONS (§ 77\*) — CONSTRUCTION OF SUBSCRIPTION — PRINCIPAL OR GUARANTOR.

To enable a silk company to take over certain other corporations and properties, a syndicate was formed to which the promoter and defendants were parties. Syndicate managers were appointed, and an underwriting agreement entered into, by which each of defendants agreed to pay a certain sum, for which he was to receive common and preferred stock from a new issue aggregating a larger amount at par value. The amount was to be paid in part in cash, a further amount on call of the managers, and payment of the remainder, with interest at 6 per cent., was to be deferred for one year or more. To raise the cash necessary to purchase the properties, it was provided that the managers and the promoter might borrow money and pledge the subscriptions and stock as collateral security therefor, provided that the loan should be for one year or more and the interest with which the subscribers should be chargeable should not exceed 6 per cent. per annum. The agreement further provided that "in the event that any such loan is made each of the subscribers whose subscription is pledged as security therefor, for himself only and not for any or either of the others hereby guarantees to the lender \* \* \* the payment of such proportion of the principal and interest of said loan as the unpaid part of his subscription hereto shall bear to the aggregate amount remaining due upon all of the subscriptions pledged; \* \* \* and each of the subscribers hereby agrees that the lender shall have the right to proceed against the subscribers severally at once upon default to recover the several sums hereby guaranteed as aforesaid \* \* \* without recourse to any other party and without recourse to any collateral security being first had or required." On the faith of such agreement, plaintiff lent a sum in excess of \$800,000, taking the note of the promoter and the underwriting agreement and certificates for the stock called for thereby as security. The note was for one year, but called for 6 per cent. interest payable semiannually, and provided that it should become due and payable at once in case the maker became bankrupt or made an assignment. *Held* that, notwithstanding the use of the term "guarantee" in the agreement, the subscribers were in a substantial sense the principals, for whose purposes the loan was made, and not guarantors, the syndicate managers and the promoters being their agents to procure it; that the rights of plaintiff against them were not based on the note, but were measured by the agreement, of whose terms plaintiff was fully advised, and its right to recover against them thereon was not, therefore, affected by the fact that there was some variance between the terms of the note and the agreement with respect to the rate of interest and for the maturity of the note in certain events before the expiration of a year; and that, defendants' obligation

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

being primary and not that of sureties or guarantors, no notice by plaintiff to them of the loan contract was necessary to bind them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210-212, 219-243; Dec. Dig. § 77.\*]

**2. APPEAL AND ERROR (§ 1053\*)—ADMISSION OF IMMATERIAL EVIDENCE—EFFECT OF WITHDRAWAL.**

The repeated admission, throughout a long trial, of evidence offered by the defendant tending to establish a conspiracy to which plaintiff was a party as alleged in the answer, although such issue had been previously eliminated from the case by the action taken on one count of the declaration, was error of so prejudicial a character that it was not cured by the withdrawal of such evidence from the jury at the close of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4173-4184; Dec. Dig. § 1053.\*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Actions at law by the Knickerbocker Trust Company against Maria A. Evans, executrix, against Stephen M. Weld, against Theophilus Parsons, against Albert S. Bigelow, against William M. Conant, and against Russell S. Codman. Judgment for defendant in each case, and plaintiff brings error. Reversed.

John G. Milburn and Julien T. Davies (Julien T. Davies, Jr., Harold McCollom, Davies, Stone & Auerbach, and Gaston, Snow & Saltonstall, on the brief), for plaintiff in error.

Felix Rackemann and H. E. Bolles (George L. Huntress, C. A. Tyler, O. D. Young, and Samuel C. Bennett, on the brief), for defendants in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. Here are six writs of error to review six judgments of the Circuit Court for the District of Massachusetts. The six cases were tried by jury, practically as one case, under the direction or order of the Circuit Court to that end. This course was adopted by the court on its own motion; but no question is raised against the validity or propriety of such trial. The issues are the same in all the cases, and the same considerations and principles apply to them all. The cases were argued together in this court as one case, and will be dealt with accordingly; and it is understood that consideration given to the questions involved, and the result reached as well, apply to each of the particular cases.

[1] The questions involved concern a situation in which the defendants became subscribers for certain shares of preferred and common stock in the American Silk Company, which was about to increase its capital stock and to take over certain other corporations and properties. In order to launch and carry through the business proposition, it was necessary to raise money with which to pay for the properties to be acquired and turned into the American Silk Company; and the necessary working cash capital was sought to be obtained through marketing for cash enough of the preferred and common stock to pay

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the properties which were to become assets of the enlarged silk company.

To advance the enterprise, there was created what is called an "underwriting agreement," which undertook to set out the purposes of the parties interested in the general enterprise, and to establish certain rights and limitations in respect to the interests of the parties concerned. The underwriting agreement contemplated and provided for syndicate managers as a necessary and important working instrumentality. The promoters, the Bennett Company, the subscribers, and the syndicate managers, so called, were parties to the agreement.

It will become important to inquire whether the relations of the stock subscribers to the general enterprise were such as to make them principals, and thus bring them within the rules of law which govern primary obligations, or whether their relations were those of guarantors with collateral and secondary liability; in other words, whether their contracts or agreements, to which we have alluded in a general way, had reference to what was in substance their own indebtedness, or original undertakings, or to a situation in which their agreements made them simply guarantors of the indebtedness of others.

Under the view which will be stated more fully later on, we look upon the solution of this question as in effect controlling; and this is so because, if the subscribers were guarantors merely, with only secondary liability in respect to the obligations of others, they are entitled, at least on certain phases of the questions, to invoke the rules *strictissimi juris*; while, if they were in substance and effect principals, and their obligations primary, their rights would be ascertained and established on less technical rules and considerations.

The first count of the amended declarations proceeded upon the idea of direct liability of the subscriber created by the underwriting agreement in favor of whoever should make the contemplated loan.

The second count of the amended declarations was upon an assignment to the lender of the rights created in behalf of the Bennett Company by the underwriting agreement.

The loan contemplated by the enterprise at its inception and provided for by the underwriting agreement, and which as claimed amounted to a sum in the neighborhood of \$850,000, was made by the Knickerbocker Trust Company, the plaintiff.

As the trial upon the first count terminated, there remained no question of fraud or bad faith on the part of the trust company which loaned the money; indeed, good faith was conceded, so far as concerned the trial upon the first count. There was, therefore, as a result of this, no question of fraud to be submitted to the jury under the first count, because the alleged fraud of the Bennett Company was inadmissible as a defense against the theory of direct liability from the subscribers to the trust company, acting in good faith.

At the conclusion of the plaintiff's case, or soon after, the court directed a verdict for the defendants on the first count, upon the ground that the loan was not such a loan as the defendants had agreed to guarantee. We understand the order directing the verdict was because of a supposed variance between the agreement of the sub-

scribers and the proofs in respect to the terms of the loan as disclosed by the loan agreement and the note; and it would seem from the record that, upon the question of variance, the court considered the agreement simply a guaranty, or "a conditional agreement to pay somebody else's debt."

The supposed variance upon which the defendants rely is based upon certain provisions in the agreement which are urged as safeguards inserted for the protection of the subscribers with respect to the contemplated time loan.

The agreement provided for the payment of 5 per cent. of the par value of the preferred stock at the time the agreement was executed, and 15 per cent. on call of the syndicate managers on five days' notice. It also provided that:

"Payment of the remainder with interest at 6 per cent. shall be deferred for one year or more from the date fixed for the payment of the 15 per cent. installment."

Again, and what is perhaps more pertinent, the following:

"Provided that each such loan shall be for the period of one year or more, and provided the interest with which the subscribers are chargeable shall not exceed the rate of 6 per cent. per annum."

A note dated April 11, 1907, for \$843,050, signed by the Bennett Company, and payable to the Knickerbocker Trust Company, with interest at the rate of 6 per cent. per annum, payable semiannually, which referred to certificates of preferred stock, amounting to \$1,211,500 par value, and common stock, amounting to \$605,800 par value, and the underwriting agreement, which were deposited as collateral security, was introduced in evidence in connection with the transactions in question. The note in terms was expressly made payable "one year after date," but it contains the following provision:

"In case the undersigned shall be adjudged a bankrupt, or shall file a voluntary petition in bankruptcy, or shall make a general assignment for the benefit of creditors, this note shall become forthwith due and payable."

The supposed variance is based upon the idea that interest, being payable semiannually, offends that part of the agreement which provides that interest shall not exceed the rate of 6 per cent. per annum; that the deduction of a commission upon the loan puts the amount actually received by the syndicate managers and the Bennett Company at variance with the amount of the note; the more substantial contention being that the note, though on one year's time, was at variance with the agreement of the subscribers, because, in a certain contingency, that of bankruptcy or general assignment, it might "become forthwith due and payable."

Apparently the learned judge at the trial looked at the question of variance as one not founded upon substance, but as one involving a technical departure, not to be looked upon with favor, because, as appears by the record, he characterized the point as one based upon "a very small hole," and, further remarking in respect to it, said:

"Therefore, without making the slightest reflection on any defendant, I say that, so far as this particular point is concerned, I have labored hard to see if I could reach a decision favorable to the plaintiff, because, so far as the case is now presented to me, the justice of the case is with the plaintiff."

Seemingly the question of variance was dealt with and disposed of upon such considerations and upon such strict rules as would doubtless properly apply to situations which involve the strict and ordinary relations of guarantor or surety to the obligations of another. If the defendants sustained the relationship of guarantors in the sense in which that legal obligation is ordinarily accepted, the variance, although technical, and one more of the letter than of the substance of the agreement, would perhaps be fatal to the trust company's right of recovery. It is true that the terms "guaranty" or "guarantees" were used in the provision of the agreement in respect to the obligations of the stock subscribers; and it is quite natural, in a jury trial, where questions of law are imperfectly presented, that it should have been accepted as properly describing their relations to the transactions involved; but upon a more complete presentation through the formal and elaborate arguments of counsel before us we are persuaded that, in substance and effect, the relationship of the subscribers to the enterprise was not at all that of either sureties or guarantors, because, aside from the fact that the Bennett Company was more actively promoting an enlargement of the American Silk Company through bringing about an increase of its capital stock and the taking over of outside properties, the subscribers were equally principals, or originals, in the joint enterprise of securing a certain business result. The very object of securing the advance subscription was to so far capitalize the enterprise, at its inception, as to make it feasible; and, by joining in the general scheme for the purpose of giving it financial aid and of making it successful, and for the purpose of securing certain ground-floor advantages, not using the expression offensively, the stock subscribers became principals in every substantial sense of becoming an original part of the enterprise. Without characterizing the enterprise as involving unwarrantable methods, by furnishing the necessary sinews the subscribers were securing to themselves certain pecuniary advantages, because, by thus joining in the enterprise and giving it aid, they became entitled to the profits on the stock of the silk company which would result through the increase of stock and the acquisition of new properties, and which would give them \$150 in fully paid stock for each \$90 actually paid in.

The exact status of the rights of the subscribers, in respect to the benefits which they were to realize by reason of thus originally becoming part of the enterprise and liable to the lender of necessary capital, is particularly established by the underwriting agreement in the words following:

"Each payment of forty-five thousand dollars (\$45,000) to be made by the subscriber shall entitle the subscriber to receive fifty thousand dollars (\$50,000) of the par value of preferred stock, and twenty-five thousand dollars (\$25,000) of the par value of common stock of the American Silk Company."

Although the words "agree and undertake" were also used in the agreement, the use of the words "guaranty" and "guarantee" was quite inapt as describing the actual substantial relations; because, disassociated from the actual situation, it would suggest, of course, the rule *strictissimi juris*; but, after all, we must look beyond the words

to the real character of the obligation. The word or the letter does not necessarily describe the true relation. This idea is aptly illustrated by Judge Sanborn in *Watson v. Merrill*, 136 Fed. 359, 362, 69 C. C. A. 185, 188 (69 L. R. A. 719), in a bankruptcy case, where it was a question whether the claim was one for rents or damages; it making a difference in respect to the provable status of the claim whether it was rent or damages, and where the learned judge said:

"The application to it of the title of a claim for damages for a breach of the lease neither changes its nature, nor makes it more provable than it would have been if its real character had been described by its name."

So it is that the true relations of these defendants to the transaction in question must be ascertained by reference to the situation of the property and the real character of the enterprise. This is important, because a slight variance may relieve one who stands as a guarantor of the debts or obligations of another, but a slight variance does not always operate to relieve a principal who undertakes to stipulate for performance of his own primary obligations.

In interpreting such words as "agrees," "undertakings," "guarantees," "guaranteed," and "guaranty," used in the agreement in connection with the undertakings of the subscribers, with a view of ascertaining whether they were mere guarantors or, in substance and effect, principals, reference must necessarily be had to the general purposes of the enterprise, its real character and scope, to the situation of the property, and to the real interests of the different parties concerned in carrying the enterprise forward to success.

To all substantial intents and purposes this was an enterprise in which the subscribers assumed to make good their undertaking, which was to furnish capital which the enterprise necessarily required in its incipient stages; and, while in their agreement they in a certain way safeguarded themselves in respect to time loans, they also said, by virtue of the same agreement, and for the purpose of making the functions of the syndicate managers operative, that:

"Each subscriber hereby assents to all the terms of this agreement, and agrees to be bound by any action of the syndicate managers taken under this agreement, and agrees to perform all his undertakings hereunder upon call of the syndicate managers to the full extent set opposite his signature."

Thus in broad language the subscribers conferred upon the syndicate manager agency authority in respect to the general purpose sought—that of effectuating the success of the enterprise.

It is quite true that the general authority and the agreement to be bound by any action of the syndicate managers should be read with reasonable regard for the words of limitation contained in the same instrument; but the scope of authority and limitations thereon are to be ascertained under general rules of construction as contradistinguished from rules of strict construction, because there was a general purpose to carry forward a business proposition, through the instrumentality of syndicate managers, in which the subscribers were principals in a very substantial sense, and in connection with which they were undertaking to make themselves directly liable to whoever should make a loan necessary to the success of the proposition; and



it is because they were thus promoting action in respect to an enterprise in which they were primarily interested, and in which they were primarily associated with the promoters, and others, in carrying it forward, that the obligation should be regarded as primary obligation governed by substantive rules of right, rather than as secondary obligation from which they may be relieved under rules of strict construction, or technical rules of right.

It is doubtless true, under such a situation as the one involved here, that action of the agents or the syndicate managers might be so far outside the authority and the purpose, especially where the lender had notice of the purpose of the enterprise and the limitations upon the authority of the agent, as to discharge the obligation altogether upon the ground that the departure was so complete as to operate in substantial derogation and fraud of the rights of the subscribers. But here the agreement necessarily contemplated certain details through syndicate manager instrumentality. The details of the loan were necessarily to be arranged by the syndicate managers; as, for instance, the agreement in no sense contemplated a note from the subscribers for the loan. The Bennett Company and the syndicate managers were in a broad sense agents of the subscribers, and in a very substantial sense they were principals with them—agents in a way in respect to the loan, and perhaps other phases, and jointly interested as principals in respect to the general purpose and scope of the enterprise, and sustaining such relations to the transactions, so far as they acted within the general purpose and scope, as would bind the subscribers in respect to the loan contemplated; but, in dealing with the Knickerbocker Trust Company, and so far as they acted in their own behalf in negotiating the loan, upon their own note, for the benefit of the subscribers and the general enterprise, and so far as they exceeded their authority under the terms of the written agreement, it would be a matter of adjustment between the Knickerbocker Company, the Bennett Company, and the syndicate managers. This is so because the original agreement which contemplated a loan and which created syndicate managers for the purpose, among other things, of negotiating a loan, in order to enable the vendors to realize upon the deferred stock payments of the subscribers, further provided that the subscription agreements of the subscribers should be delivered to the lender in pledge, etc.

The record shows that the subscription agreements, together with the stock, were deposited with the Knickerbocker Trust Company in connection with the loan transaction. It would thus result that they had full notice of all the limitations upon the authority of the Bennett Company and the syndicate managers.

In view of the whole situation, we think it entirely reasonable to say that the terms of the note create no rights in behalf of the trust company, or the lender, which could operate in any substantial way upon the rights of the subscribers in respect to time and interest and commissions, because the trust company, having notice of the limitations in this respect, would be charged with notice of the departures from the terms of the agreement, and, so far as those incidental and

technical departures are concerned, it is a matter entirely between the Bennett Company, the syndicate managers, and the trust company.

The subscribers are not bound by the particular terms of the note, neither are they bound by it as a note showing a cause of action and ground of recovery against them by the Knickerbocker Company. The note is only important in the case as a piece of evidence tending to show a loan which, in a substantial way, answered to the loan originally contemplated and described in the agreement. These suits are not at all based upon the note. Apparently in loaning, there was no purpose on the part of the trust company to look to the subscribers as a party to the loan note as such, because the loan agreement between the Knickerbocker Company and the Bennett Company expressly recognizes the limitations in respect to the loan and the stock subscriber safeguards of the original agreement, and the transaction proceeded upon the idea that the Bennett Company was the borrower, and that the loan was to be for one year upon the securities contemplated by the original agreement, "together with the collateral note signed by the borrower in the customary form used by the trust company."

This seems to be a transaction in which the note of the Bennett Company was collateral to the actual loan and real security. But, however that may be, if the terms of the note, in respect to semi-annual interest rather than annual, and in respect to the contingency of bankruptcy or general assignment, involved a departure from the terms of the original agreement, they in no way affected the rights of the subscribers, because the lender was chargeable with notice of all the terms of the agreement in respect to the liability of the subscribers, and knew the exact status of liability which the subscribers created in its behalf.

The note signed by the Bennett Company was a mere collateral incident of the loan and of the syndicate and Bennett Company agency. The act of executing the note with a semiannual interest and bankruptcy provision was an act quite likely beyond the letter of their authority, and would quite likely render them responsible, in a way, to the Knickerbocker Company; but we do not view it as an act in any way affecting the liability or the substantial rights of the stock subscribers. The note not only could not be set up by the Knickerbocker Company as a ground of recovery, but as the Knickerbocker Company knew not only the exact status of the liability of the subscribers, but the terms upon which the subscription agreements and the preferred and common stock could be pledged as security for the contemplated loan, the rights of the subscribers in respect to the collateral stock security could in no way be abridged or controlled by the terms of the note, and any possible questions as to the rights of the Knickerbocker Company as against the Bennett Company in respect to the bankruptcy provision in the note, or in respect to the semiannual interest provision, would relate to entirely immaterial issues so far as concerns the substantive rights of the stock subscribers under their subscription agreements which established the terms and conditions upon which the collateral security for the loan might be held.

Under the circumstances the note as a note, in and of itself, neither

creates the liability of the stock subscribers, nor limits nor enlarges their liability as created by the subscription agreements. The note neither controls the right of action under the agreements, nor the measure of damages based upon the right. The right is established by the agreement, and it runs direct from the subscribers as principals, in substance, to whoever should lend the necessary capital, and the lender's right of recovery is what the original agreement contemplates and declares, which is that:

"In the event that any such loan is made, each of the subscribers whose subscription is pledged as security therefor, for himself only and not for any or either of the others, hereby guarantees to the lender with whom this agreement shall be pledged and his or its assigns the payment of such a proportion of the principal and interest of said loan as the unpaid part of his subscription hereto shall bear to the aggregate amount remaining due upon all the subscriptions pledged as security for such loan; and each of the subscribers hereby agrees that the lender shall have the right to proceed against the subscribers severally at once upon default to recover the several sums hereby respectively guaranteed as aforesaid, until the full amount of the principal and interest of said loan, with costs, shall have been recovered by the lender, without recourse to any other party and without recourse to any collateral security being first had or required."

Under this agreement, running direct to the lender, the subscriber's liability is to pay his proportion of the actual loan, not to pay according to the terms of any collateral note given by the agent.

The lender, the plaintiff, in its declaration, refers to the date of the loan, and it is true that the date of the loan was the same as the date of the note; but, in no substantial or technical sense are these actions based upon the note, because the right upon which the declaration founds its cause of action is, after all, based upon the underwriting agreement, and, such being the foundation of the right, the recovery must have reference to it, and not to the note, which was incident to the loan, and which on its face may be little more than the measure of damages properly referable to the original undertaking; and it results, reasonably enough, that the recovery may be less than that claimed, and such as may be based upon the agreement, and such as the actual loan is shown to be, regardless of semiannual interest and commissions, items not contemplated by the agreement which established the liability.

The agreement of the stock subscriber was to pay his proportion of the actual loan, and it thus results, as stated, that the right of recovery is founded upon the agreement rather than upon the note, which, in a certain technical sense, may be said to be outside the agreement, and therefore beyond the authority of the agents. The right of recovery, created by the agreement, is in effect limited to the amount to become due under the agreement, and the right runs direct from the stock subscriber to the lender, and is not extended or affected, at all, by the unauthorized feature of the note given by the Bennett Company. The liability and the terms upon which the contemplated loan was to be made were both expressly described in the agreement which the lender holds as something establishing and limiting its rights.

If the note had been expressly declared upon as an instrument creating liability, which was something not done, other questions

might present themselves; but, as the declaration is based upon the original undertaking of the stock subscriber, the measure of recovery might be for a less sum than that stated in the note, which was only a piece of evidence, provided the stock subscribers' proportion of the principal of the actual loan and interest at 6 per cent. per annum is less than that indicated by the note, which contains a semiannual interest provision, and, as is claimed, certain commissions.

Thus, as is seen, the rights of the lender in respect to recovery are measured by the actual loan and interest at 6 per cent. per annum, rather than by the amount stated in the note, and the rights of the subscribers in respect to stock deposited as collateral security for the loan were fully protected by the terms of the agreement in respect to time, and it results, therefore, that the subscribers were in no way harmed by the unauthorized terms of the note given by the Bennett Company to the lender.

The declaration aptly sets out what the obligation of the subscriber was; that of agreeing or guaranteeing "to the lender with whom his said agreement should so be pledged, as aforesaid, the payment of such a proportion of the principal and interest of said loan as the unpaid part of his subscription under his said pledged agreement should bear to the aggregate amount remaining due upon all the subscriptions so pledged as security for such loan." It is also set out that each subscriber agreed that the lender should have the right to proceed against the subscribers severally at once. It is also alleged that the Knickerbocker Trust Company, acting upon the faith of a certificate of the syndicate managers and such agreements, loaned to the H. W. Bennett Company, for the period of one year, the sum of \$843,050, payable at the end of a year; that the loan was made in pursuance of the terms of the agreement dated April 11, 1907, and the sum sought in each case is each subscriber's unpaid part of his subscription, to be ascertained by calculations made as of April 11, 1907, upon the amount of \$843,050, and such unpaid part is what the plaintiff claims it is entitled to recover in each case; and it is alleged that a demand has been made, and that payment has not been made.

Thus it is seen that the plaintiff not at all, either in a substantial or technical sense, based its declaration upon the note as an instrument establishing a right, but upon the supposed right of action created by the original underwriting agreement, alleging that the loan was made in reliance upon such agreement and in pursuance of its terms.

Even if the H. W. Bennett Company's collateral note to the trust company, which is in evidence, includes items or elements not contemplated by the subscription agreement, and elements and items which the subscribers did not agree to stand for, we see no reason why the note should be accepted as affecting at all the trust company's just right, in the absence of bad faith, to recover each stock subscriber's contractual unpaid part of the actual money loan in reliance upon the underwriting agreement, although the same may be less than what would result from a calculation made upon the note.

It is quite true that some of the reasonings in respect to the rules which govern the essential question of liability would not apply to

situations of strict guaranty where the obligation is relieved upon grounds of technical and slight departure, and might not perhaps apply to supposed controversies between the stock subscribers and their agents. But accepting the obligation of the stock subscribers as primary, in respect to a loan made in good faith for their benefit, and upon their agreement, we think general and substantial principles of right render technical and harmless departures, by their agents, inadmissible as a ground of defense in their behalf and against a meritorious loan.

The trust company in good faith, so far as the record shows, let its money go out for the use of the stock subscribers, who have received its benefits, and have in no way been injured by the acts of their agents in respect to details and technical departures from the letter of authority; and, having in no way suffered, the trust company should not suffer through an application of strict rules of construction in order to make the technical and harmless departure of the subscribers' own agents operate to defeat the restoration of a meritorious loan.

Instead of being guarantors for the indebtedness of another, the subscribers as principals, in substance, made the Bennett Company and the syndicate managers their agents to carry forward an enterprise with which they had embarked; and, especially so far as concerns money loans necessary to advance their own interests, it results that they are not entitled to invoke strict rules of variance, but are bound by such acts of their agents, at least so far as they are not expressly limited and so far as they operate in accordance with the general purposes and in respect to transactions necessary to accomplish the general result contemplated.

Judge Putnam, speaking for this court in *Fullerton v. Bigelow*, 177 Fed. 359, 362, 101 C. C. A. 445, 448, in respect to a trust which required that property should be purchased "at the lowest figure obtainable at public sale," said that the phraseology was so specific as to entitle the principal to have the bid at the lowest figure obtainable at a public sale, but, as an addendum substantially changed the nature and the characteristics of the requirement in respect to public sale as the test of authority, that the remaining obligation was to proceed in a prudent manner to secure an arrangement such as might ordinarily have been accomplished.

It has been said that the *ultra vires* doctrine, as a strict rule against contracts, is generally looked upon with disfavor by the courts of this country; but it does not seem necessary to invoke any such extreme view in respect to these cases, because the situation here is one where the general scheme was intrusted to syndicate managers; and, in the event of success, the principals would reap certain pecuniary advantages; and the pecuniary advantages were dependent upon the success of the enterprise in which they had embarked; and we think the general authority of the syndicate managers and the Bennett Company was such that it was within the reasonable and necessary scope of their power to negotiate a loan accompanied with collateral upon the express one year's time stipulated, and that it was reasonable for

the agents in their own right though not within their express authority, to give their own note with a bankruptcy contingency, because, while the note was not the foundation of the loan, it was a necessary incident as between the syndicate managers, the Bennett Company, and the lender, and it was not unreasonable because it was a contingency which in no way would operate to abridge the rights of the stock subscribers.

The Bennett Company and the syndicate managers had their own interests to advance in connection with the enterprise, as well as the interests of the stock subscribers, and much depended upon negotiating the necessary loan and capitalizing the enterprise, and doubtless they might well enough, in their own right, incur personal liability as to necessary incidental matters, and in doing this, so far as the particular departures disclosed here are concerned, the status of right between the stock subscribers and the lender under the underwriting agreement was in no way changed.

We do not conceive it to be at all necessary or material to consider whether these departures from what might perhaps be called the strict letter of authority would operate to relieve the liability of a guarantor; because, as we have already said, the relationship of these defendants to the loan was not that of guarantors of the debt of another, but in substance that of parties who had guaranteed as principals to see that their own undertakings are carried out; and, if their agents or instrumentalities varied a little in respect to things not of harmful substance, they are not relieved.

The authorities cited by the defendants in error to sustain the proposition of fatal variance between the authority to negotiate a loan and the terms of the loan actually negotiated, with few exceptions, if any, relate to situations in which the guarantor or suretyship obligation was collateral and secondary to the debt or undertakings of others in respect to their own affairs, where the rules strictissimi juris apply, and have very little, if any, pertinent bearing upon questions of primary and original obligation like that which exists on the part of the stock subscribers in the cases at bar.

Without going very far into the question of distinguishing the nature of the obligation in the cases relied upon by the defendants in error, from the nature of the obligation existing in the cases under consideration, we will refer to a few of them.

The Peru Plow Company Case (*Peru Plow & Wheel Co. v. Ward*, Kan. App. 6, 41 Pac. 64), which is relied upon by the defendant as a case almost exactly in point to the one at bar, was, in fact, a case of strict surety where the party sought to be held made his agreement in respect to the debt and business of another; and in *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731, though the facts are not very clearly stated, it would seem that the guarantor was not in any broad and substantial sense the principal. *Flynn, Executor, v. Mudd & Hughes*, 27 Ill. 323, was a case about a negotiable promissory note, in which the surety was in no sense the principal debtor; and in *Foederer v. Moors*, 91 Fed. 476, 33 C. C. A. 641, the parties sought to be charged were not

principals in the sense of having created original liability. In *Miller v. Stewart*, 9 Wheat. 681, 6 L. Ed. 189, there was a contract of surety for the faithful performance of the duties of an officer, where, of course, the obligation was not original; and in *Guardian Trust Company v. Peabody*, with a divided court (122 App. Div. 648, 107 N. Y. Supp. 515), the undertaking was not original, in the sense of creating direct liability to a lender based upon the guarantors' unpaid balance of their own existing indebtedness, but a guaranty liability to be subsequently created by notes nominated in the agreement, and of a kind particularly described and required by the agreement, where the party, in whose favor the guaranty was made, participated in the act of deviation from the substantial and particular requirements of the guaranty. The case of *Lynn Safe Deposit & Trust Company v. Andrews*, 180 Mass. 527, 62 N. E. 1061, was one of strict guaranty of the debt of another under conditions which would make the liability of the guarantor secondary and one governed by strict rules of law; and *Walrath v. Thompson*, 6 Hill, 540, was a guaranty of the payment of a debt of another in which the guarantor was not interested as a primary party to the obligation.

We see no occasion to further pursue cases involving guaranties where the obligation is secondary, because if the obligation of the subscribers in the case at bar was primary they have no pertinent bearing.

As we view the obligation of the defendant subscribers as original, and in substance upon their own existing indebtedness or undertaking, and as running directly from themselves to the lender, rather than a guaranty of the agreements and undertakings of the Bennett Company, we do not perceive that there are any questions in respect to notice from the lender to the subscribers such as is required in situations of suretyship and guaranty liabilities with respect to negotiable notes of others, and perhaps in other situations of collateral and secondary liability.

After the trial of the cases under consideration had proceeded several days, upon both counts, upon motion, which the Circuit Court treated as in substance made, a verdict was directed for the defendants on the first count. The Circuit Court apparently viewed the situation and referred to it as one in which the Knickerbocker Company "meant to loan that money under the terms of the underwriting agreement," and as one not showing anything contradictory between the loan agreement and the note, but one in which inconsistency "lies between the loan agreement and the underwriting agreement," and accepting the strict rules of law, which govern in respect to guarantors and sureties where a lender seeks to hold them under "a conditional agreement to pay somebody else's debt," upon forcible observations which clearly indicate that the learned judge's sense of justice was strongly offended by the operation of strict rules upon the obligation in question, directed a verdict for the defendants on the first count, and the trial thereafter proceeded upon the second count alone.

As we hold that the liability of the stock subscribers was original, and a liability in respect to their own undertakings, and that so far

as variance exists between the loan agreement and the note on the one side, and the underwriting agreement upon the other, that it was a matter between the lender and the Bennett Company and the syndicate managers, in no way affecting the liability established by the underwriting agreement in which the obligation runs direct from the subscriber to the lender—and therefore a harmless variance so far as concerns the rights under the original undertaking—it results that the judgments below must be reversed.

In the defendant's brief filed in this court, the grounds of defense to the first count are formally set out as follows:

"(1) The defendants never guaranteed any specified loan, but agreed with the Bennett Company to guarantee a particular kind of loan to the Bennett Company if any such should be thereafter made, and that none such was made.

"(2) The condition of the offer of guarantee was that the loan should be for a year or more. The loan was in fact made for a year or less.

"(3) The agreements of the defendants were with the Bennett Company and were merely offers to guarantee which required acceptance by some lender, and notice of such acceptance, to complete any contract and establish any liability, and that there was neither acceptance of the offer as made, nor any notice of acceptance whatever, nor even attempt to notify."

Under the interpretation and construction given to the underwriting agreement, and under the view taken as to the principles and rules of law which govern the obligation of the subscribers, none of the grounds stated in the brief and nothing in the record discloses any defense to their liability; but it still remains that the answer sets up bad faith and conspiracy as a ground of defense.

It is true that after verdicts for the defendants had been directed upon the ground of variance, and after the trial had proceeded several days upon the second count, the question of the lender's bad faith was not understood to be longer an issue as against the Knickerbocker Company either under the first or the second count, and all questions of bad faith were withdrawn, as is shown by the following colloquy, which appears in the record:

"Plaintiff's Counsel: The Knickerbocker Trust Company is charged with being a party to a conspiracy.

"The Court: I don't understand that the Knickerbocker Trust Company is now charged with participation in fraud as an issue in this case; but, if counsel will be kind enough to say that is so, I don't think we need go any further.

"Defendant's Counsel: I think what we say is this: In view of the ruling of the court upon the first count, it is unnecessary for us, on the second count, to offer any evidence on that. I don't mean to say we have withdrawn what we stated. I don't understand that that allegation is legally involved upon the issue upon the second count.

"Plaintiff's Counsel: Then, I understand, there is no further claim, certainly, in this suit, at this time, that the Knickerbocker Trust Company was a party to any conspiracy?

"The Court: As the case now stands on the second count there is no such issue to be passed upon by the jury.

"Defendant's Counsel: I don't desire to be understood as retracting anything which I have charged in regard to the conspiracy. I don't understand that since the first count has dropped out that it is necessary for us to show any such thing as to the Knickerbocker Trust Company; the suit being now the suit of the Bennett and not of the Knickerbocker Trust Company.

"The Court. The issue of conspiracy, so far as the Knickerbocker Trust



Company is concerned, I don't understand the defendants now contend is an issue in this case.

"Plaintiff's Counsel: And the issue of any charge of fraud against the Knickerbocker Trust Company is not in issue at this time in this case. That is what they say.

"The Court: That is what I understand. I understand that as a fact it is not in issue in the present trial, which is proceeding solely under the second count."

Notwithstanding such withdrawal, as the rights of the parties under the first count were turned solely upon the ground of variance in the court below, and as the order directing the verdict was made at a stage of the trial before the defendants had closed their case, and as the withdrawal of the question of bad faith was under such qualifying conditions as to probably leave that question open to the defendants upon a subsequent trial under the first count, the situation, though the record as it now stands shows no defense, is not one which would warrant the direction of a general verdict for the plaintiff, and, while the judgments should be set aside, there should be leave for further proceedings in the Circuit Court not inconsistent with the theory of this opinion.

If the rights between the lender and the subscribers are finally established under the first count, upon a subsequent trial, in accordance with the theory of this opinion, the questions as to the former trial and verdicts upon the second count would become wholly immaterial, and we see no reason, upon that view, why all questions relating to the trial and the verdict upon that count might not be held in abeyance and unconsidered for the present at least.

If the obligation is primary, any trial upon the second count would be a mistrial and wholly immaterial, because no verdict based upon the kind of liability alleged in the second count could be made referable to and become the basis of a judgment against a liability which runs direct from the subscriber to the lender. So long, therefore, as our holding stands in respect to primary liability in these cases, no verdict for the defendant upon the second count could operate to defeat the plaintiff's primary right, and for that reason any subsequent trial upon that count, while the status of such liability remains, would be upon altogether immaterial and fictitious issues.

If the obligation is primary, as we have held, the only possible defense is fraud, with which the lender was tainted. In any trial upon such an issue the plaintiff would have as broad a scope in respect to questions of fraud as it could possibly have under the second count, and, if it should fail, it would have had one trial upon that issue, and it would therefore have no interest, and perhaps no right, to try the question over again under the second count; but if, upon a trial under the first count, the plaintiff should prevail upon the question of fact as to fraud, and fail upon the ground that as a matter of law and construction the liability was not primary, then it might become material to the plaintiff's rights to have a trial upon the second count.

Under the view which we hold as to the nature of the obligation, it would not be practical or consistent to try the first and second counts together, because the moment the trial judge should rule in

accordance with what we hold in respect to primary obligation, all questions under the second count would become immaterial, because in no way germane to that kind of liability.

If the defendants prevail in a trial of the issue of fraud under the first count, recourse to the verdict on the second count would not be required in order to establish their rights, and, if they should fail, a verdict upon the second count could not under any circumstance avail them as a defense to their primary liability. Thus under the view we take, as to the nature of the liability, it is quite inconceivable that the pending exceptions and the verdict in respect to the second count are at present material, or can become so, except in the event of the plaintiff's prevailing upon the issue of fraud in a trial upon the first count, and failing to establish its rights upon the ground that the liability of the subscribers was not primary, but that of guarantors. If this should result, the second count verdict would become material, and the plaintiff is therefore entitled to have pending exceptions in respect to that part of the trial considered and determined.

The exceptions taken in the course of the trial upon the second count have reference to the refusal of the court to instruct, and to its instructions; but the substantial prejudicial matter is the admission of improper evidence.

[2] At a very late stage of the trial it was determined that a large part of the evidence introduced to the jury was inadmissible, as far as the issue to be submitted to the jury was concerned, and the court undertook to withdraw it from the minds of the jury; and the question for us to determine is whether the withdrawal, under the particular circumstances of this case, must be accepted as being so far effective as to remove all prejudice and thereby render the trial a fair trial within the meaning of the law.

Much evidence was admitted, subject to exception, which, as we have said, was wholly immaterial; and the question is whether it can reasonably be accepted as harmless under the particular circumstances of the trial in question. So far as the evidence was supposed to have been prejudicial, it groups about the tenth paragraph of the defendants' answer, as follows:

"(10) That on or about the 1st day of December, 1906, in and about the city and state of New York, the plaintiff company, together with its then president, Charles T. Barney, and its then vice president or first vice president, Frederick L. Eldridge, together with Harry W. Bennett and one Matthew G. Collins (said Eldridge, Bennett, and Collins being the persons referred to in the agreement attached to plaintiff's declaration), for the purpose of making and obtaining for themselves secret and unlawful profits, and the obtaining of secret, unlawful, and fraudulent gains and advantages, conspired and arranged together for the formation and promotion of the American Silk Company, referred to in plaintiff's declaration; that said Barney was then the president of the Knickerbocker Trust Company, plaintiff; that said Eldridge was then its vice president, sometimes called its 'first vice president'; that said Harry W. Bennett was then carrying on business as a promoter under the name 'H. W. Bennett & Co.' with offices on Broad street in the city of New York; that said Collins was then interested as a stockholder and officer and otherwise in the York Silk Manufacturing Company (Pennsylvania corporation), and being the corporation of that name referred to in the agreement annexed as 'Exhibit A' in plaintiff's declaration; that said York Silk Manufacturing Company was at that time indebted to the said Knickerbocker Com-

pany, and had been so indebted on a demand note originally given in August, 1905, in the sum of \$495,000; that said H. W. Bennett & Co., the partnership above mentioned, was at the time and had for a long time theretofore been heavily indebted to the said Knickerbocker Trust Company, plaintiff, on account of or in connection with other large promotion schemes for corporate enterprises, in which the said plaintiff company and said Bennett & Company had co-operated; and that said Knickerbocker Company was also, or had also recently theretofore been, mortgagee of the said York Silk Manufacturing Company under a mortgage or deed of trust for \$500,000."

Other paragraphs in the answer relate to the details of the alleged fraudulent scheme referred to in the paragraph which we have quoted; and specifically to obtaining secret profits to be used for the advantage of the parties to the alleged conspiracy, including the Knickerbocker Trust Company; to the use of a certain alleged false prospectus; to an alleged fraudulent scheme through which Bennett should secure the subscriptions to the stock of the American Silk Company, which are the basis of the suits, and assign them to the Knickerbocker Trust Company at illegal rates of interest; and to an alleged purpose to form a sham corporation known as the H. W. Bennett Company for working out their dishonest intentions. The answer at great length describes the alleged fraudulent conspiracy between the parties, including the solicitors of the Knickerbocker Trust Company, as the active authority in the conspiracy and in directing and guiding all the details. The paragraph in respect to the solicitors in effect charges them with organizing the corporation without any honest intention of its being in good faith a corporation, or for any "purpose or object beyond the participation in the fraudulent plan and scheme herein set forth." By and large, the plaintiff corporation and its attorneys were pictured as being from the beginning in the conspiracy with Bennett, Collins, and Eldredge. The plaintiff corporation was charged with being a party to the conspiracy as a whole. The charges in this respect were very severe and of a prejudicial nature.

Under the severe characterizations of the allegations in respect to the misrepresentations of Bennett and Collins and Eldredge, and in respect to an alleged conspiracy, evidence was admitted as tending to show a step in the direction of conspiracy, upon the assumption that subsequent evidence would connect the Knickerbocker Trust Company with the conspiracy, and as having made the advances as a part of the program of the conspirators. Under the allegation of conspiracy it was doubtless legitimate for the court to admit the evidence, postponing final action in regard to it until a later stage of the trial; but, when the first count was withdrawn from the jury, the claim of conspiracy went with it, and from that time forward evidence of the character complained of should have been treated as altogether out of the case.

After the first count had been withdrawn, together with the allegation that the Knickerbocker Company was in a conspiracy as to the matters in question, and as the plaintiff in respect to the second count stood as an assignee of the rights of the Bennett Company under the underwriting agreement, the only issue, under that count, was whether Bennett, who controlled the subscriptions for stock, had obtained them by misrepresentations. Yet, notwithstanding the fact that the ex-

pressed views of the court were against it, the defendants insisted on introducing evidence on the issue of conspiracy.

The case was on trial from March 30th to April 17th. The ruling on the first count to which we have referred was very early in the trial; so early that, while only 40 printed pages of the record preceded it, 351 printed pages succeeded it. It is not proposed to deal specifically with the prejudicial effect of special instances of inadmissible evidence, but with the effect of the general whole under the circumstances of this particular trial. The record is permeated with prejudicial evidence objected to by the plaintiff, all tending to show close relations between the Knickerbocker Trust Company and the members of the syndicate which promoted the organization of the American Silk Company, of which Bennett, Collins, and Eldredge were members. The court again and again expressed its views that such testimony was not admissible, but concluded to admit it at the risk of the defendants, with a view of determining at the end of the trial whether or not he should strike it out. The defendants in substance admit this because they say:

"It is to be remembered that the answer set up the defenses, conspiracy and false representations.

"The evidence which the plaintiff now complains of was offered by the defendants in support of the charge of conspiracy. It is true that it was all rejected by the trial court at the close of the trial, but it must be apparent that when the several separate bits of this evidence were offered the trial court properly admitted them as being competent on the question of the conspiracy; that is, having some fair probative force and value in that direction.

"The court received the evidence of conspiracy *de bene* as appears in several places in the record."

The proposition that evidence of conspiracy might have been received by the trial court *de bene*, up to the time when the court ruled out the first count, affords no excuse for the persistent efforts by which it was brought before the jury after the first count was thus ruled out.

Among the expressions of the court as to this class of evidence is the following:

"I am going to allow defendant's counsel to put in pretty much everything they want, subject to the exceptions of plaintiff's counsel. That will protect the plaintiff, and I think we will save time."

This remark was made, as the record shows, in response to the plaintiff's strenuous objections.

Again:

"The Court: Yes. I do not believe that the evidence is material; but I have gone a great way in letting all this in, indicating to the jury that I might have occasion to rule it out later. I will admit it subject to your exception for the present, and the jury will bear in mind that I may have occasion to exclude a large part of this testimony from their consideration hereafter."

More positive expressions, however, are found in another part of the record, where the following colloquy is shown:

"The Court: When we come to the discussion of questions of law, the court may have some views.

"Plaintiff's Counsel: Yes, but in the meantime this great mass of testimony has got before this jury, and it is going to be very difficult, it seems to me,

for them, out of the enormous record, to pick out the small amount of testimony that really bears upon the actual issues of this case.

"The Court: I think there is much in your objection, and it may be that things will be let in which can't afterwards be excluded, and it will be so prejudicial as to deprive, practically deprive, the other side of any advantage they may get therefrom. But, at the same time, were I to undertake to consider each of these objections at the present time and rule upon them, it is clear the case would never end, and I think, on the whole, this is a safer proceeding. There are objections, and I don't desire to minimize their effect. I think, on the whole, this is the safer proceeding."

Single instances, or several instances, of wrongful admission, and a subsequent withdrawal of evidence, are often treated as harmless; but here there are many instances. They permeate the record; and while particular instances standing alone might be harmless, standing as a whole, as they did here, through the course of a long trial, they make such a mass of suggestion and evidence of intimacy between the plaintiff and its officers and Bennett that the situation must be accepted as necessarily and naturally imbuing the mind of the jury with hostile impressions quite impossible to eradicate. The plaintiff's position upon this phase of the case is stated as follows:

"Reversible error was committed by the learned trial court in permitting defendants' counsel to thrust before the jury a mass of evidence concerning the profits of Bennett and Collins, the subsequent history of the silk company, and of its constituent companies and Collins' part in their management, thus tending to discredit the plaintiff's assignor; and also in permitting defendants' counsel to prejudice the jury, directly, whether deliberately or not, against the Knickerbocker Trust Company by charges and insinuations of conspiracy sought to be drawn from immaterial evidence, all of which matters were in no way relevant to the issues upon the second count, and which charges and insinuations the defendants' counsel refused to retract before the jury."

The conclusion is irresistible that the mass of testimony shown by the record, which was wholly irrelevant after the court's ruling on the first count, must have prejudiced the jury beyond the possibility of cure through a general withdrawal.

It results that the judgments and the verdicts in all the cases should be set aside.

In each case the judgment will be:

The judgment of the Circuit Court is reversed; the verdict is set aside; the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; and the plaintiff in error recovers its costs of appeal.

## ALSOP v. CONWAY et al.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1911.)

No. 2,073.

**1. APPEAL AND ERROR (§ 323\*)—NECESSARY PARTIES—SEVERAL JUDGMENT ON DECREE.**

The rule which requires the parties to a judgment or decree to join in an appeal or writ of error or that their presence be dispensed with through summons and severance applies only to joint judgments or decrees, and a defendant against whom a several decree is entered, which does not affect his codefendants, may appeal from such portion of the decree without joining them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1800; Dec. Dig. § 323.\*]

**2. BANKS AND BANKING (§ 49\*)—DOUBLE LIABILITY OF STOCKHOLDERS—RIGHT TO ENFORCE—KENTUCKY STATUTE.**

Ky. St. § 616 (Russell's St. § 2256), authorizes the appointment of a receiver for an insolvent bank or corporation who shall, under the direction of the court, take possession of the "assets of every description" of such bank or corporation and collect or dispose of the debts due it and sell all of its property. Section 547 (section 2131) provides that stockholders in corporations "shall be liable to creditors" only for the unpaid part of their stock, "except stockholders in banks, trust companies \* \* \* shall be liable equally and ratably, and not one for the other, for all contracts and liabilities of such corporations to the extent of the amount of their stock at par value, in addition to the amount of such stock." *Held*, under the decisions of the Court of Appeals of the state, that the double liability of stockholders in a bank or trust company is not an asset of the corporation and cannot be enforced by a receiver appointed under section 616, but the right of action therefor remains in the creditors.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 49.\*]

**3. COURTS (§ 493\*)—CONFLICTING JURISDICTION—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.**

The appointment of a receiver for an insolvent trust company by a state court under Ky. St. § 616 (Russell's St. § 2256), to take possession of and administer the assets of the corporation, did not give such court jurisdiction over the enforcement of the double liability of the stockholders, imposed by statute, which right of action is in the creditors and not in the corporation, nor did a petition filed by the receiver asking instructions as to his duties in respect to the enforcement of such liability, to which the stockholders were not made parties, and on which no action was taken, deprive a federal court of jurisdiction to entertain a suit by creditors subsequently brought in that court to enforce such liability.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 493.\*]

Conflict of jurisdiction of federal courts with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

**4. BANKS AND BANKING (§ 49\*)—DOUBLE LIABILITY OF STOCKHOLDERS—ENFORCEMENT IN EQUITY.**

Under Ky. St. § 547 (Russell's St. § 2131), which makes stockholders in banks and trust companies liable for an amount equal to the par value of their stock "equally and ratably and not one for the other for all contracts and liabilities of such corporations," the amounts recovered on account of such double liability from the stockholders of an insolvent bank or trust company constitutes a trust fund to be ratably distributed among the creditors, and such liability is properly enforced by a suit in equity brought in behalf of all creditors against all stockholders, who also have a common interest in the ascertainment of the amount of stock, assets,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and indebtedness of the corporation, in which suit such questions can be determined and the fund collected and administered.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 49.\*]

**5. COURTS (§ 328\*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.**

In a suit in a federal court by creditors of an insolvent corporation in behalf of themselves and all other creditors to enforce the double liability of stockholders, in the absence of a demurrer the court did not lose jurisdiction because at the time of filing the bill no one of complainants had a matured claim amounting to \$2,000, nor because not all of the claims equalled that amount.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. § 328.\*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

**6. COURTS (§ 308\*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.**

In a suit in a federal court by creditors of an insolvent corporation to enforce the double liability of stockholders on behalf of all creditors, where jurisdiction was based on diversity of citizenship, the court was not ousted of jurisdiction because some of the creditors were citizens of the same state as defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. § 308.\*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

**7. CORPORATIONS (§ 243\*)—STOCKHOLDERS—ACTION TO ENFORCE STATUTORY LIABILITY—DEFENSES.**

A stockholder in a corporation, who retained his stock and received dividends thereon for more than two years and until insolvency proceedings against the corporation, cannot then rescind and avoid his statutory liability to creditors on the ground that he was induced to purchase the stock from the corporation by the fraud and misrepresentation of its officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 958; Dec. Dig. § 243.\*]

**8. BANKS AND BANKING (§ 49\*)—STOCKHOLDERS—ACTION TO ENFORCE STATUTORY LIABILITY—EVIDENCE OF OWNERSHIP.**

In a suit to charge defendant as a stockholder in an insolvent banking corporation with double liability under the statute, where it was shown that certificates of stock, issued in his name, were in his safety deposit box at the time of the failure, and that he had been credited on his bank book with two dividends thereon, the presumption is that he was the owner of such stock, and the burden rested on him to prove the contrary.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 49.\*]

Stockholders' liability to creditors in equity, see notes to *Rickerson Roller-Mill Co. v. Farrell Foundry & M. Co.*, 23 C. C. A. 315; *Scott v. Latimer*, 33 C. C. A. 23.]

**9. CORPORATIONS (§ 273\*)—STOCKHOLDERS—ACTION TO ENFORCE STATUTORY LIABILITY—INTEREST.**

On recovery in a suit to enforce the double liability of stockholders in an insolvent corporation, it was proper to allow interest from the commencement of the suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1165; Dec. Dig. § 273.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Suit in equity by John Conway, Amelia Simperts, E. L. Dupuy, and M. B. Dupuy against the Owensboro Savings Bank & Trust Company, T. A. Pedley, its receiver, J. N. Alsop, and others. Decree for complainants, and defendant Alsop appeals. Affirmed.

The appellees, four in number, all being citizens of states other than Kentucky, on behalf of themselves and all other creditors of the Owensboro Savings Bank & Trust Company (hereafter called the bank) who might choose to become parties to the suit and contribute to the expense thereof, filed their bill in the court below against the bank, T. A. Pedley, receiver of said bank, and a large number of individual holders of the capital stock of the same, including appellant (the defendants being all citizens of the state of Kentucky), for the purpose of enforcing against the individual defendants the so-called "double liability" imposed by the Kentucky Statutes upon stockholders in banks and trust companies organized under the laws of that state. The suit proceeded to final decree in favor of complainants. The appeal is from so much of the decree as required payment by appellant of the sum of \$9,000, being the face value of stock in the bank alleged to be owned by him, with interest thereon from the commencement of this suit. The material facts are these:

The Owensboro Savings Bank & Trust Company was organized with a capital stock of \$100,000. On December 9, 1905, its capital stock was increased to \$200,000, viz., 2,000 shares of \$100 each. On April 24, 1908, the bank having become insolvent, T. A. Pedley was appointed (and soon afterwards qualified) as receiver of the bank, by order of the circuit court for Davies county, Ky., by virtue of section 616 of the Kentucky Statutes (Russell's St. § 2256) which provides that:

"The Secretary of State, upon becoming satisfied that any bank or corporation has become insolvent, or that its capital has become, and is permitted to remain, impaired, or that it has violated any of the provisions of the law under which it was organized, may, with the approval of the Attorney General, apply to the circuit court, or judge thereof in vacation, of the county in which the bank or corporation is located, for the appointment of a receiver, who, under the direction of the court or judge, shall take possession of books, papers, and assets of every description, and all business of the bank or corporation, and collect all collectable debts and demands, and sell or compound, under the order of the court, all bad debts, and sell all the real and personal property of the bank or corporation, on such terms as the court may direct."

Section 547 of the Kentucky Statutes (Russell's St. § 2131) provides that:

"The stockholders of each corporation shall be liable to creditors for the full amount of the unpaid part of stock subscribed for by them, and no stockholder shall be liable because of being a stockholder, for any sum more than to the amount of the unpaid part of stock held by such stockholder of any company, except stockholders in banks, trust companies, guaranty companies, investment companies and insurance companies, shall be liable equally and ratably, and not one for the other, for all contracts and liabilities of such corporation to the extent of the amount of their stock at par value, in addition to the amount of such stock. \* \* \*

Section 595 (section 2184) provides that:

"The stockholders of each bank organized under this article shall be individually responsible, equally and ratably, and not one for the other, for all contracts and liabilities of such bank to the extent of the amount of their stock at par value in addition to the amount of such stock."

The state permits the formation of corporations for the purpose of conducting both a banking and trust company business in counties of the population of that in which the bank in question was located; and under section 613 (section 2253) the stockholders of each trust company are made "individually responsible, equally and ratably, and not one for the other, for all contracts and liabilities of such corporation to the amount of their stock at par value, in addition to the amount of such stock. \* \* \*



The order of the state court appointing the receiver directed the latter to "take possession of all the books, papers and assets of every description, and all the business of the defendant, Owensboro Savings Bank & Trust Company, and collect all collectable debts and demands of said bank and trust company, and sell or compound, under the orders of this court, all bad debts, and sell all the real and personal property of said bank and trust company, on such terms as this court shall direct," etc. The receiver so appointed, on May 12, 1908, filed his petition in the Davies county circuit court in equity, against the bank and certain of its creditors, the petition containing the statement that, "in order to pay in full creditors of said (bank), including its depositors and other creditors, it will be necessary to resort to the double liability of the stockholders of said (bank) in aid of its property and assets, and he asks to be advised by the court as to his duties with reference to the enforcement of said liability." He asked that each of the creditors of the bank be enjoined from asserting claims or liens upon any of its property and from interfering with the administration of his trust as receiver except in and through the proceeding referred to, and asked the advice and direction of the court with respect to his duties in the winding up and administration of the affairs of the bank, as well as "for equitable and proper relief." Injunction was issued accordingly.

On May 19, 1908, appellees filed their bill in this cause, alleging (in substance sufficient for the purposes of this opinion) that they were respectively creditors of the bank as holders of interest-bearing certificates of deposit therein, amounting in the aggregate to \$5,770; alleged the insolvency of the bank, the double liability of its stockholders under section 595 of the Kentucky statutes, the fact that its assets were not more than one-half of its liabilities, and the necessity of assessing each stockholder a sum equal to the par value of his stock for the benefit of the bank's creditors, such assessment being alleged to be insufficient to pay the liabilities of the bank; alleged the appointment and qualification of Pedley as receiver, under the proceedings in the state court, and the receiver's possession of "all the assets, property, etc., of the defendant" bank; that the defendant Pedley, as receiver of the bank, "has no authority to enforce said statutory liability as such receiver, either in law or in equity, said statutory liability being a liability enforceable only by the creditors of the defendant" bank; alleged that the creditors of the bank who have a common and general interest in enforcing the double liability of stockholders are more than 2,000 in number, and so numerous as to make it impracticable to bring all of them before the court in a reasonable time. The bill asked an order permitting complainants to sue "for and in behalf of all the creditors of defendant bank who will unite with them in this suit," prayed judgment against the bank upon complainant's demands; that all other creditors be enjoined from prosecuting any action against the stockholders for their double liability except by uniting in this suit; that "the liability of all stockholders be fully determined and adjudicated; that each defendant stockholder herein be assessed for the benefit of the creditors herein an amount equal to the par value of his stock"; for judgment against the individual defendants for the amounts of their stockholdings; "that all said sums be ordered paid into court; and that same be distributed under order of court, and if necessary a receiver be appointed to collect and enforce the judgment of the court and distribute the funds under order of court," and for general relief.

Upon the filing of this bill, Pedley, the receiver appointed by the state court, was appointed receiver under the bill in this cause "to receive and hold, subject to the orders of the court, all funds collected herein and all funds brought in by reason of said statutory liability herein relied upon and to do all things that may be hereinafter ordered by the court." The appellant here demurred to the bill: First, for lack of jurisdiction of the subject-matter, on the ground that complainants had an adequate remedy at law and that matters of equitable cognizance are not alleged; second, that the bill relates to several distinct and independent matters in which defendant is not interested; third, that the bill is without equity; and, fourth, that the court is without jurisdiction of the parties, in that the bill does not show that the parties for whom the complainants are suing are citizens of states other than Kentucky, or

that their respective claims exceed \$2,000. This demurrer was overruled. Appellant answered, alleging (in substance sufficient for the purposes of this opinion) that he was never the owner of but 10 shares of the capital stock of the bank; that he purchased this block from the bank, as part of its increased capitalization and by reason of false and fraudulent representations made by the bank's officers as to the financial condition and solvency of the bank; that he was never the owner of the remaining 80 shares of the capital stock on account of which it was sought to charge him; that said 80 shares belonged to one Parrish; that after the failure of the bank he learned of the transfer of said shares to him under an alleged contract therefor, and at once repudiated the same and returned to the receiver the dividends which had been credited to his bank account upon said shares; that, if he ever contracted to purchase said shares, he was induced to do so by the false and fraudulent representations of said Parrish as to the value thereof and the responsibility and solvency of the bank. Both blocks of stock were, by the answer, tendered back. The answer set up, in bar of this suit, the appointment of the receiver in the state court, the suit by the latter against appellant and others for the settlement of the affairs of the bank and the collecting in of its property and assets, the injunction before referred to, and the fact that the complainants had not requested the receiver appointed in the state court to sue for the statutory double liability. The amount of the bank's indebtedness, shown by the master's report as proven before him, was \$778,134.85. It appeared by the testimony of the receiver that the assets of the bank would realize gross from \$175,000 to \$225,000; these figures taking no account of the statutory double liability of stockholders. The final decree required (so far as necessary to be stated here) payments of the statutory liability from a large number of stockholders, as to some of whom the bill was taken as confessed; the decree requiring such payments into the registry of the court or to the receiver, and, in case execution should be issued, payment into the registry of the court. As already stated, the appellant was required to pay the sum of \$9,000 with interest from May 19, 1908, the date of the filing of the bill. By the decree the court reserved full control over all other and further proceedings necessary for the collection and administration of the fund created by said statutory liability.

George W. Jolly and Alexander Pope Humphrey, for appellant.  
C. M. Finn and Sweeney, Ellis & Sweeney, for appellees.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge (after stating the facts as above). [1] A preliminary question arises upon the motion of the appellee to dismiss the appeal on the ground that the parties interested in the appeal are not before the court, or their presence dispensed with through summons and severance. The rule invoked by appellee relates only to joint judgments. *Ayers v. Polsdorfer* (Sixth Circuit) 105 Fed. 739, 45 C. C. A. 24; *Gilfillan v. McKee*, 159 U. S. 303, 312, 16 Sup. Ct. 6, 40 L. Ed. 161; and cases cited; *Winters v. United States*, 207 U. S. 564, 574, 28 Sup. Ct. 207, 52 L. Ed. 340. That portion of the decree from which the appeal is taken is clearly several as to the defendant Alsop. It is true that such provision has the effect to deny the right of recovery by the bank and its receiver in the state court proceeding; but that does not make the judgment joint. Moreover, the receiver appointed by the state court is not aggrieved, as he is also the receiver in the federal court, and the bank's rights are represented by the receiver. Indeed, it is stated in appellee's brief that the bill in this cause was taken as confessed by both the bank and the receiver.

The appellants attack the decree below upon several grounds, which will be separately considered:

[2] 1. That the double liability of the stockholders in a bank organized under the laws of Kentucky is enforceable by the receiver provided for by the laws of that state, and not by the creditors of the insolvent corporation.

Sections 547, 595, 613, and 616 are all contained in chapter 32 of the Kentucky Statutes (Russell's St. c. 11), relating to private corporations, section 547 being found in article 1, which contains general provisions relating to such corporations; section 595 being in article 2, relating to banks; and sections 613 and 616 being found in article 3, which relates generally to trust companies. It will be noted that, while section 547 expressly declares that stockholders "shall be liable to creditors" for the recovery in question, the words last quoted are omitted from sections 595 and 613, and the words "individually responsible" substituted. It is argued from this fact that the sections relating to banks and trust companies are to be distinguished in the respect referred to from the section relating to corporations generally. We think this point is not well taken. By section 538 (section 2121), which is the opening section of the chapter relating to private corporations, the general provisions of the article are made applicable to banks, trust companies, and certain other named corporations so far as "not inconsistent with the laws relating specially to them." We find no inconsistency between the general provisions cited and the special provisions relating to banks and trust companies. Moreover, the double liability of stockholders in banks, trust companies, and certain other corporations is expressly declared by section 547. It is clear that, if the liability in question is directly from the stockholder to the creditor, the latter only, and not the corporation or its receiver, are the persons entitled to enforce it. The claim in such case is not an asset of the corporation, and so would not pass to the receiver appointed under the state law, who, under section 616, acquires only property, rights, and assets of the corporation. See *Mechanics' Savings Bank v. Fidelity Ins. Co.* (C. C.) 87 Fed. 113, 116; 1 Cook on Corporations (6th Ed.) § 218. We think the question we are considering is ruled by *Tiger Shoe Mfg. Co.'s Trustee v. Shanklin*, 125 Ky. 715, 102 S. W. 295, where it was held, construing section 547 of the Kentucky Statutes, that, while an assignee in bankruptcy of a mercantile corporation could maintain an action for unpaid subscriptions, he could not maintain an action against stockholders to enforce the statutory double liability. We find nothing in the other decisions of the Court of Appeals of Kentucky (viz., *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776; *Covington Co. v. Rosedale*, 76 S. W. 506, 25 Ky. Law Rep. 964; *Bracken v. Nicol*, 124 Ky. 628, 99 S. W. 920, 11 L. R. A. [N. S.] 818; *Weakley v. McClarty*, 136 Ky. 838, 125 S. W. 265, 136 Am. St. Rep. 279; *Ky. Mutual Ins. Co.'s Assignee v. Schaefer*, 120 Ky. 227, 85 S. W. 1098; *Gamewell, etc., Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862) in conflict with *Tiger Shoe Mfg. Co.'s Trustee v. Shanklin*. It is true that in the *Gamewell Case* the stockholders' liability is spoken of as an asset of the corporation.

But this remark is purely obiter, for the action there was on the part of creditors, and did not involve the rights of a receiver under the state statute. Moreover, it is not in harmony with the later case of *Tiger Shoe Mfg. Co.'s Trustee v. Shanklin*. In our opinion, the right of action for the double liability of stockholders in the bank did not pass by virtue of the Kentucky statutes to the receiver appointed under those statutes, but remained in the creditors.

[3] 2. It is urged that the state court, by virtue of the proceedings taken by the receiver appointed by that court, acquired exclusive jurisdiction over the administration of the estate of the insolvent bank, including the enforcement of the stockholders' double liability.

It may be conceded that, if the state court has acquired jurisdiction over the enforcement of the stockholders' double liability, the court below had no jurisdiction over that subject. As already stated, however, the receiver obtained by virtue of the Kentucky statute no authority to recover on account of this liability. The order appointing the receiver did not attempt or purport to pass such right as an asset of the bank. If, therefore, the state court obtained exclusive jurisdiction over the subject-matter of this controversy, it must have done so by virtue of the proceedings taken in that court for such recovery. But the proceedings there had cannot be so construed. The petition filed by the receiver in the state court did not make stockholders of the bank parties defendant. The petition showed that, in order to pay the bank's creditors in full, it would be necessary to resort to the double liability of stockholders; but as to this subject the receiver merely asked to be advised by the court as to his duties. He sought no such recovery in that action. It would have been entirely competent for the state court, had the receiver been thought entitled to maintain suit for such liability, to authorize the institution of proceedings either in the state or the federal court; but the record does not indicate that such course was taken, or that the state court paid any attention to the request for instructions referred to. So far as may be inferred from this record, the state court has proceeded with the administration of the bank's affairs entirely irrespective of the matter of double liability, and the federal court is proceeding to collect and administer the funds arising from that liability. The same person is acting as receiver of both courts. In these circumstances, no conflict of jurisdiction is apparent. It should go without saying that, if the court below has jurisdiction, it is not because of any special jurisdiction over the subject-matter, but because of the asserted diversity of citizenship of the parties, which subject will be considered later. In our opinion, there is nothing in the proceedings in the state court to interfere with the exercise of jurisdiction as actually exercised by the court below.

[4] 3. It is earnestly contended that there is no equity in the bill, for the reason that each stockholder is liable equally and ratably, and not one for the other; that it is necessary to collect the whole amount of the double liability from each stockholder; and that the suit should thus be at law. The argument is that the liability of each stockholder presents a separate legal question in which that stockholder alone is

concerned, and that there is thus no basis for invoking equity to prevent multiplicity of suits.

The determination of this question involves a consideration of the nature of this suit. While section 547 of the Kentucky Statutes provides that stockholders "shall be liable to creditors," that section, so far as it relates to banks and trust companies, as well as sections 595 and 613, limit such liability to "all contracts and liabilities" of the bank or corporation. Under these statutes it is clear that a proceeding for the enforcement of the equal and ratable liability imposed by statute can be maintained only by one or more creditors on behalf of all, and not by one creditor to secure payment of his own debt to the exclusion of others. *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376; *Terry v. Tubman*, 92 U. S. 156, 161, 23 L. Ed. 537; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Handley v. Stutz*, 137 U. S. 366, and cases cited at page 369, 11 Sup. Ct. 117, 34 L. Ed. 706. The amounts recovered on account of such double liability thus become a trust fund, properly administered in equity and distributed among creditors who by the bill are brought before the court and are made parties to the proceeding. *Story's Equity Jurisprudence*, § 1252; *Cook on Corporations* (4th Ed.) vol. 1, § 222. There is in such case a question, common to all stockholders, of the amount of the bank's indebtedness as compared with its assets, and thus of any liability on the part of stockholders. Not only are all creditors directly interested in the collection and distribution, but the stockholders are likewise interested, not only as respects the amount to be recovered for the benefit of creditors, but also of the amount of outstanding stock; for the reason that, although it is alleged in the bill that the entire liability is necessary to be enforced in order to enable payment in full to creditors, every stockholder is at liberty to contest this allegation. The suit below was thus essentially a proceeding for the collection, administration, and distribution of the trust fund. Such proceeding is properly brought in equity. *Pollard v. Bailey*, *supra*; *Terry v. Tubman*, *supra*; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547; *Handley v. Stutz*, *supra*. See, also, *Bailey v. Tillinghast* (Sixth Circuit) 99 Fed. 801, 805, 806, 40 C. C. A. 93; *In re Jassoy Co.* (Second Circuit) 178 Fed. 515, 101 C. C. A. 641; *Hornor v. Henning*, 93 U. S. 228, 23 L. Ed. 879.

We have not overlooked the settled course of decisions that actions for the recovery of the full statutory liability under the national banking act must be had at law. *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216. But suits for collection under the national banking act differ from the proceedings before us in two important respects: First, that under the national banking act the question whether the assessments shall be for 100 per cent. or less than the full statutory liability rests entirely in the discretion of the comptroller (*Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Casey v. Galli*, *supra*); and, second, the administration and distribution of the funds collected is not had in the suit instituted for their collection, but is carried on by the comptroller independently of judicial proceedings. But notwithstanding these distinc-

tions, where a suit by a receiver under the national banking act is for less than the full liability, the proceeding is not necessarily at law. A suit in equity may, in proper cases, be maintained on the ground not only that a trust fund is sought to be recovered, and that there is a complication of interest in the questions and matters involved, but for the purpose of avoiding multiplicity of suits. *Bailey v. Tillinghast*, supra. We find nothing in *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, opposed to the views we have expressed, for there the suit was merely to recover, by suit in Pennsylvania, the liability of stockholders of a Minnesota corporation whose affairs were being administered in a suit instituted in that state. There was plainly no reason why separate suit should not have been brought against each stockholder, and at law. In our opinion, the suit before us was properly brought in equity, and against all the stockholders.

[5] 4. It is objected that the court acquired no jurisdiction under the bill, for the reason that at the time of its filing none of complainants' claims were due except one (that of Conway), and that this was for the sum of \$2,000, exclusive of interest. It is urged that matured claims exceeding \$2,000 must be alleged.

It is unnecessary to determine whether, in this proceeding for administering a trust fund, there must be claims actually mature amounting to \$2,000, exclusive of interest, for this question is not presented by any assignment of error, nor was it raised in the court below. It is clear that the Circuit Court did not lose jurisdiction over the case, independently of demurrer, by reason of the nonmaturity of sufficient claims to give the court statutory jurisdiction. *Schunk v. Moline, etc., Co.*, 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255. Apart from the question of the maturity of the claims, the fact that the claims of some of the complainants did not exceed \$2,000 does not affect the jurisdiction of the court in a proceeding of this nature. *Handley v. Stutz*, supra.

[6] 5. The fact that there are creditors of the bank who were citizens of the state of Kentucky, and who were in a sense represented by complainants, does not, in our opinion, oust the court of jurisdiction on the ground of diversity of citizenship between the parties. *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329.

[7] 6. Finally, it is alleged that upon the merits appellant is not subject to the statutory liability upon either the \$1,000 stock purchased from the bank or the \$8,000 of stock transferred to defendant by Parrish.

First, as to the \$1,000 of stock purchased from the bank: This was bought January 10, 1906. This stock remained in defendant's ownership and possession until after the insolvency proceedings, and without any attempt to repudiate the purchase. During this time he received four semiannual dividends of 5 per cent. each. The rule adopted by the courts of the United States with respect to stockholders' liability under the national banking act is thus stated by Mr. Justice Harlan in *Scott v. Deweese*, 181 U. S. at page 213, 21 Sup. Ct. at page 589 (45 L. Ed. 822):

"If the subscriber became a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the

government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151 [U. S. Comp. St. 1901, p. 3465], if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position."

See, also, *Lantry v. Wallace*, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218; *Scott v. Abbott* (Eighth Circuit) 160 Fed. 573, 583, 87 C. C. A. 475.

The decisions of the Circuit Court of Appeals of Kentucky upon the common-law right of rescission are not binding on this court. However, we find nothing in the decisions of that court to sustain the right of rescission sought to be exercised here. It is true that in *Ky. Mutual Inv. Co.'s Assignee v. Schaefer*, supra, it was held that where a subscriber for stock is not in fault, but is himself the innocent victim of a fraud which he did not and could not discover before the perpetrator of the fraud failed, he is entitled, as against the assignee for the benefit of creditors, to make any defense which he could make against the assignor. But in the later case of *Reid v. Owensboro Savings Bank & Trust Co.*, 132 S. W. 1026, the Court of Appeals of Kentucky, in passing upon the liability of a holder of the same issue of stock as that held by defendant here, in a suit for dividends paid thereon sought to be recovered back by the receiver, held that when a stockholder has been induced by false and fraudulent representations of the officers of a corporation to purchase his stock, if the corporation is insolvent when the action for rescission or other relief is brought, or if proceedings have been instituted to liquidate its affairs on the ground of insolvency, or rights of creditors will be affected, the shareholder who has been induced by fraud or misrepresentation to purchase stock cannot obtain relief unless he became a shareholder so shortly before the insolvency as not to have had reasonable time or opportunity to investigate its affairs and discover the fraud, nor unless upon discovery he without delay asserts his right to appropriate relief. Upon the facts in the *Reid* Case, which are similar to those here, it was held that the shareholder was not entitled to rescind. We think it is clear that defendant was properly held subject to the double liability on the \$1,000 of stock bought from the bank.

[8] The question of liability on account of the \$8,000 of stock bought from Parrish is not so easy of solution. As to the fact of the alleged purchase there is a sharp conflict of testimony between the defendant and Parrish. The former claims that he never even bargained for the stock; that Parrish owed him \$12,000 for some Alsop Process Company stock sold by defendant to Parrish; that the latter, in April, 1907, offered him \$8,000 of the bank stock in payment of the debt, which was refused; that, although the stock was in defendant's safety deposit box at the time of the failure of the bank, he did not know of its presence there until after that time; that he was out of the country much of the time during the period of the transactions in question, part of his business being transacted by Parrish and perhaps other officers of the bank. There were also credited to defendant's bank account two semiannual dividends of 5 per cent. each (July 5, 1907, and January 30, 1908) on the entire \$9,000 of stock standing

in defendant's name. Defendant testifies that he did not know of these payments, and had not noticed the entries on his passbook until after the failure of the bank; the entries having been made by one of the officers of the bank, pursuant to custom by which the bank book remained at the bank for receiving credits for payments and collections. Parrish, on the other hand, testifies that the defendant purchased the stock January 7, 1907, in exchange for the Process Company stock referred to; that Parrish being unable to turn over the bank stock on that date by reason of its being in pledge, and until money could be borrowed on the Process Company stock, it was arranged that the bank stock should be later transferred to defendant; that three certificates aggregating 80 shares were, on three several dates between March 7 and April 19, 1907, placed by Parrish in defendant's safety deposit box according to previous arrangement; that defendant soon thereafter knew and approved of the delivery of these certificates; that defendant also had and consulted his bank book not long after the payments of the dividends were made; and that it was not until after the failure of the bank that defendant sought to be relieved of the transaction.

From the conflicting testimony of these two witnesses, but for the presumption of defendant's ownership of the stock and the one item of evidence to which we shall presently refer, it would be difficult, if not impossible, to satisfactorily determine the question of defendant's actual purchase of the stock. We think, however, that the burden is upon defendant to show that he did not purchase it. He is presumed to be the owner of it if his name appears upon the books of the bank as such owner, and the burden is upon him to show the contrary. *Webster v. Upton*, 91 U. S. 65, 72, 23 L. Ed. 384; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Finn v. Brown*, 142 U. S. 56, 67, 12 Sup. Ct. 136, 35 L. Ed. 936. The Kentucky statute requires every corporation to keep in its principal office a book in which shall be entered the name, post office address, the number of shares of stock held by such stockholder, and the time when each person became such stockholder; also all transfers of stock, stating when and the number of shares transferred, and by and to whom. This book is required to be subject to the inspection of all stockholders and persons doing business with the corporation. The receiver testified that he never found "the particular book of that description," but stated, however, "that all the information as required by that statute is on the stubs of the stock books before me." It seems to be taken for granted, although there may be no express testimony to that effect, that the stubs of the bank stock certificate book show the issue to defendant of the certificates in question. As already said, however, there is no doubt, as we understand the record, that the certificates were actually issued, and were outstanding in defendant's name, and were in his safety deposit box at the time the bank failed. We think these facts *prima facie* show his ownership of the stock.

The item of evidence to which we have referred is contained in the following written instrument:

"I hereby bargain, sell and convey to A. L. Parrish (\$4,000) four thousand par value of stock in the Alsop Process Company, St. Louis, Mo., for which



said A. L. Parrish agrees to transfer and deliver (\$8,000.00) eight thousand dollars par value stock in the Owensboro Savings Bank & Trust Company, Owensboro, Ky., on or before April 1, 1907. Said stock is to be fully paid and unincumbered. This trade and exchange made and entered into on the 7th January, 1907, and signed by both parties."

The instrument bears the signature of Parrish and the purported signature of defendant, who does not deny the signature but is unable to account for it, unless that he signed it without reading it and in ignorance of its contents. We think the evidence satisfactorily shows that defendant did actually sign this instrument. The burden of proof is, in these circumstances, upon him to show that his signature was obtained by misrepresentation or fraud. This we think he has failed to do; and in view of the presumption of his ownership of the stock, and the burden which is thrown upon him by the production of the written instrument, we are constrained to the opinion that defendant must be held to have purchased the stock in April, 1907. If defendant actually and knowingly bought the stock at that time, we think that, under the authorities to which we have referred, he must be held subject to the statutory liability, and that the decree of the Circuit Court which so adjudged was right. He had held the stock for a full year, had received two substantial dividends upon it, and for a year previous had had other stock in the bank. He had abundant opportunity to investigate and ascertain the truth or falsity of the representations made to him, and thus the question of the solvency or insolvency of the bank.

[9] It was proper to allow interest from the date of the commencement of suit. *Kaufman v. Tredway*, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190; *Senn v. Levy*, 111 Ky. 318, 63 S. W. 776.

The judgment of the Circuit Court will be affirmed.

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ROBERTSON v. CONWAY et al.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,104.

1. BANKS AND BANKING (§ 49\*)—STOCKHOLDERS—ACTION TO ENFORCE STATUTORY DOUBLE LIABILITY—DEFENSES.

In a suit in equity on behalf of the creditors of an insolvent banking corporation against the stockholders to enforce their double liability, under Ky. St. § 547 (Russell's St. § 2131), where a defendant retained his stock for two years, and until after the corporation became insolvent, without objection, it is not a defense that he then brought a suit against the corporation to rescind his subscription on the ground of fraud, nor that he gave notes for the stock, which are unpaid, and has not received the certificate; nor is he entitled to any reduction of his statutory liability because he paid a premium for the stock.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 49.\*]

2. COURTS (§ 328\*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STOCKHOLDERS.

Under Ky. St. § 547 (Russell's St. § 2131), which makes stockholders in banks and trust companies "individually responsible, equally and rata-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bly, and not one for the other, for all contracts and liabilities of such corporation to the extent of the amount of their stock at par value in addition to the amount of such stock," the amount to be recovered on account of the liability of the stockholders of such a corporation being sought to be administered in equity in a suit brought in behalf of all creditors against all stockholders who are within the jurisdiction, and where the amounts due from the corporation to complainants exceed \$2,000, and the amounts due from some of the defendants exceed such sum, and the requisite diversity of citizenship exists, such suit may be brought in a federal court, and such court, having acquired jurisdiction generally to administer the trust, may, as ancillary to such jurisdiction, decree against a stockholder, although his liability is less than \$2,000, either under an ancillary bill or in the original case.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 328.\*

Jurisdiction of federal court as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Suit in equity by John Conway and others against H. N. Robertson and others. Decree for complainants, and defendant Robertson appeals. Affirmed.

Brown & Nuckols (Eli H. Brown, of counsel), for appellant.

William T. Ellis, James J. Sweeney, and Clarence M. Finn, for appellees.

Before SEVERENS and KNAPPEN, Circuit Judges, and SALTER, District Judge.

KNAPPEN, Circuit Judge. This is an appeal from a decree of the Circuit Court requiring appellant to pay to complainants, for the benefit of themselves and other creditors, the sum of \$1,000 and interest as the full "double liability" of appellant as stockholder in the Owensboro Savings Bank & Trust Company under the statutes of Kentucky. Ky. St. § 547 (Russell's St. § 2131). The decree appealed from is the same decree considered by this court in the case of *Alsop v. Conway*, 188 Fed. 568, decided May 2, 1911, in which the case generally and its history are fully stated. It was there held (1) that the motion to dismiss the appeal on the ground that the parties interested therein are not before the court was not well taken; (2) that the stockholders' double liability under the statute in question belongs to the creditors, and is not an asset of the receiver provided for by the Kentucky statute relating to the administration of the affairs of insolvent banks; (3) that there is nothing in the receivership proceedings in the state court to interfere with the exercise of jurisdiction as actually exercised in this case by the court below; (4) that this suit was properly brought in equity and against all the stockholders made parties; (5) that the Circuit Court did not lose jurisdiction over the case by reason of the nonmaturity of claims exceeding \$2,000, nor by the fact that the claims of some of the complainants did not exceed that amount; and (6) that the fact that certain creditors of the bank, not parties upon the record, were citizens of Kentucky did not oust the court of jurisdiction on the ground of diversity of citizenship be-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tween the original parties. This case differs from the case of Alsop v. Conway in but two important respects: First, the defense is made that the matter in dispute was but \$1,000 exclusive of interest, and that the Circuit Court had thus no jurisdiction as to this appellant; and, second, Robertson's stock consisted only of 10 shares, of the par value of \$100 each, of the increased capital stock of the bank, authorized December 9, 1905, and issued about January, 1906.

[1] In addition to the defense upon the merits urged in the Alsop Case, that the purchase of this stock was induced by fraudulent representations by officers of the bank as to its financial condition, the further defense is made that the increased stock sold appellant was "invalid, fictitious, and void" under the laws of Kentucky, and the sale not binding on appellant, for the reason that bona fide subscriptions for the entire authorized amount of such increase were not made within one year from the date of such authorization; that but a small portion of such stock was paid for in cash, the purchasers of the larger part thereof having paid therefor by executing and delivering their promissory notes, the certificates thereof being retained by the bank as collateral security for such notes; that appellant gave his promissory note (with surety in part) for the entire amount of such stock purchase; that said notes have not been paid; and that an action is pending in one of the state courts of Kentucky for the cancellation of said stock subscription. It is further urged that, if appellant is subject to any part of the statutory double liability, he can equitably be charged with only 50 per cent. thereof, on account of having paid a premium of 50 per cent. on the stock purchase.

In disposing of this defense upon the merits, **little need be said in addition to the considerations stated in the Alsop Case with respect to the liability on account of the increased stock there in question.** Appellant purchased his stock about two years before the failure of the bank. He made no attempt to rescind until after such failure. His right to rescind by reason of the false representations as to the financial condition of the bank is concluded by the considerations expressed in the Alsop Case. The defense that the increased stock was fictitious is not supported by any proof in the record before us. It is, however, without merit as against the creditors. *Bailey v. Tillinghast* (6th Circuit), 99 Fed. 801, 40 C. C. A. 93. Nor is there any merit in the defense that another suit is pending for the cancellation of the stock subscription. Not only is there no assertion, either in pleading or proof, that such suit was pending at the time of the institution of the present suit, but there is neither allegation nor proof that any one authorized to represent creditors with respect to the statutory double liability is a party to such suit in the state court. As pointed out in the Alsop Case, the liability in question is to creditors, and not to the bank or its receiver appointed under the insolvency proceedings in the state court. It is too clear for argument, that the premium paid for the purchase of the stock cannot be offset against the statutory liability in question. The fact that appellant did not pay for his stock in money, nor receive possession of the certificates therefor, is not, in our opinion, material by way of defense to this statutory action in favor of creditors. In view of these considerations, and upon

the authority of the *Alsop Case*, we are constrained to hold that the defense made as to the merits cannot be sustained.

[2] We are thus brought to the question of law peculiar to this appeal, viz., whether the fact that the amount claimed against appellant is but \$1,000, exclusive of interest and costs, deprived the Circuit Court of jurisdiction over him.

It is the general rule that, in a suit in equity brought in the Circuit Court by two or more persons on several and distinct demands, a defendant cannot be joined against whom the sum demanded does not exceed \$2,000. In that class of cases the amount in controversy as to such defendant is merely the amount claimed from him. Thus in *Walter v. Northeastern R. Co.*, 147 U. S. 370, 374, 13 Sup. Ct. 348, 37 L. Ed. 206, it was held that the Circuit Court had no jurisdiction over a bill to enjoin the collection of taxes from a railroad company under distinct assessments, in separate counties, no one of which amounts to more than \$2,000. In *Citizens Bank of Louisiana v. Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451, it was held that separate assessments were not sufficient to give jurisdiction to a bill to enjoin the collection of taxes in several parishes by joining against different collectors. And under statutes limiting the appellate jurisdiction of the Supreme Court to cases where the amount in controversy exceeds a certain sum, it is the rule that, where suit in equity is brought by two or more persons on several and distinct demands, the defendant can appeal as to those complainants only to each of whom the jurisdictional amount is decreed. The rule is also well settled that distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give the Supreme Court jurisdiction on appeal. *Ex parte Phoenix Ins. Co.*, 117 U. S. 367, 369, 6 Sup. Ct. 772, 29 L. Ed. 923; *Paving Co. v. Mulford*, 100 U. S. 147, 25 L. Ed. 591; *Stratton v. Jarvis*, 8 Pet. 4, 8 L. Ed. 846; *Henderson v. Wadsworth*, 115 U. S. 264, 274-277, 6 Sup. Ct. 140, 29 L. Ed. 377; *Chamberlin v. Browning*, 177 U. S. 605, 20 Sup. Ct. 820, 44 L. Ed. 906.

On the other hand, where the liabilities of the defendant are joint, or depend upon the same state of facts, the aggregate liability is held to be the amount in dispute, with respect to the jurisdiction of the Circuit Court. Thus, in *McDaniel v. Traylor*, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. Ed. 533, the Circuit Court was held to have jurisdiction of a bill by heirs to set aside recoveries in favor of each of several defendants alleged to have fraudulently combined to procure orders of the probate court allowing the claims, the claim of each defendant being less than \$2,000, the aggregate amount, however, exceeding \$2,000 and the undivided interest in the real estate of each exceeding \$2,000. In *Virginia, etc., Chemical Co. v. Insurance Co.* (4th Circuit), 113 Fed. 1, 5, 6, 51 C. C. A. 21, where a bill was filed by several insurance companies, each of whom separately issued policies on the same property, providing for proportional liability only and where the same defense was interposed, the Circuit Court was held to have jurisdiction to enjoin the prosecution of the actions at law, although one involved less than \$2,000. The same distinction is recognized with respect to the appellate jurisdiction of the Supreme Court. Thus, in

*Marshall v. Holmes*, 141 U. S. 589, 595, 12 Sup. Ct. 62, 35 L. Ed. 870, where several judgments, each less than \$500 but aggregating more than \$3,000 were rendered in a state court in favor of the same party and against the same defendant, the case was held removable; the validity of the judgments depending upon the same facts. In *New Orleans, etc., Ry. Co. v. Parker*, 143 U. S. 42, 51, 12 Sup. Ct. 364, 36 L. Ed. 66, where several plaintiffs claimed under the same title, and the judgments necessarily involved the validity of that title, the Supreme Court was held to have jurisdiction, although the individual claims of none exceeded \$5,000.

While in this case the liability of the defendants was not joint, nor did they, as respects the special defenses set up by certain of the defendants (including the appellant here), depend upon the same state of facts, yet the liability of the defendants is by the bill predicated upon the same state of facts. The statute invoked makes all stockholders "individually responsible, equally and ratably, and not one for the other, for all contracts and liabilities of such bank to the extent of the amount of their stock at par value in addition to the amount of such stock." Under the bill in question there were thus necessarily involved certain fundamental questions common to all stockholders, viz., the amount, if anything, by which the debts of the bank exceeded its assets, and the amount of the outstanding stock. As pointed out in the opinion in the *Alsop Case*, the amounts recovered on account of the stockholders' liability in question constitute a trust fund, properly administered in equity, and the suit below was essentially a proceeding for the collection, administration, and distribution of this trust fund. As held by this court in the *Alsop Case*, suit to enforce such liability could not be brought by one creditor to secure the payment of his own debt to the exclusion of others, and this suit was properly brought in equity. Of course, no question of federal jurisdiction over any individual stockholder was involved in the *Alsop Case*. It is peculiarly requisite to the effectiveness of the administration of such trust that all stockholders within the jurisdiction of the court should, so far as practicable, be brought before it. As said in *Pollard v. Bailey*, 20 Wall. at page 525, 22 L. Ed. 376:

"Every stockholder, when called upon to perform his obligations, has the right to require that the extent thereof shall be determined once for all, as well that which he is under to his associate stockholders as that to the creditors."

The question of liability of the defendant stockholder to his associate stockholders is not, perhaps, strictly speaking, involved in this proceeding; but there is always involved the question of the aggregate amount of the statutory liability and the extent of the outstanding stock. If these questions are not settled in the original suit for the administration of the trust, they are open to contest in every case thereafter brought to enforce the stockholders' liability. In view of the nature of this suit, as one for the collection, administration, and distribution of the trust fund, jurisdiction as to the amount in controversy was, in our opinion, as expressed in the *Alsop Case*, conferred upon the Circuit Court by the fact that the aggregate amounts

due to complainants exceeded the jurisdictional minimum. As said in *Handley v. Stutz*, 137 U. S. 366, 369, 11 Sup. Ct. 117, 118 (34 L. Ed. 706), in considering a bill in equity by some in behalf of all of the creditors of a corporation against the corporation and the holders of stock therein:

"The sums alleged to be due from the corporation to the original plaintiffs amounting to more than \$2,000, the Circuit Court had jurisdiction of the case, and authority to administer and distribute the amounts due from the individual defendants to the corporation for unpaid subscriptions to stock as a trust fund for the benefit of all the creditors of the corporation, and for that purpose to permit creditors, who had not originally joined in the bill, to come in and prove their claims before a master."

The jurisdiction of the Circuit Court is alone involved here. It is clear that the Circuit Court obtained by the filing of the bill jurisdiction generally to administer the trust in question; there being the requisite diversity of citizenship of the parties, the amount claimed by complainants being in excess of \$2,000, and the amounts claimed against certain of the defendant stockholders being likewise in excess of that sum. The only question which could arise is over the right to include as a defendant a stockholder against whom a recovery less than the jurisdictional amount was claimed. There is one consideration upon which, in our opinion, the jurisdiction of the Circuit Court over this appellant may safely be asserted; and we prefer to rest the jurisdiction on this ground, without deciding whether such jurisdiction would exist independently of such consideration. It is clear that the court, having acquired jurisdiction over the administration of the trust connected with the collection and distribution of the fund in question, could by an ancillary proceeding have brought in the appellant here, and thus have adjudicated as to him all the questions involved in the original suit. *Stewart v. Dunham*, 115 U. S. 61, 64, 5 Sup. Ct. 1163, 1164 (29 L. Ed. 329); *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. In *Stewart v. Dunham*, in which jurisdiction was obtained by diversity of citizenship, the Supreme Court, in holding that the jurisdiction of the Circuit Court was not ousted by admitting in that court as coplaintiffs other parties who were citizens of the same state as defendants, said:

"The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

In *White v. Ewing* it was held that a Circuit Court of the United States has "jurisdiction, in a general creditors' suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, to hear and determine an ancillary

suit instituted in the same cause by its receiver in accordance with its order against debtors of such corporation, so far as in said suit the receiver claims the right to recover from any one debtor a sum not exceeding \$2,000." The suit before us must be held to be a general creditors' suit for the purpose of administering the trust fund in question. We think that, under the ruling in *Stewart v. Dunham*, it would be merely a matter of form whether the appellant were made a defendant to the original bill or brought in under an ancillary proceeding; for in the latter case the same questions would be open to litigation, and would require settlement, as in the original case.

It is true that in *Handley v. Stutz* only stockholders charged with liability within the appellate jurisdiction of the Supreme Court appealed. It is also true that in *Stewart v. Dunham* the Supreme Court dismissed the appeals as to all creditors except those in whose favor decrees for the jurisdictional amount on appeal had been rendered. The holding in that respect is not, in our opinion, opposed to the conclusion we have reached in this case as to the jurisdiction of the Circuit Court over the appellant.

It results from these views that the decree of the Circuit Court, so far as appealed from, should be affirmed.

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CUMBERLAND GASLIGHT CO. v. WEST VIRGINIA & MARYLAND  
GAS CO.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1911.)

No. 1,018.

1. STATUTES (§ 238\*)—CONSTRUCTION—LEGISLATIVE GRANTS.

Legislative acts granting franchises to private corporations are to be construed strictly, and the grantees take nothing by implication either as against the power making the grant or as against other corporations or individuals.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 319; Dec. Dig. § 238.\*]

2. GAS (§ 7\*)—GAS COMPANIES—RIGHTS IN STREETS—COMPETING COMPANIES—NATURAL AND MANUFACTURED GAS.

Natural gas is not a competitor of manufactured gas in such strict legal sense that a corporation having an exclusive franchise to use the streets and ways of a city for its pipes for conveying manufactured gas for lighting purposes only may exclude another company from the right to use such streets and ways, with the municipal consent, for pipes to convey natural gas for both fuel and lighting purposes.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.\*]

3. EVIDENCE (§ 80\*)—PRESUMPTION—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS IN OTHER STATES.

In the absence of legislation on the subject, it is presumed, under the rule of comity, that the law of a state permits corporations of other states to conduct therein the business for which they were chartered if such business is not in conflict with its laws or public policy, and affords them the equal protection of its laws with domestic corporations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 101; Dec. Dig. § 80;\* Common Law, Cent. Dig. §§ 14–16.

Foreign corporations doing business in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 622.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. GAS (§ 7\*)—FOREIGN CORPORATIONS—RIGHT TO QUESTION POWERS.

Under section 93 of the general incorporation law of Maryland (Laws 1868, c. 471), as amended by Act April 7, 1876 (Laws 1876, c. 349), which authorizes any gaslight corporation organized thereunder to furnish gas in any city or town for the lighting of streets or public or private buildings and to lay pipes in the streets and ways with the consent of the municipality, an ordinance of a city having general power to legislate for the general welfare and for providing proper and suitable lights for the streets, etc., granting the right to a foreign corporation to lay pipes in its streets to supply the city and its inhabitants with natural gas for fuel and lighting purposes, is not subject to attack by another gas company having a franchise to use such streets; that being a matter for the state alone.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 7.\*]

5. CONSTITUTIONAL LAW (§ 207\*)—"CITIZEN."

A foreign corporation is not a "citizen" within the meaning of article 4, § 2, Const. U. S. entitling them "to all privileges and immunities" as such "in the several states."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 634; Dec. Dig. § 207.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, pp. 7602, 7603.

Status of foreign corporations, see note to Republican Mountain Silver Mines v. Brown, 7 C. C. A. 419.]

Goff, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

Action at law by the Cumberland Gaslight Company against the West Virginia & Maryland Gas Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 182 Fed. 667.

The plaintiff in error filed its original and amended declaration in the Circuit Court of the United States for the District of Maryland, alleging itself to have been incorporated by a special act of the Legislature of Maryland, whereby it was fully and legally empowered to lay gas pipes in and along any of the streets, lanes, or alleys of the city of Cumberland, and to sell and distribute gas to this city and its inhabitants provided the mayor and city council should assent thereto; that the mayor and city council did assent thereto; that, under and by virtue of said act of assembly and the said assent of the mayor and city council, it became and was and is now vested with the exclusive franchise and right to lay pipes for the transmission and distribution of gas in said city, and no other person or corporation under the laws of Maryland has such right; that it has exercised such right since its incorporation, engaged thereby in the distribution and sale of its manufactured gas to the city of Cumberland and its inhabitants for heating, lighting, cooking, and other purposes; and that said franchise was a valuable one and a source of annual profit to it. It is further alleged that the defendant in error is a West Virginia corporation, engaged in business in Maryland, and in the city of Cumberland, to wit, the business of distributing and selling natural gas to the inhabitants of said city; that it was its duty to refrain from laying pipes, for the distribution and sale of gas, in the streets, lanes, and alleys of Cumberland, which duty it has disregarded, and without legal authority has dug up certain of said streets, lanes, and alleys and laid pipes therein for the distribution of natural gas and has engaged in the business of distributing natural gas through such pipes to the city of Cumberland and its inhabitants for lighting, heating, cooking, and other purposes, thereby caus-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date & Rep'r Indexes



ing plaintiff in error a great loss of customers, and to its damage \$100,000. A demurrer to the declaration as amended was entered, and it was by written stipulation of counsel agreed that the ordinance of the mayor and city council of Cumberland granting to defendant in error the right to lay, operate, etc., natural gas mains in the streets of the city and distribute natural gas, should be read and considered by the court in determining such demurrer. The court below sustained the demurrer, and, the plaintiff electing to stand upon its declaration and not asking leave to further amend, dismissed the action with costs. And to review this judgment this writ of error has been sued out.

Wm. L. Marbury and W. C. Devecmon, for plaintiff in error.

Ferdinand Williams and Benjamin A. Richmond, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge (after stating the facts as above). The plaintiff corporation was duly incorporated under a special act of the Maryland Legislature of 1853 (chapter 221), section 6 of which provides:

"That the president and directors shall have full power and authority to purchase or lease property, and to erect thereon the necessary buildings and works of the said company, and shall have power to manufacture gas of any material they may think best, and to dispose of the same for the lighting of the city of Cumberland, or the streets thereof, or any buildings, manufactories, or houses therein situated, and to effect this object, shall have power to lay pipes in and along any of the streets, lanes or alleys of said city; provided, that in so doing, they shall not injure the same; provided, however, that the mayor and city council assent to the same."

Section 7 of the act provides:

"That if any person or persons shall willfully do or cause to be done any act or acts whereby the works of said corporation or any part thereof shall be in any way injured or obstructed, the person or persons so offending shall forfeit and pay to the said corporation the amount of damages sustained by means of said offense or injury, to be recovered, with costs of suit, in the name of said corporation, before any court having cognizance of the same."

Section 9 of the act provides:

"That the Legislature reserves to itself the right to alter or repeal this act at pleasure."

In 1868 by chapter 471 the Legislature enacted a general incorporation law which provided for, among other things (section 30, Class 17), "the formation of gaslight companies," and by section 93:

"That any gaslight corporation formed under this act shall have full power to manufacture and sell, and to furnish such quantities of gas as may be required in the city or town where the same may be located, for lighting the streets and public and private buildings and for other purposes; and such corporation shall have power to lay conductors for conducting gas through the streets, lanes, alleys and squares in such city or town with the consent of the municipal authorities of said city or town, and under such reasonable regulations as they may prescribe."

Section 51 of this act provides:

"That no corporation shall possess or exercise any corporate powers, except such as are conferred by law, and such as shall be necessary to the exercise of the powers so acquired."

By an act, approved April 7, 1876, chapter 349, the above-cited section 93 was repealed and the following substituted:

"Sec. 93. That any gaslight corporation formed under this act shall have full power to manufacture and sell, and to furnish such quantities of gas as may be required in any city, town or county of this state, in which or adjoining which the same may be located, for lighting the streets, roads, and public and private buildings, and for other purposes; and such corporation is hereby authorized and empowered to lay conductors or pipes, for the transmission of gas, in any city, town or county, under the streets, squares, lanes, alleys, and roads thereof, paved or unpaved, and to connect the same with any manufactory, public or private building, lamp or other structure or object, and with the place of supply, subject, however, to any law or ordinance that may be passed by the municipal authorities of the city or town, or the county commissioners having jurisdiction, for the filling up and repaving any street, square, lane or alley or road under which the said pipes may be laid."

By other acts embodied in article 23, §§ 137 and 138, and article 81, § 164, of the "Public General Laws of Maryland," provisions are made for the doing business of foreign corporations in the state upon complying with certain conditions and in cases of electric construction companies and gas companies paying a state tax of one and a half per centum of their annual gross receipts.

Finally the Legislature in 1910 (chapter 55, § 142a, p. 72) enacted:

"Any gaslight corporation formed under this article shall have full power to manufacture artificial gas and to sell and furnish such quantities of gas both natural and artificial, as may be required in any city, town or county of this state, in which or adjoining which the same may be located, for lighting the streets, roads, and public or private buildings, or for other purposes, and such corporation is hereby authorized and empowered to lay conductors or pipes for the transmission of gas, both natural and artificial, in any city, town or county, under the streets, squares, lanes, alleys, and roads thereof, paved or unpaved, and to connect the same with any manufactory, public or private building, lamp, or other structure, or object, and with the place of supply, after first securing the proper assent of the municipal authorities of said city or town, or of the county commissioners of said county, under such reasonable and proper regulations and conditions that may be prescribed by them, subject, however, also to any law or ordinance that may be passed by the municipal authorities of the city or town or the county commissioners having jurisdiction, for the filling up and repaving of any street, lane or alley or road under which the said pipes may be laid."

The charter of Cumberland, at the time this controversy originated, conferred upon the municipality the power to pass all such ordinances, not contrary to the Constitution and laws of the state, as it may deem necessary for the good government of the city, for the protection and preservation of the city's property, rights, and privileges, for the protection of the health, comfort, and convenience of the citizens, for providing proper and suitable lights upon the public streets, to authorize and require the inspection of gas pipes, water pipes, plumbing, drainage, and electric lines or wires on private property or elsewhere, to regulate private connections with sewer, gas, and water pipes, and prohibited it granting to any corporation or individual any franchise, "unless notice of the same shall have been first published for at least two weeks in two newspapers in the city of Cumberland, and no franchise, right or privilege in relation to any highways, avenues, streets, lanes or alleys, either on, above or below the surface of the same  
\* \* \* for a longer period than twenty-five years."

[1] In the solution of the question before us it seems to us first necessary to ascertain the status of the plaintiff corporation and define its rights and privileges under its charter and the several subsequent acts hereinabove quoted. In doing so we must remember that it is elementary law that legislative acts granting franchises to private corporations are to be construed strictly according to their terms. Grantees in such acts take nothing by implication, either as against the power making the grant, or against other corporations or individuals.

The reasons for this settled rule are set forth by the court in the leading case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773, where it is said by Chief Justice Taney:

"The object and the end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created; and in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. \* \* \* The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power, or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

In Rose's Notes on this case (volume 3, p. 681) it is said, touching this rule:

"It may be questioned whether the Supreme Court has ever laid down a more salutary doctrine than the principle here announced, and the citing cases which follow show how firmly it has become imbedded in our jurisprudence."

And more than 100 cases, from substantially all the courts of this country, in support of this statement are cited.

With this rule to govern us, we note:

- (a) That this franchise was granted in 1853, 58 years ago.
- (b) That it was not an exclusive one as that term is ordinarily used in connection with such franchises.
- (c) That it was one at the will of the Legislature expressly reserving its right to alter or repeal it any time.
- (d) That it was in express terms confined to the right to purchase or lease property, erect thereon the necessary buildings and works, manufacture gas of any material it may think best, and sell and dispose of the same for the lighting of the city of Cumberland, and the streets, buildings, manufactories, and houses therein.
- (e) That to effect this object, and as an incident thereto, it was given power to lay pipes in and along any of the streets, lanes, or alleys of the city, but without injury thereto, provided that the mayor and city council assented.

(f) That, in case any one should willfully do any act injuring or obstructing its works, the corporation should be entitled to recover from such person the resultant damage therefor.

There is absolutely nothing in this charter conferring upon the plaintiff the exclusive monopoly of furnishing light to this city or its inhabitants. It is conceded that the Legislature of Maryland could, at any time, have granted similar franchises to any number of companies to enter the city and compete with it in furnishing such lighting facilities. There is nothing in this charter that authorized it to furnish other than gas of its own manufacture. There is nothing that authorized it to furnish such manufactured gas for fuel or for any other purpose than that of lighting. By no possible implication can it be said to have excluded electricity or natural gas for combined heating and lighting purposes or either. Coal and wood at the time were entirely too cheap and plentiful to permit gas to be contemplated as a rival to either as a fuel, for it is to be remembered that 58 years ago, when this charter was granted, the use of manufactured gas was comparatively a few years old. It was not until 1798 that William Murdock, the Scot, demonstrated that gas distilled from coal could be put to practical use, and a short time thereafter Lebon, the Frenchman, ascertained it could be distilled from wood, and it was not until 1820, only 33 years before this charter was granted, that Neilson of Glasgow discovered the principle of the flat burner which afforded the means for the practical use of distilled gas for lighting purposes. Nor can it be assumed for a moment that the right under this charter should cover the supplying by plaintiff of either natural gas or electricity to this city, for petroleum was not discovered in this country until 1845 near Pittsburgh, and the commercial use of natural gas, found in connection with it, was not utilized until long after this charter was granted; and, as to electricity, it was not until 1863 that Nollel originated the magneto-electric battery whereby an illuminating current was generated. The electric lamp known as the "Jablochkoff Candle," the invention of a Russian military officer, came only in 1876, and it was still several years after before Edison perfected the incandescent lamp, whereby electric lighting was made practical. See Williams' History of Science, vol. 6, p. 201 et seq.

But it is contended that all this is immaterial because this declaration as amended is not based upon the exclusive right to furnish gas, but upon the violation of plaintiff's franchise authorizing it to lay gas pipes in and along the streets, lanes, or alleys of the city, or any of them, for the purpose of selling its gas to the city and its inhabitants.

[2] There can be no question that this power to lay pipe lines is a part of plaintiff's franchise; but it is a qualified right and, like all other grants of this character, must be strictly construed according to its very terms and subject to all its limitations. In this connection we note that by these terms and conditions it was empowered (a) to lay these pipes in these streets only after the assent of the mayor and council had been obtained. So far as its pipes are now laid, assuming that such assent has been obtained, it has a vested right to keep and maintain them, and, if any one shall willfully injure or destroy them,

it has right to recover damages for the resultant loss under section 7 of the charter act as above quoted; but (b) as to laying any further pipe lines in the streets where now laid, or in other or additional streets, it is a contingent right wholly dependent upon the will and consent of the mayor and city council; (c) that its sole right to lay such lines is for the purpose of conveying its manufactured gas from its works to the city and its customers therein. It cannot lay these pipes to convey oil, water, or any other substance, and it can only convey its gas through them so long as it exercises its franchise right to manufacture and furnish gas. If it shall abandon exercise of this last obligation, the right to maintain the pipe lines would immediately cease. It has no right to object to the laying of pipe lines through this city for the purpose of conveying oil or water except so far as the laying thereof might physically injure or destroy its own. No more has it right to complain because of the laying of pipe lines to convey natural gas into the city, if natural gas must be held, in a legal sense, not to be a competitor of its manufactured gas, and the sale of which, notwithstanding it may, like the sale of electricity, reduce or destroy its profits, does not conflict with its right, strictly construed, to furnish its manufactured gas for lighting purposes. Is natural gas a competitor in this strict legal sense of manufactured gas limited to lighting purposes?

Without taking time for original discussion of this proposition, it would seem to be sufficient to say that the use of natural gas both for fuel and lighting purposes originated in Pennsylvania, and this state and the two adjoining ones of Ohio and West Virginia may be considered possibly the largest producers of such gas of any of the states of the Union. We may, therefore, well look to the decisions of the courts of these states, where the question would be one of peculiar local interest and would receive at the hands of such courts careful thought and consideration for their views upon this matter. In 1903 the Supreme Court of Ohio (69 Ohio St. 259, 69 N. E. 436) decided the case of Circleville Light & Power Co. v. Buckeye Gas Co. et al., after elaborate argument. In this case the plaintiff had a franchise to furnish manufactured gas and electricity to the city of Circleville and its citizens for illuminating purposes and sought to enjoin the defendant from furnishing natural gas thereto under an ordinance of the city, which it claimed was invalid because it had not been ratified by a vote of the qualified voters of the city as required by a statute of the state which authorized a city's authorities to contract with any gas or water company for supplying gas or water for the city, but that no such company should go into operation in any city or village where such corporation had been formed, until after the question of authorizing such operation had been submitted to the qualified voters of the city or village, and authorized by ordinance. It was this authorization by vote it was alleged the defendant company had not obtained and was therefore furnishing natural gas to the city for illuminating purposes unlawfully and to plaintiff's loss of business and injury, for which reason an injunction was prayed. Upon demurrer to the bill, this question as to whether natural gas was a competitor of manufactured gas in a legal sense such as to warrant plaintiff relief was

the principal one involved. The court held that it was not and sustained the demurrer because: (a) The statute requiring the ratification by vote had been passed before natural gas for commercial use was known in the state, and could not therefore have been contemplated by it. (b) Because, while the word "gas" may be in one sense a generic term, it is quite plain that, as used in the statute, it does not embrace every species of gas discovered or manufactured in modern times. There are numerous gases manufactured or generated, used in the arts and manufactures, not contemplated by the statute. (c) Because the gas manufactured by the plaintiff was a substance produced by human skill and art, while natural gas comes from the great laboratory of nature, all ready for the immediate use of man when let to the surface of the earth. (d) Because the plaintiff in effect was claiming a monopoly in supplying gas to this city, and all doubt about the extent of plaintiff's monopoly must be resolved against it. Citing Justice Gordon on Appeal of the Scranton Electric Light & Heating Co., 122 Pa. 154, 15 Atl. 446, 1 L. R. A. 285, 9 Am. St. Rep. 79, where it is said:

"Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are hence as a rule detrimental to the public welfare; nor are they at all allowable except where the resultant advantage is in favor of the public, as, for instance, where a water or gas company could not exist except as a monopoly."

Also Justice Brewer in Omaha Horse Ry. Co. v. Cable Tramway Co., 30 Fed. (C. C.) 324-328, where it is said:

"He who says that the state has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the state, as the representative of the public, from according the same right to another."

In the case we are considering, another important reason can be given. It is common knowledge that natural gas is now mainly utilized for fuel purposes; that its cheapness, coupled with its cleanliness and easy method of manipulation, enables it successfully to compete with wood and coal as such fuel, even more so, under existing conditions, than electricity can do, and it appears from the city ordinance, which by consent of parties herein is to be considered and read in this connection, that part of the consideration moving its adoption was the supplying this natural gas free to the city for heating purposes for the city hall, station house, all fire engine houses, the office buildings of the water commissioners, and all other buildings now or hereafter owned or occupied by the mayor and city council. On the other hand, it is undeniable that under its charter the plaintiff can alone supply manufactured gas for illuminating purposes. Can it be said that the city must, by reason of this restricted franchise of plaintiff's, which can only supply its lighting, be estopped from providing for itself and its citizens the better and more economic fuel? In 1887 the Supreme Court of Appeals of West Virginia decided the

case of Parkersburg Gas Co. v. City of Parkersburg, 30 W. Va. 435, 4 S. E. 650. There the city had, by ordinance, granted in 1864 to the plaintiff company "the exclusive privilege of using the streets, alleys and public grounds of said city for the purpose of laying down pipes for the conveyance of gas in and through the city, for the use of said city and its inhabitants." Afterwards the city made a contract with the Sunlight & Vapor Stove Company to supply certain of its streets with gasoline lights upon posts similar to those used by the gas company. Still later it authorized an electric light company to erect a plant and furnish electric lighting to the city and its inhabitants. The gas company brought its bill against this electric light company, the Sunlight & Vapor Company, and the city of Parkersburg, praying an injunction, which was granted by the court below. In reversing the case and directing the dismissal of the bill, the Supreme Court of Appeals does so upon two grounds: First, because it ascertained the powers of the city under its charter from the state did not warrant it to grant the exclusive franchise to plaintiff; and, second, because the plaintiff's franchise was a monopoly, not favored, to be strictly construed, and when so strictly construed not identical with those of the Vapor and Electric Companies. The court cites in this case approvingly *Emerson v. Commonwealth*, 108 Pa. 111, where it was held that the franchise of two charters—the one, the Fuel Gas Company, incorporated for the purpose of supplying "heat to the public from gas within the city of Pittsburg," and the other, the Pennsylvania Fuel Company, incorporated for the purpose of "supplying heat to the public within the city of Pittsburg by means of natural gas, conveyed from such adjoining counties as may be convenient"—were not identical and therefore not necessarily hostile to each other, the effect of which decision was construed to be that the grant of an exclusive right to one company to supply the city of Pittsburg with *manufactured* gas is not infringed by the grant of the right to another company to supply the city with *natural* gas. This decision in *Emerson v. Commonwealth*, 108 Pa. 111, decided in 1884, so approved by the West Virginia court, was the first, touching this question, rendered by the Supreme Court of Pennsylvania. It was a battle royal between counsel; some of the ablest lawyers on both sides that the state affords having been engaged. It was an action of quo warranto involving the construction to be given a statute authorizing the creation of corporations for the manufacture and supply of gas, and the supply of light or heat by other means, enacted in 1874 by the Pennsylvania Legislature. On January 19, 1882, the Fuel Gas Company had been chartered under this act to "supply heat to the public from gas within the city of Pittsburg." On February 22, 1882, a month following, the Pennsylvania Fuel Company was chartered "for the purpose of supplying heat to the public within the city of Pittsburg by means of natural gas conveyed from such adjoining counties as may be convenient." The first company contended that its franchise was exclusive, that the two franchises were identical, and the latter in consequence was void. The lower court so held, and judgment of ouster was entered. This judgment was reversed and venire

de novo awarded; the appellate court holding that the franchises were not identical. It was stated in argument that the first charter granted in Pennsylvania for the purpose of utilizing natural gas was not until 1879.

This case was subsequently cited and approved in *Scranton Electric L. & H. Co. v. Scranton Ill. H. & P. Co.*, 122 Pa. 154, 15 Atl. 446, 1 L. R. A. 285, 9 Am. St. Rep. 79, decided in 1888. Finally, in 1894 the same court decided the case of *Warren Gaslight Co. v. Pennsylvania Gas Co.*, 161 Pa. 510, 29 Atl. 101, involving exactly the question under discussion here. The Warren Company was chartered by special legislative act in 1869 having exclusive right to supply Warren with gas, to erect buildings for its manufacture, and to lay pipes for its transmission in the streets. The Pennsylvania Company was subsequently chartered for the purpose of supplying this borough of Warren with natural gas. Plaintiff company applied for injunction, which was denied, and the bill dismissed. In this case distinction is made between franchises to furnish natural gas and those to furnish manufactured gas, the two are held not to be identical, and the two gases are held not to be in a legal sense competitors. The case is of further interest because there, as here, the relief sought was based upon plaintiff's franchise to lay pipes in the streets. Touching this contention, the court says:

"It is contended by the solicitors for the plaintiff that the plaintiff's franchise gives it the exclusive right to lay pipes in the streets, and that the right to lay pipes in the streets is the franchise which the plaintiff received from the commonwealth, and that the defendant should be restrained from laying pipes in the streets. We cannot so view the case. Of course, if defendant could be restrained from the use of the streets for laying pipes, the whole purpose of the plaintiff would be accomplished thereby, for there is no known means of conveying gas except by pipes, and pipes in a town or city could only be laid in the streets. The laying of pipes for the transportation of gas is a mere incident to the business and not the business itself. The business was the delivering and sale of natural gas for light and heat; the transportation is incidental thereto. The same is also true of water companies; they produce, store, and supply to customers water. Transportation by pipes is the means of delivering and is a mere incident of the business."

We might well base the decision of this question upon these authorities alone; but because of the importance of the case, and the fact that a different ground appeals more strongly to the judgment of one of our number, we propose to consider the further proposition as to whether the mayor and city council of Cumberland was authorized and empowered legally to pass the ordinance complained of authorizing the defendant to furnish its natural gas to the city and its inhabitants and to lay its pipes in the streets for the purpose. While municipal charters are not to be construed so strictly as franchises granted to private corporations creating monopolies, yet, as regards them, the general rule holds good that every statute which takes from Legislature its power will always be construed most strongly in favor of the state. The rules of construction obtaining as to these municipal corporations are aptly stated by Dillon when he says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied



in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power be exercised, or any act done, which is forbidden by charter or statute. These principles are of transcendent importance and lie at the foundation of the law of municipal corporations." Dillon on Munic. Corp. (4th Ed.) § 89 (55), p. 145.

It is most earnestly contended by counsel for plaintiff that the charter of Cumberland, examined by these rules, cannot be held to be broad enough to permit the passage by its council of this ordinance under its general welfare clauses: (a) Because gas and other lighting companies are not mentioned therein; and (b) because the power to use the public streets to distribute gas for private use is not indispensable for either "the good government of the city," the "protection and preservation of peace and good order and securing persons and property from violence, danger or destruction," or the "protection of the health, comfort and convenience of the city," and direct authority (Abbott on Mun. Corp. vol. 3, 2092, § 890; Elliott, Mun. Corp. 84, § 72) is cited. On the other hand, Dillon, in the historical review introductory to his great work (section 3a), after calling attention to the similar conditions existing in ancient Rome and our modern cities, says:

"In a most important particular, however, Rome suffers by comparison with modern cities: *Its public places were not lighted.* All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches. Its condition was similar to that of London, 200 years ago, so graphically described by Macaulay. \* \* \* No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay of the state of a great city buried in the darkness of night; *and they show how clearly the power to provide for this is essentially and particularly one pertaining to municipal rule and regulation.*"

And further on (section 692), speaking of a general grant to a municipal corporation to light its streets, such as is contained in this charter to Cumberland, he says:

"A general grant, while it carries with it, by implication, all such powers as are clearly necessary for the proper and convenient exercise of the authority conferred, such as using the streets for mains and for placing lamp posts, and making contracts or adopting ordinances proper to the execution of the power, does not authorize the city council to grant to any person or corporation an *exclusive right to use the streets* for the purpose of laying down gas pipes for a term of years, and thereafter until the work shall be purchased from the grantee by the city. The court admitted that the power to light the city would authorize the council to contract for gas, and to grant the contracting party the use of the streets, but denied its authority to make such use exclusive for a determinate future period"—citing *State v. Cinc. Gasl. & C. Co.*, 18 Ohio St. 262; *Indianapolis v. Indianapolis Gasl. & C. Co.*, 66 Ind. 396; *Parkersburg Gas. Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650.

But the question need not be discussed further because it is decisively determined by another fact found here. In the rules of construction of municipal charters which we have quoted, it is stated such corporations cannot "do any act, or make any contract, or incur any liability not authorized thereby (its charter) or by some legislative act applicable thereto," and we have already called attention to the fact that the Legislature of Maryland, in 1868, incorporated in a general incorporation law (section 93) full power to gas companies to manufacture and sell and to furnish gas to any and all cities and towns and to their inhabitants in the state, and to that end fully empowered such companies to lay pipes in the streets of such cities and towns with the assent of the municipal authorities. This section was re-enacted and broadened in its terms by the Legislature in 1876, and there can be no question that it empowered the companies chartered and operating under it to occupy the streets of Cumberland for the purpose of furnishing gas for lighting purposes after the assent of the mayor and city council had been obtained. The suggestion that this act nowhere empowers such companies to furnish gas for *fuel* purposes may be here dismissed at once. The plaintiff cannot possibly be concerned in it, simply because its own charter never conferred upon it any right to furnish gas for any such purpose or for any other purpose than for illumination.

The question then narrows itself down to whether the defendant company was one authorized under this general incorporation law to engage in this business. It is true that the terms of the act say "any gaslight corporation formed under this act," and it is admitted that defendant company was not formed under it, but is a foreign corporation existing under the laws of West Virginia.

[3] Since *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274, was decided, it is well settled:

"That a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and, where that law ceases to operate and is no longer obligatory, a corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty."

[5] Such corporations are not "citizens" within the meaning of article 4, § 2, of the federal Constitution, entitling them "to all privileges and immunities" as such "in the several states," nor do they come under the protection of section 1 of the fourteenth amendment, prohibiting the abridgment of such privileges and immunities, but under this amendment they cannot be denied "the equal protection of the laws."

See *Kirven v. Va.-Car. Chem. Co.*, 76 C. C. A. (4th Ct.) 172, 145 Fed. 288.

But, while all this is true, it by no means follows that a corporation will not be recognized in states other than that of its creation. Its residence in one place creates no insuperable objection to its power to contract in another. Under the well-recognized principle of comity, a foreign corporation may transact in the domestic state such business as its charter authorizes, and may make all contracts in the

course of its business there, not in violation of the laws and public policy of the domestic state. And this comity, forming, as it does, the basis of recognition of foreign corporations, is binding on the courts as being part of the common law of the state. It must be presumed to exist, and does exist, until a state expresses an intention to the contrary in some affirmative way, that is, by direct enactments on the subject, or by its settled public policy deduced from the general course of legislation or the settled adjudication of its courts of last resort. An intention to prohibit a foreign corporation from transacting business in the domestic state cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. *Bank v. Earle*, 13 Pet. 590, 10 L. Ed. 274; *Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888; *Runyan v. Coster*, 14 Pet. 122, 10 L. Ed. 382; *Cowell v. Col. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Kennebec Co. v. Augustine Ins. Co.*, 6 Gray (Mass.) 204; *Stoney v. Am. L. Ins. Co.*, 11 Paige (N. Y.) 635; *Thompson v. Waters*, 25 Mich. 224, 12 Am. Rep. 243; *Story, Conflict of Laws*, § 36; 13 Am. & Eng. Enc. Law (2d Ed.) 838.

And the Court of Appeals of Maryland has fully recognized and approved these principles in *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196.

[4] How far such comity shall be extended, within what limits it shall be restricted, are purely matters for the decision of the sovereign state, which alone can extend or limit its operation or refuse wholly its exercise. This has been well held by the Supreme Court of North Carolina in *Tobacco Co. v. Tobacco Co.*, 145 N. C. 367, 59 S. E. 123, in an able and well-considered opinion by Judge Connor, now an associate of ours on the federal bench.

For the reasons stated, we are convinced that the court below did not err in the conclusion that plaintiff could not maintain its action; and therefore its order sustaining the demurrer to the declaration must be affirmed.

GOFF, Circuit Judge. I dissent. In my judgment the declaration states a cause of action, and I think that the court below erred in not overruling the demurrer.

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DAYTON COAL & IRON CO., Limited, v. DODD.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,066.

**1. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT—JURISDICTION OF COURT.**

Where a court has general jurisdiction over the appointment of administrators, every possible intendment will be given effect in support of an appointment, and only jurisdictional defects appearing on the face of the record can be attacked collaterally.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 178-182; Dec. Dig. § 29.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. EXECUTORS AND ADMINISTRATORS (§ 20\*)—APPOINTMENT—JURISDICTION OF COURT.**

Shannon's Code Tenn. § 6023, provides that the county court shall have its regular sessions on the first Monday of each month, and the court shall sit from day to day so long as the business thereof may require. An order appointing an administrator recited that "a quorum court was opened and held \* \* \* on the 2d day of July, 1907, when the following business was had and entered of record." *Held*, that the order was not to be construed as stating that the regular session of the court was begun on that day, and that it did not show lack of jurisdiction to make the order.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 20.\*]

**3. MASTER AND SERVANT (§ 191\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—FELLOW SERVANT.**

It is the rule in the federal courts that an employer is not liable for an injury to an employé occasioned by the negligence of another employé engaged in the same general undertaking; both performing duties tending to accomplish the same general purpose, although they may be in different departments.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 475-479; Dec. Dig. § 191.\*]

**4. MASTER AND SERVANT (§ 194\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—FELLOW SERVANTS—EMPLOYÉS BEING CARRIED TO AND FROM WORK.**

Employés, while being carried free by the employer as a part of their contract of service to and from their place of work, are fellow servants of other employés, and not passengers, and it is immaterial that the carriage is after the hours of work or under an implied term of the contract of employment giving the employé the privilege of riding at his option, but not requiring it as a necessary part of the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 383, 384; Dec. Dig. § 194.\*]

Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Flippin v. Kimball*, 31 C. C. A. 286.]

**5. MASTER AND SERVANT (§ 194\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—FELLOW SERVANTS.**

Defendant operated iron furnaces, and also coal mines and coke ovens some three miles from its plant, to which the coal and coke were transported by means of a private railroad. Plaintiff's intestate was a coal miner in defendant's employ. The most of the miners resided at a distance from the mine on the line of railroad and were given the privilege of riding free, in coal and coke cars, on defendant's trains to and from their work if they desired. While plaintiff's intestate was so riding to his home, with other miners, after completing his day's work, cars which had been standing on a branch track were permitted to run onto the main track causing a collision in which he and others were killed. *Held*, that deceased was not a passenger at the time, but his relation to defendant was that of an employé, and that there could be no recovery for his death on the ground that it was caused by the negligence of other employés in handling the standing cars; they being his fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 383, 384; Dec. Dig. § 194.\*]

**6. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.**

Plaintiff's intestate, an employé of defendant, while riding from his work on one of defendant's trains, was killed in a collision with runaway cars which escaped from a branch track upon the main track. Defendant had installed a derailing switch on the branch to prevent such escape, which had been used until a few days prior to the collision, when

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a new head brakeman had been employed, and there was evidence that he had not been instructed as to its use. *Held*, that the question of defendant's liability for failing in its duty as master to give such instructions was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1044-1050; Dec. Dig. § 286.\*]

**7. MASTER AND SERVANT (§§ 293, 295\*)—ACTION FOR INJURY TO SERVANT—INSTRUCTIONS.**

Instructions considered and approved in an action against a master for the death of an employé while riding on a train on a private railroad operated by defendant; such instructions relating to the care required of defendant and the assumption of risk by the deceased.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161, 1168-1171; Dec. Dig. §§ 293, 295.\*]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Action at law by J. J. Dodd, administrator of Elijah Huff, deceased, against the Dayton Coal & Iron Company, Limited. Judgment for plaintiff, and defendant brings error. Reversed.

W. B. Miller and Paxton, Warrington & Seasongood, for plaintiff in error.

Foster V. Brown, Frank Spurlock, and Joe Brown, for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. The writ of error is brought in this case to review a judgment in favor of defendant in error for personal injuries to plaintiff's intestate, resulting in death. The prominent facts are these:

The plaintiff in error (hereinafter called the defendant) was at the time of the accident engaged in operating a furnace at Dayton, Tenn., for the manufacture of pig iron, purchasing the ore used for that purpose, also maintaining coal mines and coke ovens about three miles from Dayton, together with a small railroad system, consisting of a line from the Dayton yards to the coal mines, and another, about two miles long, from the Dayton yards to the river, and connecting with traffic thereon. There was also connection at Dayton with the tracks of the Cincinnati Southern Railway. The operating of the furnaces (which was the principal business), the railroad, the mines, and coke ovens (coke being required in the manufacture of pig iron), constituted one business, over which there was a general superintendent; there being also a yardmaster, or foreman of the railroad department. The train running between Dayton and the mines was manned by a locomotive engineer, a fireman, a head brakeman, and an assistant brakeman; there being no conductor. The business of this railroad was largely the hauling of coal and coke from the mines to Dayton, and the hauling of empty coal and coke cars, as well as supplies of various kinds, from Dayton to the mines and ovens. Day and night train shifts were maintained. The first train which left Dayton at 6 o'clock in the morning, and was the first run of the day shift, was called the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"miners' train." It consisted largely of empty coal and coke cars to be filled at the mines and ovens, and in which coal and coke cars the miners rode to the mines; supplies being sometimes carried in the train. The company had houses at Dayton, Morgantown, and elsewhere along the railroad, which it rented to its employes. Some of the latter, including deceased, did not rent company houses. The greater part of the miners lived at Dayton and at Morgantown; the latter being a mile or less from the mines. The miners were allowed to ride on this train free, and most of them did so ride; the wages being the same whether they rode or not. They were not, however, required to ride.

The whistle was blown at Dayton as a notice to the miners that the train was about to start. Those living at Morgantown took the train at a certain customary meeting point. At about 4:30 in the afternoon, after the last blast, the miners took the train at Hanging Rock for the return home; that run being the last made by the day shift, and this return train consisting largely, but not always exclusively, of empty coal and coke cars. The miners had nothing to do with either the operation of the morning or the evening train; their actual work having ended when the last blast was fired. The railroad was entirely a private road, and did no commercial business whatever. It carried no passengers, unless the miners are to be regarded such. No passenger cars were carried. From a point at or near Hanging Rock on the main track (where the miners left the train), a spur or tail track, about 300 feet in length, extended to the coal tipple. This tail track had been extended several months before the accident, and in connection therewith a derailing switch put in, in order to throw off the track any runaway car which might escape from the vicinity of the tipple, and thus prevent the car running upon the main track. Until a few weeks before the accident in question it had been customary to operate the derailing switch in connection with trains passing over it. A few weeks before the accident, however, a new head brakeman was installed. He was not instructed to use the derailing switch, and did not make a practice of doing so during his employment, which covered the time of the accident to the deceased. On the evening in question the train brought in from Dayton two cars (one fully, the other partly, loaded) which it left at the coal tipple, in connection with a third car standing thereat. On leaving these cars the train passed over the tail track and onto the main track; the derailing switch not having been set after the passage of the train. The miners (between 200 and 400) boarded the train at Hanging Rock. A few minutes after the train left, the stable boss at the mines, who was also engaged that day in loading coal cars, in company with another employe, pinched two of the cars at the tipple apart from the third, in order to make room for the passage of the mules between the mines and the stables, with the result that the two cars referred to became unmanageable and ran away down the incline of the tail track and upon the main track, overtaking and colliding with the miners' train, killing the plaintiff's intestate and several others. Had the derailing switch been set, the accident could not have happened. The plaintiff

relied upon several grounds of negligence, not necessary to be here stated in addition to those submitted to the jury. Upon the trial the defendant contended that the relation between defendant and deceased was that of master and servant. The plaintiff contended that the defendant's relation was that of a carrier of passengers. The trial court held that the defendant was, as concerned the deceased, not a common carrier of passengers, but a private carrier, bound only to "exercise such a degree of care and skill in the management and running of its train as a prudent, cautious man, experienced in the business would be expected to use under the circumstances; that is to say, in reference to the means of transportation employed and the character of the train being operated." The court submitted to the jury three alleged grounds of negligence: First, the failure of the defendant's superior officers or agents to "instruct the brakeman in reference to the use or operation of the derailing switch; that is, the alleged failure to see that the use of that derailing switch was kept up by the train crew." Second, the alleged negligence of the head brakeman in failing to set the derailing switch. And, third, the alleged negligence of the employes in so handling the cars at the tippie as to permit them to run away and collide with the miners' train. At the close of the testimony the defendant moved for peremptory instruction, which was denied.

1. A preliminary question arises over the authority of the administrator appointed by the county court of Rhea county, Tenn. Section 6023 of Shannon's Code of Tennessee provides that:

"The county court to be held by the county judge, shall have its regular sessions on the first Monday of each month."

The order appointing the administrator was made on July 2, 1907. The caption of the order of appointment is as follows:

"Be it remembered that a quorum court was opened and held for Rhea county, at the courthouse in the city of Dayton, Tennessee, on the 2d day of July, 1907, \* \* \* when the following business was had and entered of record."

[1] It seems to be conceded that the 2d of July, 1907, was Tuesday, and it is urged that the order thus shows upon its face a lack of jurisdiction. The section of the Code above quoted contains, however, this provision:

"And the court shall sit from day to day so long as the business thereof may require."

The county court being one of general jurisdiction over the appointment of administrators, all possible intendments will be made in support of the order of appointment, and only jurisdictional defects appearing on the face of the record can be attacked collaterally. *Brien v. Hart*, 6 Humph. (Tenn.) 131; *State v. Anderson*, 16 Lea (Tenn.) 321; *Curtis v. Charlevoix County Supervisors*, 154 Mich. 646, 656, 118 N. W. 618.

[2] To exclude an intendment that the regular session was opened on Monday, July 1st, and continued on Tuesday, July 2d, as the statute permits, it is necessary to construe the language "a quorum court

was opened and held" as if it read "a regular session of the quorum court was begun and opened"; for only thus would the lack of jurisdiction appear upon the face of the record. It is clear, to our minds, that the language of the order should not be so construed, and that lack of jurisdiction does not appear upon the face of the order.

[3] 2. The fundamental question presented is whether the relation of the deceased to the defendant, while on the train in question, was that of a passenger or servant. This question gains special importance from the fact that two of the grounds of liability submitted to the jury relate to negligence of employes of defendant who, it is insisted, were fellow servants of the deceased; it being the settled rule in the federal courts that an employer is not liable for an injury to an employé occasioned by the negligence of another employé engaged in the same general undertaking, and that it is not necessary to the application of this rule that the employés should be engaged in the same operation or particular work; it being sufficient if the two are in the employment of the same master and engaged in the same common enterprise, both performing duties tending to accomplish the same general purpose, although they may be in different departments. *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Louisville & N. Ry. Co. v. Stuber* (Sixth Circuit) 108 Fed. 934, 938, 48 C. C. A. 149, 54 L. R. A. 696; *Illinois Central R. Co. v. Hart* (Sixth Circuit) 176 Fed. 245, 247, 100 C. C. A. 49. That defendant was not a commercial carrier, or a carrier of passengers for hire, is clear; and the Circuit Court was right in so holding. *Taenzer v. C., R. I. & P. R. Co.*, 170 Fed. 240, 95 C. C. A. 436; *Dayton v. Coal & Iron Co.*, 99 Tenn. 578, 42 S. W. 444. The specific question is whether the defendant's relation to deceased was that of a private carrier, or whether the riding of the deceased on the train in question from the mine to his home was an incident of the employment, to the extent that the relation of employer and employé continued during such carriage.

[4] The general rule is, in our opinion, settled by the weight of authority that employés, while being carried as part of their contract of service to and from their place of work, are fellow servants and not passengers. This is the general rule even as to railway employés, and the application of this rule does not necessarily fail from the mere fact that the carriage is had after the day's work has ceased. Nor is it necessary that the agreement for such carriage be expressed. It is sufficient if it be an implied term of the contract of employment, or contemplated thereby, as an incident thereof and a privilege connected therewith, for the sole purpose of facilitating the work of the employer and the employé. Nor is the mere fact that it is not necessary that the employé ride upon the train controlling of his status as employé. This rule is supported by a long line of authorities, including the following: *Gillshannon v. Railroad*, 10 Cush. (Mass.) 228; *Seaver v. Boston & Maine R. Co.*, 14 Gray (Mass.) 466; *Gilman v. Eastern Railroad Corporation*, 10 Allen (Mass.) 233, 87 Am.



Dec. 635; *McGuirk v. Shattuck*, 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454; *Kilduff v. Boston Elev. Ry. Co.*, 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873; *Kansas Pacific Ry. Co. v. Salmon*, 11 Kan. 83; *Bowles v. Indiana Ry. Co.*, 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279; *Ionnone v. N. Y., N. H. & H. R. R. Co.*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812; *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267, 274, 47 Am. Rep. 36; *Cicalese v. Lehigh Valley R. Co.*, 75 N. J. Law, 897, 900, 69 Atl. 166; *Wright v. Railroad*, 122 N. C. 852, 29 S. E. 100; *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133, 20 L. R. A. (N. S.) 354; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; *Cremins v. Guest*, etc., Ltd., L. R. 1 K. B. Div. 469; *Gane v. Colliery Co.*, L. R. 2 K. B. Div. 539; *Birmingham Ry., etc., Co. v. Sawyer*, 156 Ala. 199, 47 South. 67.

In *Gillshannon v. Railroad*, a common laborer on a railroad, while riding on a gravel train to his place of labor, was injured by a collision. It was held that the relation of master and servant existed between the plaintiff and the railroad company; the court saying:}

"If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed. \* \* \* If it be not properly inferable from evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnishes no ground for maintaining this action."

In *Seaver v. Boston & Maine R. Co.*, a carpenter employed by the day by a railroad corporation to work on the line of its road, and carried on its cars to the place of such work without any fare, was held not entitled to maintain an action against the corporation for injuries occasioned to him, while being so carried, by the negligence of those managing the train or charged with the duty of keeping in repair the equipment of the train.

In *Gilman v. Eastern Railroad Corporation*, where the railroad company was held not responsible to a person employed by it to repair its cars for a personal injury arising from the negligence of a switchman upon a track over which he is carried by the company free of charge, between his home and the place of his work, Justice Gray, speaking of the *Gillshannon* and *Seaver* Cases, said:

"In each of those two, as in this, the plaintiff's work did not begin until his arrival at his destination; and in this, as in those, the work was upon the structures, means, or instruments with which the defendants were to carry on their business of common carriers, the workman paid nothing for his passage, and the object of the defendants in carrying him was to get him to his place of work."

In *McGuirk v. Shattuck*, a woman who was employed by a person as a laundress, and who was being conveyed either gratuitously or as a part of a contract of employment, from her home to that of her employer in his wagon, was held to be in the service of the employer.

In *Kilduff v. Boston Elev. Ry. Co.*, a workman employed by a street railway company as a laborer in the construction of a new line of track was killed while being transported with other workmen back from the place of work after his day's work was finished. Mr. Justice Morton said:

"Although at the time of the accident the plaintiff's intestate had finished his work for the day, and he was under no obligation to do any more work for the defendant on that day, it seems to us plain that he was being transported by the defendant as an incident of his employment, and that the relation between him and the defendant was therefore that of master and servant and not that of carrier and passenger. The car was a special car in which only the laborers who were working on that particular job were allowed to ride, and was furnished for the mutual accommodation of the company and the laborers, and the plaintiff's intestate paid no fare. The portion of the track where the accident occurred was not open to the public, and transportation over that and the rest of the route was plainly furnished by the defendant to the deceased as a laborer in its employment and not as a passenger. It cannot reasonably be referred to any other relation."

In *Ionnone v. N. Y., N. H. & H. R. Co.*, where an employé of the defendant railroad company upon the completion of his work was invited to ride in the defendant's car to a point near his home, the carriage being gratuitous, it was said:

"The carrying of the deceased, after his day's work was done, to a point near his home, is, we think, to be regarded not as creating the relation of a passenger, but rather as a privilege incidental to his contract of service, granted to him by the defendant, of which he availed himself to facilitate his return to his home, and that it was a privilege accorded to him merely by reason of his contract of service."

In *Bowles v. Indiana Ry. Co.*, it is said:

"The general rule may be said to be that, where an employé is being carried by his employer in the conveyance of the latter to and from the work for which the former is employed, he is regarded not as a passenger, but as an employé; though if he is being carried merely for his own convenience, pleasure, or business, he is a passenger."

In *Kansas Pacific Ry. Co. v. Salmon*, the rule of master and servant was applied to the case of a person in the employ of the railroad company riding from his home to his employment in the caboose car attached to a freight train, without paying fare, according to the custom and understanding of the parties, from which cars and trains all persons except the employés of the company were excluded.

In *Wright v. Railroad Co.*, the rule was applied to the case of a section master, who, after his day's work, rode on a train to his lodging place without paying or being expected to pay his fare. In all or nearly all of the cases we have thus far cited, one or more of the Massachusetts cases referred to are cited with approval.

In *Birmingham Ry. Co. v. Sawyer*, it was held that a section hand, injured while riding back and forth to work on a car, without charge, pursuant to a rule of the company, is not a passenger, but is in the exercise of a mere privilege connected with his employment.

In *Tunney v. Midland Ry. Co.*, the rule was applied to the case of a laborer employed by a railway company to assist in loading a "pickup train" with materials left by plate layers and others upon the line;

one of the terms of his employment being that he should be carried from his home to the place at which his work for the day was to be done by the train, and to be brought back to his home at the end of each day.

*Cremins v. Guest, etc., Ltd., and Gane v. Colliery Company*, involved awards under the workmen's compensation act, and in both the question whether plaintiff was in the course of his employment was involved. The *Cremins* Case turned upon an implied agreement with the colliery company that he should have the right to travel between his home and the colliery free of charge. In the *Gane* Case, among the acts enumerated as within the contract of employment, was "taking a train, which he (the collier) is entitled to use by virtue of his contract of service."

The Supreme Court of the United States has not passed upon the specific question involved here, although some of its decisions have more or less bearing thereon.

In *Martin v. Atchison, T. & S. F. R. Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051, the fellow-servant rule was applied to the case of a common laborer who was injured by being run into by a train while on a hand car on the road proceeding to his place of work.

In *Texas & Pacific Ry. Co. v. Bourman*, 212 U. S. 536, 29 Sup. Ct. 319, 53 L. Ed. 641, the fellow-servant rule was applied to a section hand who, after being engaged in clearing up a wreck, was taken aboard an express train to be conveyed to the station at which he lived, and being injured while on the train by the alleged negligence of the engineer of the train and his own foreman.

In 4 *Elliott on Railroads*, § 1578a, it is said:

"As to whether an employé riding on a train is a passenger there is some conflict; but the rule seems to be that if he is being carried to and from his working place he is not a passenger, but if he is carried for his own convenience or business he is a passenger."

See, also, *Labatt on Master & Servant*, § 624.

Several cases are cited in support of the contention that the deceased occupied the relation of passenger. All but one of these cases are distinguishable in their facts from the case presented here, and nearly all are reconcilable with the authorities we have cited. For example:

In *Whitney v. N. Y., N. H. & H. R. R. Co.* (First Circuit) 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615, in which the employé was held a passenger, it was said:

"He (the employé) stipulated, not only for an increase of wages, but also for free transportation to Boston from the city where he was to be employed, for his own convenience, and not in connection with going to or from his work. He was injured while on one of these trips to Boston and while not going to and from his work, and while he was not employed; that is to say, during the hours when he was free for recreation or to visit his family, or to use his time for any purpose of his own."

*Philadelphia & Reading R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502, does not involve the status of an employé while riding gratuitously.

The case of *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, involved the case of one accepted as a passenger under a custom to permit those whose usual employment is on board of steamboats to go from place to place free of charge.

In *Packet Co. v. McCue*, 17 Wall. 508, 21 L. Ed. 705, a man standing on a wharf was hailed by the mate of a boat to assist in loading goods upon it. After completing his work he was paid at the office on the boat. While going ashore he was injured by the negligence of the boat's employes handling the gang plank. Whether the employment ceased after payment for the service was made and before the wharf was reached was held a question of fact for the jury.

In *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335, and *Id.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417, the injury occurred while the employe was riding upon his own personal business, on a ticket given him as part of his compensation, under which he was at liberty to use the ticket whether going to and from his work or not.

In *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284, the motorman who was held to be a passenger was traveling free at a time when he was not on actual duty, under a rule permitting such employes to ride at any time or place, and for any purpose, if in uniform.

In *O'Donnell v. Alleghany Valley R. Co.*, 59 Pa. 239, 98 Am. Dec. 336, the carpenter, who was held a passenger while traveling between his home and his place of work, received a less price per day than if he had paid his fare.

In *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721, the case was said to be in its controlling features "on all fours with *O'Donnell v. Railroad Company*."

The case of *Louisville & N. Ry. Co. v. Scott's Adm'r*, 56 S. W. 674, 22 Ky. Law Rep. 30, 50 L. R. A. 381, seems to have turned largely upon the proposition that the conductor accepted the deceased as a passenger.

In *Abell v. Western Maryland R. Co.*, 63 Md. 433, 445, the deceased was riding on a pass which, as said by the court, "was no part of the contract between Abell and the railroad. The contract between them was to pay a certain sum for a day's work. It was given as a mere gratuity, and as other passes are given."

In *Enos v. R. I. Suburban Co.*, 28 R. I. 291, 67 Atl. 5, 12 L. R. A. (N. S.) 244, in which a railroad flagman, who received for his services a weekly sum of money plus 14 transportation tickets good on the defendant's road, was held a passenger while riding to his home upon one of the tickets, it is fairly inferable from the opinion, although not expressly stated, that the tickets were good elsewhere than between the place of work and the home, and that they were not limited to use while going to or returning from work. Nor does it affirmatively appear that the wages would be the same were the tickets not given; the court saying:

"The plaintiff earned 14 tickets as well as \$8 per week, and the fact that the tickets were purchased by work, instead of cash, is unimportant."

Two cases decided by the Supreme Court of Tennessee are directly in conflict with what we have stated to be the general rule as to the status of an employé while being carried gratuitously to and from his working place. These cases are *Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. 861, and *New Etna Coal Co. v. Bailey*, recently decided and not for publication. In the first of these cases it was held that a railroad employé having nothing to do with the operation of trains but the performing of service at a station, who is permitted by the carrier to travel to and from the place of service on a train without payment of fare, is not a trespasser but a passenger while on its trains. The question whether the relation of master and servant existed was not expressly raised in that case; but the court said that:

"The weight of authority and of sound policy, we think, is that where a servant performs all his work at a fixed place, and the master, either by custom or as a gratuity, carries him to and from his work, the servant doing no service for the master on the train, he is to be treated as a passenger."

We think, however, that the authorities do not sustain this proposition as applied to the case we are considering.

The facts in the *New Etna Coal Company Case* are substantially the same as those in the case before us; and were we to follow that decision we should be compelled to hold that the deceased was a passenger. The decision in the *New Etna Case* seems to rest largely upon two propositions: First, that an employé traveling for a purpose wholly disconnected with his employment, and while not engaged in the master's service, upon free transportation furnished him by the master in consideration of his being an employé, occupies, while so traveling, not the position of a servant, but a passenger; and, second, that there is a clear distinction between cases where the servant performs all his duties at a given place and cases where the servant in the necessary performance of his duties, and while in the performance thereof, is transported by the master from place to place, wherever his services may be required. We think that, under the authority we have cited and the facts of this case, the carriage of the deceased cannot be said to have been wholly disconnected from his employment, but that it was, on the other hand, in a very proper sense, connected therewith, contemplated thereby, and incident thereto; and while the case of the servant who is being transported by the master from place to place, wherever his services may be required (such as section hands, employés on work trains, and those having charge of structures or operations along the line of the road), is not identical with that of one who performs all his duties at a given point, yet we think the legal distinction referred to is not recognized by the authorities generally.

In *Louisville & Nashville R. Co. v. Stuber*, 108 Fed. at page 936, 48 C. C. A. 151 (54 L. R. A. 696), Judge (now Mr. Justice) Lurton, speaking for this court, called attention to the fact that:

"Under the decisions of the Tennessee Supreme Court, the liability of a railroad company to one servant who has sustained injury through the negligence of another has been made to depend upon the subordination of the one to the other, as well as upon refinements in respect to different departments of service."

We, of course, do not know to what extent, if at all, the rule so prevailing in Tennessee may have affected the decisions in the two cases we have just discussed.

There is, in our opinion, nothing in the decisions of this court in *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, *Winters v. B. & O. R. Co.*, 177 Fed. 44, 100 C. C. A. 462, *Dishon v. Cincinnati, N. O. & T. P. R. Co.*, 133 Fed. 471, 66 C. C. A. 345, or *Huntzicker v. Illinois Central R. Co.*, 129 Fed. 548, 64 C. C. A. 78, supporting the proposition that the status of the deceased in the case we are considering was that of passenger. On the contrary, there are expressions in *Ellsworth v. Metheney* and *Huntzicker v. Illinois Central R. Co.* not in harmony with such conception. For an interesting review of decisions upon the question before us, see the opinion of Judge Cochran in *Dishon v. Cincinnati, N. O. & T. P. R. Co.* (C. C.) 126 Fed. 194, and the reference thereto in the opinion of this court, 133 Fed. at page 477, 66 C. C. A. 345.

In *Louisville & Nashville R. Co. v. Stuber*, supra, the plaintiff was foreman of water supply on a division of the defendant's railroad; his business being to supervise the tanks and pumping machinery at the water stations and keep the same in repair, in the performance of which duties he was required to ride over the road from station to station, being furnished with a pass good on all trains. While he was riding on a detached engine to a station where his services were required, he was injured in a collision caused by the negligence of the engineer in charge of such engine. In holding that the plaintiff was not a passenger, Judge Lurton said:

"His transportation to and from his place of work was part of his contract of service, and while being thus transported he was as much in the service of the company as when engaged in the repair or construction of a water tank or pump. He was traveling at the time under a single contract of service, and his right to be carried free to and from his work is inseparable from the contract to do the work, and no valid ground exists for saying that he paid his own fare, or was in any sense a passenger."

The facts in the *Stuber Case* are thus not identical with those presented here. But, following the proposition just quoted, Judge Lurton said:

"The rule is now well settled that railway employes, while being carried, as part of their contract of service, to and from their place of work, are fellow servants, and not passengers"—citing with approval, among other cases, *Gillshannon v. R. R. Corporation*, 10 Cush. (Mass.) 228; *Seaver v. R. R. Co.*, 14 Gray (Mass.) 466; *Vick v. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36, and *Tunney v. Ry. Co.*, L. R. 1 C. P. 291.

The cases of *Doyle v. Railroad Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335, Id., 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417, *McNulty v. R. R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721, and *State v. Western Maryland R. Co.*, 63 Md. 433, were there distinguished by Judge Lurton as "cases in which it appeared that at the time of the injury the employé was not in the service of the company, but was traveling for his own purposes, and therefore a passenger." The right to ride on the train in question was, in our opinion, an

implied term of the miners' employment. Such carriage was for the benefit both of the miners and of the company, and was a privilege given for the purpose of facilitating the employment and labor thereunder. The fact that the renting of houses to miners was facilitated by the maintaining of the miners' train does not impress us as important. The houses were presumably maintained, in part, at least, to facilitate the employment of laborers. In fact, deceased did not rent from defendant, and no distinction as respects the carriage was made between those who did and those who did not so rent. Where an employé is, by contract expressed or implied, carried to and from his work in a passenger car of a common carrier, there is more or less room for argument that the contract contemplated his carriage as a passenger; but with the exception of *New Etna Coal Co. v. Bailey*, we have been cited to no case in which an employé riding gratuitously to and from his work, as an incident of his employment by an employer other than a common carrier, has been held to be a passenger.

[5] We are constrained to hold that the deceased while being transported to his home by virtue of his employment as a miner, and upon this private miners' train, was not a passenger of defendant.

It follows from this conclusion that the case was submitted to the jury upon an erroneous theory, under which recovery was permissible for the negligent acts of coemployés. This error requires a reversal of the judgment.

[6] 3. The court did not err, however, in our opinion, in refusing to direct a verdict for defendant. The first ground of negligence submitted was "the alleged failure of the defendant's superior officers or agents to instruct the brakeman in reference to the use and operation of the derailing switch; that is, the alleged failure to see that the use of that derailing switch was kept up by the train crew." This ground did not involve the negligent conduct of a fellow servant. It was predicated upon the nondelegable duty which a master owes to the servant. It is true that with respect to the operation of its road the defendant's duty to the deceased extended no further, with respect to the complaint under consideration, than to exercise ordinary care to provide a sufficient number of reasonably competent employés, make proper rules for their government, and exercise proper supervision over them; and if that had been done the defendant would not be liable for an injury to an employé in the operation of the road through the negligence of other employés in the operating department, or their failure to observe the rules, notwithstanding such negligence made the place unsafe to work in. *Martin v. Atchison, T. & S. F. R. Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; *Pennsylvania Co. v. Fishack* (Sixth Circuit) 123 Fed. 465, 59 C. C. A. 269; *Kinnear Mfg. Co. v. Carlisle*, (Sixth Circuit) 152 Fed. 933, 81 C. C. A. 81; *Illinois Central R. R. Co. v. Hart* (Sixth Circuit) 176 Fed. 245, 251, 100 C. C. A. 49. But the negligence aimed at by the proposition we are considering is the failure of the defendant to properly instruct its operatives, and to exercise proper supervision over them. There was evidence tending to show that due care re-

quired the installation and use of the derailing switch. Its installation was suggested by the defendant's actual experience with a runaway car. The use of this derailing switch had been maintained until a few weeks previous to the accident. There was testimony that its use was discontinued by reason of the failure of defendant to instruct the new head brakeman to use the same. The general superintendent testified that he did not know that the switch was not being operated, and that, had he known, he would have issued such instructions as would have caused it to be used; also, that the accident in question is evidence that the situation required the maintaining of the derailing switch. In view of this testimony, the court would not have been justified in holding, as matter of law, that the fact that the use of such switch was in advance of operations as usually conducted in plants of this character relieved defendant of the charge of negligence. Such proposition was, at best, addressed to the consideration of the jury. Nor would the court have been justified, under the evidence, in holding that the deceased had assumed the risk arising from the nonuse of the derailing switch. He was not engaged in the operation of the road. While the evidence showed that he passed daily in sight of the switch, and while there was evidence from which the jury might have found that he knew the switch was not being regularly used, the testimony was not, in our judgment, such as to require a finding that he knew of the discontinuance of the use of the switch, and that he knew and appreciated the dangers to ensue from such disuse.

[7] 4. The jury were instructed that the measure of care owing by defendant to deceased was what "a prudent, cautious man, experienced in the business of managing and running trains and accustomed to the use of trains under similar circumstances as these, in the exercise of care and skill would have used. \* \* \*" The defendant presented a request the effect of which, if given, would have been to exclude from consideration the ground of negligence relating to the alleged failure of instruction and supervision with reference to the derailing switch. The charge as given is in accordance with that approved in *Shoemaker v. Kingsbury*, 12 Wall. 369, 20 L. Ed. 432, as relating to the duty resting upon a private carrier. The criticism is made that the instruction imposed too high a degree of care upon the employer. We think the criticism is not well made. The deceased was not a mere licensee, as would seem, from the authorities cited, to be defendant's view.

5. Upon the subject of the assumption of risk, the jury was instructed that, if the officers and agents of the company were negligent in the discontinuance of the use of the derailing switch, then the inquiry would be "whether the deceased, Huff, knew of the discontinuance of this switch, and whether a man of ordinary intelligence should have appreciated the dangers that would result from a failure to keep up the use of the derailing switch. If you find from the weight of the proof that the deceased, Huff, knew that the use of the derailing switch was not kept up, and knew, as a man of ordinary intelligence, and appreciated the dangers to be apprehended from the fact, \* \* \*" such fact would be a complete defense to the allegation



of negligence relating to the failure to maintain the use of the derailing switch. To this instruction the criticism is made that it is not necessary that the deceased should have actually appreciated the dangers, provided he, as a reasonable man, should have appreciated them. The instruction which we have quoted may, we think, fairly be construed as conforming to the definition contended for by defendant's counsel.

For the errors above pointed out, the judgment will be reversed, and a new trial ordered.

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REYNOLDS v. NEW YORK TRUST CO.

(Circuit Court of Appeals, First Circuit. June 22, 1911.)

No. 918.

1. ACTION (§ 28\*)—WAIVER OF CONVERSION—ACTION ON QUASI CONTRACT.

Where a plaintiff's goods have been converted, his right to waive the tort and sue in contract for their value is the same, whether defendant has sold the goods or has kept, concealed, or consumed them.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28.\*]

2. COURTS (§ 361\*)—BANKRUPTCY—CONSTITUTIONAL GRANT OF POWER—CONSTRUCTION OF ACTS—EFFECT OF STATE DECISIONS.

In the exercise of jurisdiction in bankruptcy, conferred under the Constitution, the courts of the United States have the right to resort to the principles of the common law, and therefrom to determine whether an obligation of a contract nature arises upon a conversion of goods and is available to the owner upon waiver of his right to pursue his remedy in tort, and are not controlled by the decisions of the state courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 361.\*]

3. BANKRUPTCY (§ 318\*)—PROVABLE DEBTS—QUASI CONTRACTS—WAIVER OF TORT.

Bankruptcy courts may give to Bankruptcy Act July 1, 1898, c. 541, § 63a (4), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447), which allows proof of debts founded upon "a contract express or implied," a construction sufficiently broad to include quasi contracts arising upon a conversion where the tort has been waived.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 318.\*]

4. TORTS (§ 22\*)—JOINT AND SEVERAL LIABILITY—ELECTION BY PLAINTIFF.

The liability of one of several tort-feasors is not both joint and several, but is joint or several at the election of the plaintiff, and, if he has recovered a joint judgment, he is not entitled also to a several judgment against one of the same persons.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. § 22.\*]

5. BANKRUPTCY (§ 309\*)—PROVABLE DEBTS—PARTNER—CONVERSION BY PARTNERSHIP.

The rule, which permits the owner of property converted to waive the tort and recover the value of the property as on an implied contract, is based on the ground that defendant's estate has been unjustly enriched by the conversion, and where it was by a partnership, and inured to the benefit of the firm estate, whatever implied contract arises is that of the firm, and not of an individual partner, and the owner of the property, after having proved his claim against the partnership estate as one of contract, is not entitled to prove it against the individual estate of a

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

partner, which would have the effect of giving them an advantage over creditors having express contracts with the firm.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 309.\*]

Appeal from the District Court of the United States for the District of Massachusetts.

In the matter of E. H. Gay, bankrupt. Appeal by John P. Reynolds, trustee, from an order allowing the claim of the New York Trust Company. Reversed.

Albert S. Woodman (Tyler & Young, Woodman & Whitehouse, Charles H. Tyler, Owen D. Young, John P. Wright, and Robert T. Whitehouse, on the brief), for appellant.

Charles P. Howland (Charles W. Whittlesey and Howland, Murray & Prentice, on the brief), for appellee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. This is an appeal by the trustee in bankruptcy of E. H. Gay, from an order of the District Court for the District of Massachusetts, allowing a claim of the New York Trust Company for the sum of \$14,875 against the individual estate of E. H. Gay. A claim of like amount was allowed against the copartnership estate of E. H. Gay & Co., bankrupt. From the allowance of the claim against the copartnership estate there is no appeal.

The question before us is whether the Trust Company has the right to make double proof and to have its claim allowed both against the copartnership estate and against the individual estate of one of the copartners.

By stipulation the parties have agreed upon the following facts:

(1) E. H. Gay was the managing partner of E. H. Gay & Co. The New York Trust Company, owner of 25 \$500 first-mortgage 6 per cent. bonds of the Manistee, Filer City & East Lake Street Railway Company, lodged them with E. H. Gay & Co. on March 14, 1905, together with \$3,125 in cash, under a deposit agreement by which E. H. Gay & Co. were to deliver to the New York Trust Company at par value \$15,625 bonds of a corporation to be organized in the course of the reorganization of the Railway Company.

(2) In pursuance of this agreement the Manistee Light & Traction Company was incorporated. Its bonds were issued and delivered to E. H. Gay & Co., who received and held 15 <sup>625</sup>/<sub>1000</sub> of them for the New York Trust Company under the deposit agreement. These 15 <sup>625</sup>/<sub>1000</sub> bonds were pledged by E. H. Gay & Co., without authority from or knowledge of the New York Trust Company, as security for loans negotiated in the course of the firm business of E. H. Gay & Co. for their own benefit. No notice was ever sent to the New York Trust Company that the Manistee Light & Traction Company bonds had been received by E. H. Gay & Co. for the benefit of the New York Trust Company, and the Trust Company had no knowledge that E. H. Gay & Co. had the bonds.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(3) No attempt is made by the New York Trust Company to show that the unauthorized pledge of the bonds was the individual act of E. H. Gay.

(4) It is hereby stipulated by parties that the market value of bonds of the Manistee Light & Traction Company at the time of conversion herein was \$950 for each bond of \$1,000 face value, and, if said claim of the petitioner is allowed as a claim against the individual estate of E. H. Gay, it is agreed that such allowance may be in the sum of \$14,-875.

The claim filed against the copartnership estate made no allegation of a conversion either by the copartnership or by E. H. Gay, but alleged merely the receipt by E. H. Gay & Co. of bonds, for delivery to the Trust Company, and the nondelivery to the Trust Company.

The learned District Judge was of the opinion that the claim allowed against the firm estate was neither presented nor allowed as a claim based on a liability in tort, and that as against the firm no liability in tort had been waived in order to rest the claim on an implied promise arising upon the waiver of tort; but that failure to comply with the firm's express promise was the sole basis of proof against the firm.

The claim against the individual estate of E. H. Gay is based solely upon the theory of an implied contract or quasi contract, arising from the conversion of the bonds by E. H. Gay & Co. in the course of the firm business.

By its terms the claim against E. H. Gay individually alleged a conversion of the bonds by E. H. Gay. This allegation, however, becomes immaterial since the stipulation provides that no attempt is made to show that the unauthorized pledge was the individual act of E. H. Gay; and since it does not appear that E. H. Gay individually received benefit therefrom.

The Trust Company contends that the conversion was in course of the firm business, and that thereby the partners became jointly and severally liable in tort for the conversion; that upon the waiver of tort there arise implied contracts or quasi contracts both of the firm and of the individual partners to pay the value of the bonds converted to the use of the firm.

Where there are separate and distinct express contracts of the firm and of a copartner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for the firm debt, there are substantial reasons for permitting him to resort to both estates. *In re McCoy*, 150 Fed. 106, 80 C. C. A. 60; *Chapman v. Bowen*, 207 U. S. 89, 28 Sup. Ct. 32, 52 L. Ed. 116.

The additional several contract of a partner is not implied from the firm transaction, but must be created by a distinct act of the copartner.

As the conversion in the present case was by the firm, in the course of firm business; as the actual participation of E. H. Gay is not proved; as there is no evidence that his individual estate benefited by the firm conversion—there is difficulty in finding any substantial ground upon which to imply from the circumstances a separate contract of E. H. Gay, which corresponds to an express individual contract to answer for a firm debt.

While the partnership relation exposes one partner to liability for firm debts contracted by another partner without his consent, one partner has no authority to make an individual contract for another partner.

In the present case it is contended that because under the partnership relation partners, through firm dealings, may be made jointly and severally liable in tort, there arise quasi ex contractu on waiver of tort, not only a joint contract, but also several contracts of each partner to pay the amount of the firm debt. This contention seems also to involve the proposition that upon a conversion of bonds or stock by a partnership there arise a number of debts; as many individual debts as there are partners, and also a firm debt.

The breach of an express contract to deliver the bonds to the Trust Company creates only a partnership debt, for payment of which resort must be had to the proceeds of the partnership property. Bankruptcy Act July 1, 1898, c. 541, § 5f, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424).

Upon a suit for such a breach of contract only a single judgment could be had, a judgment against the firm, upon which resort would be had to the firm assets.

The claim against E. H. Gay is based entirely upon the fact, stated in the stipulation though not in the claim, that the copartnership converted the bonds.

Viewing both estates, we have asserted against E. H. Gay, as a joint debtor, either a breach of express contract or an implied contract to pay for value received; as an individual debtor, the conversion of the bonds, a tort, with a waiver of the remedy in tort.

We now reach the important question whether the fact that there was a conversion by the firm is in itself a sufficient basis for an implied or quasi contract of E. H. Gay individually.

As was said in the opinion of this court in *Clarke v. Rogers*, 183 Fed. 518, 106 C. C. A. 64:

"A claim based on a tort as known at common law is undoubtedly provable whenever it may be resolved into an implied contract. For example, it is a settled rule that where a tort-feasor by conversion of personal property has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract."

The trustee, appellant, claims that it is a well-established law that:

"Unless there has been a sale of the property and a receipt of the proceeds of the same in money, the tort cannot be waived, and an action or claim will not lie as for money had and received, upon an implied promise or quasi contract"—citing *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Ladd v. Rogers*, 11 Allen (Mass.) 209; *Allen v. Ford*, 19 Pick. (Mass.) 217; *Berkshire Glass Co. v. Wolcott*, 2 Allen (Mass.) 227, 79 Am. Dec. 781; *Brown v. Holbrook*, 4 Gray (Mass.) 102; *Hagar v. Norton*, 188 Mass. 50, 73 N. E. 1073; *Newmarket Mfg. Co. v. Coon*, 150 Mass. 566, 23 N. E. 380; *Cooper v. Cooper*, 147 Mass. 373, 17 N. E. 892, 9 Am. St. Rep. 721.

While some of these cases might be distinguished on the ground that they relate merely to the scope of the special action for money had and received, yet it must be conceded that upon the whole they may be regarded as giving a somewhat narrow limitation to the doctrine of quasi contract. We should be reluctant, however, to rule

that the claim should be disallowed on so limited a view of the scope of the law of quasi contracts.

It is difficult to find any substantial ground upon which the judicial conscience which admits the use of fiction to sustain an action of assumpsit for money had and received should refuse to adopt a similar fiction upon an action in assumpsit for goods sold and delivered. Where a person has converted personal property to his own use by keeping, concealing, or consuming it, there is every reason for requiring him to pay its value and for giving the owner an option to sue upon contract. To hold him upon an implied contract if he has sold the goods for money and used the proceeds, but to refuse to hold him upon an implied contract for the value of goods consumed but not sold, is to limit the doctrine of quasi contracts by an arbitrary distinction which disregards the substantial similarity of the two cases.

[1] If the plaintiff's goods are taken, his right to waive the tort and to sue in contract should be the same whether the defendant has sold the goods or has consumed them.

While the authorities in America are divided (Keener on Quasi Contracts, 193 et seq.), there seems little doubt of the soundness of Mr. Keener's conclusion that:

"The two cases involve a common element which is universally recognized in the one case, and should be in the other, as furnishing a ground for recovery, namely, that the defendant has had that for which in conscience he should give the plaintiff an equivalent in money." Keener on Quasi Contracts, 195.

In *Crawford v. Burke*, 195 U. S. 176-194, 25 Sup. Ct. 9, 13 (49 L. Ed. 147), where the defendants sold stocks and thereby converted them to their own use, the court said:

"It is evident that the plaintiff might have sued them in an action on contract charging them with the money advanced and with the value of the stock."

The trustee contends that upon the question whether there arises, from a mere conversion without a sale, an implied contract or a quasi contract to pay the value of the goods converted, we should be governed by the Massachusetts decisions, citing *Fleitas v. Richardson*, 147 U. S. 550, 13 Sup. Ct. 495, 37 L. Ed. 276; *Humphrey v. Tattman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; *In re Chantler Cloak & Suit Co. (C. C.)* 151 Fed. 952; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577.

These cases, however, are too restricted in scope to support the trustee's contention.

[2] In the exercise of the jurisdiction in bankruptcy conferred under the Constitution, the courts of the United States have the right to resort to the principles of the common law, and therefrom to determine whether or not an obligation of a contractual character arises upon the conversion of goods and is available to the owner upon waiver of his right to pursue his remedy for tort. See the learned opinion of Shiras, J., in *Murray v. Chicago & N. W. Ry. Co. (C. C.)* 62 Fed. 24, cited with approval in *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92-103, 21 Sup. Ct. 561, 45 L. Ed. 765.

The decisions of a state court, so far as they relate to the scope of particular forms of action and as to the adoption or nonadoption of particular modes of procedure involving the use of ancient fictions, can hardly be regarded as conclusive upon the broader question of the existence of an obligation of a contractual character.

In *Clarke v. Rogers* (C. C. A.) 183 Fed. 518-524, Judge Putnam clearly recognizes the distinction between the question of the existence of a contractual obligation and the question of the mode of recovery in the following language:

"Independently of the bond, we believe there is an obligation resting on a defaulting testamentary trustee to restore the value of the assets embezzled, which is of a contractual character. The method of recovering on this would be so far purely incidental that the Legislature might at any time provide for an action at common law in behalf of the successor as trustee, whatever might at any time be the preceding remedies either by a suit in equity, or by a suit on the bond, or by a summary order of the court having jurisdiction in reference thereto."

[3] As the bankruptcy statute suspends the special remedies under state laws and substitutes its own procedure, it is important that the meaning of section 63, which defines debts which may be proved, should not be narrowed nor confused by reading into it local decisions denying a right of recovery under particular modes of procedure. Uniformity of construction is desirable, and we think the courts of bankruptcy are at liberty to give to the words "upon a contract express or implied," in section 63a4, a breadth of meaning which will include quasi contracts, in which the real ground of liability is that for value received in money or in goods a defendant should pay.

Assuming, therefore, that by the conversion there was created a contractual obligation, we have next to inquire what is its nature.

[4] It is argued that as tort-feasors are jointly and severally liable, so the implied contract is both joint and several. The proposition that joint tort-feasors are "jointly and severally liable" requires careful consideration, however, since there is ground for thinking that the fundamental error in the Trust Company's argument arises from the inaccuracy of this expression.

The liability of one of the several tort-feasors is not both joint and several, but is joint or several at the election of the plaintiff. The plaintiff may have judgment against one or more, but he may not have two judgments against the same person on the same transaction.

If a tort is committed by several, it may be treated as joint or several at the election of the aggrieved party. *Gould on Pleading*, c. 4, § 66; *Sessions v. Johnson*, 95 U. S. 348, 24 L. Ed. 596; *Atlantic & Pacific R. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. Ed. 485; *Chicago, Burlington & Quincy Ry. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. — (April 10, 1911).

A joint judgment is a bar to a several action, and a several judgment to a joint action.

At law, therefore, one whose goods were converted by partners could not have both a joint and several judgment, but could have either at his election. The present claims, therefore, if reduced to

judgment in tort, would not be two, but one judgment only, joint or several, at the plaintiff's election.

It seems impossible that the Trust Company should have greater rights before judgment than if it had proceeded to judgment.

In *Bigby v. U. S.*, 188 U. S. 400-409, 23 Sup. Ct. 468, 472 (47 L. Ed. 519), it was said:

"A party may in some cases waive a tort, that is, he may forbear to sue in tort and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that 'a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained.'"

The individual tort imputed to E. H. Gay being waived, what elements remain to support an individual contract? That a partnership of which he is a member has had the bonds.

In Keener on Quasi Contracts it is said (page 160):

"Assuming a defendant to be a tort-feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby," etc.

If the right to recover on quasi contract upon a waiver of tort rests upon the doctrine of unjust enrichment, the difference between enrichment by money and by stocks or bonds, of known market value, would be unsubstantial. To limit the right to recover on quasi contract to cases where money had been received would be arbitrary and hardly defensible in reason.

As there is no individual act of E. H. Gay, or benefit to his estate which is separable from the act and benefit of the firm, what is there except the fact that the creditor once had a right to sue him individually as a tort-feasor to support the theory of an individual promise or an individual quasi contract?

The Trust Company contends that both the claim against the firm and the claim against the individual were proved on the theory of implied contract based on the conversion of the bonds, and that the proof against the firm was not on an express contract. *Chicago & N. W. Ry. Co. v. De Clow*, 124 Fed. 142-148, 61 C. C. A. 34, is cited, to sustain the proposition that there has been no election to proceed for breach of express contract, and thereby to waive any action on implied contract.

[5] Assuming for the purposes of the case, however, that the Trust Company bases both claims upon the contractual obligations arising upon a waiver of the joint tort, we do not escape the fundamental difficulty in the case. If there is an implied contract of the firm, of E. H. Gay jointly with the other partners, growing out of the fact that the firm pledged the bonds as security for loans negotiated in the course of the firm business, and for the firm benefit, can it be said with consistency that E. H. Gay is also liable because he individually had the bonds or their proceeds?

It is apparent that in the decision of this case we can derive no assistance from those cases in which it appeared that a partner, or one of several joint tort-feasors, had individually converted property or

funds and wrongfully appropriated them to the uses of a firm. The opinion of the District Court correctly distinguishes between cases of that character and the present case. In such cases the individual, as well as the firm, has had the property—the individual by using it as his contribution to the firm, and the firm by using it in the firm business. Both were under an obligation because both had received a benefit. Here are two distinct causes of action.

It is apparent that the present claim was allowed solely upon the authority of decisions in the Second Circuit. In *re* Coe (D. C.) 169 Fed. 1002; In *re* Coe (C. C. A.) 183 Fed. 745. In the opinion of the District Court (169 Fed. 1002) it was said that the members of a firm were jointly and severally liable upon a claim either in tort or upon quasi contract, at the creditors' election, for misappropriation, and that upon their bankruptcy the plaintiff could file double proof both against the partnership assets and against the individual assets of each partner, citing In *re* Baxter, Fed. Cas. No. 1,119; In *re* Jordan (D. C.) 2 Fed. 319; In *re* Blackford, 35 App. Div. 330, 54 N. Y. Supp. 972; Lindley on Partnership (5th Ed.) 703; Loveland on Bankruptcy, 315, and cases cited: In *re* Parkers, 19 Q. B. Div. 84. In the Circuit Court of Appeals (183 Fed. 745) it was said:

"It makes no difference that the parties acted without evil intent, nor that the firm got the benefit of what they did. It remains a wrongful conversion for which all the partners are liable, not jointly as partners, but jointly and severally as tort-feasors, whether they each actively participated in it or not; the acts of every one being imputed to every other."

The only additional authority cited by the Circuit Court of Appeals was *Blyth v. Fladgate*, L. R. Ch. Div. (1891) 337.

With the greatest respect for the opinions of the learned judges in both the District Court and the Circuit Court of Appeals, we are unable to accept the proposition that joint tort-feasors are jointly and severally liable, if by that is meant subject to both joint and several judgments. As we have said, a plaintiff is not entitled to two judgments against a tort-feasor, but is put to his election. He is permitted to deal with each of the tort-feasors as if he were the sole cause of the tort; but he may not subject a single defendant to two judgments, joint and several.

Had this creditor proceeded to reduce its tort claim to judgment before bankruptcy, and to prove on the judgment in tort under section 63a (1), he could have had but one judgment against E. H. Gay; at the creditors' election an individual judgment, or a judgment against E. H. Gay with others. In other words, he would have been compelled to elect between a joint and a several liability.

It is true that upon the joint judgment in tort he might have had execution against the individual estate, but this is equally true of a joint judgment on contract.

The bankruptcy statute intervenes to destroy the ordinary rights under execution, by section 5g, which divides the assets into partnership estate and individual estate, and gives priority of rights in the assets to creditors according to whether the debts are partnership or individual.



The brief of the Trust Company states, correctly we think, that "this is a question concerning the nature of legal rights." The creditor's legal right was to make his claim joint or several; he could not make it both, and must elect. The creditor's rights were in the alternative and not cumulative; he is forced to an election; not according to the early English rule that an election must be made even where there are distinct contract rights against both the firm and the individual, but on the ground that at law his right is to have his cause of action joint or several, but not both.

If it be granted for the purposes of the case that upon a waiver of tort there arise contractual obligations which correspond to the tort obligations, then it follows not that there are two contracts, one joint and one several, but one contract which is joint, or in the alternative a number of contracts which are several. But, as we have seen, the proposition that upon a waiver of tort there arise contractual obligations corresponding to liabilities in tort is itself most doubtful.

If on principle the doctrine of quasi contracts is broader in scope than the action for money had and received, and should be extended to all cases in which a defendant has had that for which in conscience he should give the plaintiff an equivalent in money (Keener, 195), yet in the present case this reason applies only to the firm, and not to the individual who was not an actual participant, nor beneficiary.

Under such conditions the rule that forbids contribution between wrongdoers abates, and the right arises to recover from the actual wrongdoer the damage imposed upon one who is not in fact a participant; the ultimate responsibility being cast upon the actual wrongdoers. *Union Stock Yards Co. v. Chicago & N. W. Ry. Co.*, 196 U. S. 217, 224, et seq., 25 Sup. Ct. 226, 49 L. Ed. 453.

Whether in any event the right to contribution would not cast this claim ultimately upon the partnership estate, under chapter 3, § 5g, through a claim of the individual estate, is a query which we need not solve, but simply refer to as a possible complication that might result from implying a contract against one who is held liable as a tortfeasor without actual participation or moral responsibility.

Furthermore, the fiction of a promise should not be extended beyond its legitimate purpose, and especially should it not be permitted to affect injuriously the rights of third persons.

There is an inconsistency between the requirement that a plaintiff should waive the tort and take his place with the other creditors, and a contention that by virtue of the tort alone he should have implied contracts which put him in a better position than other creditors who have express contracts.

The bankruptcy act requires a distinction between firm and individual debts. The test of whether the debt is firm or individual is the character of the transaction from which it arises. Here there was no transaction other than a firm transaction; and a fiction of law which raises a promise based solely upon tort liability and not upon an obligation to pay for value received by an individual, cannot be allowed without an infringement of the rights of the individual creditors, and of bankruptcy rules of equality.

Upon a review of the cases cited we find no sufficient authority for the allowance of double proof in a case like the present. Without questioning the correctness of the decisions in the cases in the Second circuit, or considering the differences in facts, we nevertheless do not feel constrained to accept the proposition that upon a waiver of tort there arise contractual obligations corresponding to tort obligations, or the further proposition that upon waiver of a joint tort there arise both joint and several obligations *ex contractu*. The contractual obligation arises only when value has been received for which in good conscience a defendant should pay.

We are of the opinion that the claim against the individual estate of E. H. Gay should be disallowed on the ground that upon this record only a firm contract exists after the waiver of tort.

The judgment of the District Court is reversed, and the case remanded to that court with direction to disallow the claim of the New York Trust Company for the sum of \$14,875 against the individual estate of E. H. Gay, and the appellant recovers costs in this court.

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NELSON et al. v. OHIO CULTIVATOR CO.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1911.)

No. 2,102.

1. CONTRACTS (§§ 169, 170\*)—EXTRINSIC AIDS TO CONSTRUCTION—CONSTRUCTION BY PARTIES.

A contract, if ambiguous, is to be construed in the light of the circumstances which surrounded its execution, and if the parties have given it a practical construction which harmonizes with what was probably their intention in view of such circumstances, that construction becomes a part of the contract itself, and will be adopted by the court.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 752, 753; Dec. Dig. §§ 169, 170.\*]

2. CONTRACTS (§ 352\*)—ACTION FOR BREACH—QUESTIONS FOR JURY.

Defendant contracted to manufacture machines under patents owned by plaintiffs during the life of such patents, and to pay royalties thereon, and also to sell and deliver a number of the machines to plaintiffs by a certain date. On their part plaintiffs were to give security to pay for such machines, if required, before defendant should be required to make them, and also to furnish the wooden patterns for the castings. Whether they were also required to furnish the metal patterns necessary to make the castings was a question in dispute. There was delay in giving the security, and also in furnishing the patterns, such that defendant could not complete the machines for delivery to plaintiffs by the time required, and when such time arrived defendant rescinded the contract, having made no machines. There was evidence tending to show that plaintiffs agreed to an extension of the time for delivery of the machines to them, and that defendant waived the delays. *Held*, on the evidence, that whether defendant was justified in rescinding the contract, and whether, if not, plaintiffs sustained substantial damages, were questions for the jury, and that the direction of a verdict was error.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1824-1828; Dec. Dig. § 352.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. TRIAL (§ 178\*)—DIRECTION OF VERDICT—CONSIDERATION OF EVIDENCE.**

It is the duty of the court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom the instruction is asked and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, to determine whether or not under the law a verdict might be found for that party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.\*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action at law by Frank J. Nelson and Frederick D. Bell against the Ohio Cultivator Company. From a judgment entered on a verdict directed by the court, plaintiffs bring error. Reversed.

Arthur C. Wade (Guy W. Kinney, on the brief), for plaintiffs in error.

C. A. Seiders, for defendant in error.

Before KNAPPEN, Circuit Judge, and McCALL and SATER, District Judges.

SATER, District Judge. At the close of the evidence the trial court, on the defendant's motion for a directed verdict, instructed the jury to find for it on the second and third causes of action, and nominal damages in the sum of \$1, for the plaintiffs, on the first cause of action. The plaintiffs charge that this was error and seek a reversal. In our consideration of the case, reference will be made to such facts only in the voluminous record as are reasonably necessary to a determination of the questions presented.

On October 27, 1906, the plaintiffs, citizens of New York and owners of certain letters patent, issued in 1897, for improvements in potato planters and diggers and potato cutters and droppers, entered into a contract with the defendant, of Bellevue, Ohio, to run for the life of the patents, whereby defendant, an Ohio corporation and an extensive manufacturer of agricultural implements, agreed to manufacture, in a good, substantial, workmanlike manner, of good durable material as many of the machines each year as could be sold or as the trade demanded, and to sell the same either singly or in combination as the trade required. It bound itself to use its best endeavor to sell the machines and advertise them throughout the large territory in which it transacted business, at a rate fairly to compete with similar machines of similar utility and cost of production, and to pay the plaintiffs \$5 for each machine sold singly, i. e., as a planter or a digger, and \$10 for each machine whose parts were sold in combination. The plaintiffs agreed to purchase 50 of the completed combined machines for \$3,500, to be sold by them in New York, for which state they reserved the exclusive right to sell the patented device. These machines, on which no royalty was to be paid, were to be delivered to them on March 1, 1907, for which the plaintiffs, at the time of delivery, were to give their note maturing December 1, 1907. Except as to the 50 machines above mentioned, the defendant was to furnish plaintiffs machines and extras

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the New York trade at market price. Whenever the royalties paid aggregated \$50,000, the defendant was, by assignment then duly to be made by the plaintiffs, to become the sole owner of the patents, and the payment of royalties was thereupon to cease. The plaintiffs were to furnish at their own expense all metal patterns, core boxes, dies, and templets necessary to manufacture the machines, and to defend at their own expense any patent litigation that might arise from infringement, so long as the defendant manufactured in accordance with the patents. They aver in their amended petition, and support such averment by their evidence, that subsequent to the execution of the written contract a parol agreement was entered into that the defendant should manufacture the metal (gray iron) patterns, core boxes, dies, and templets, but Stahl, the defendant's president, denies that any such modification of the written contract was made. At the same sitting at which the written contract was executed, the plaintiff Nelson, by a separate written instrument, represented and warranted that he was financially responsible for the 50 machines to be delivered to him by the defendant on March 1, 1907, to the amount of \$3,500, and that, if upon investigation, such was not found to be the fact, he would execute and deliver a bond before he required the delivery of the goods. On March 1, 1907, the defendant, alleging as a reason therefor that the plaintiffs had, by their failure to observe their contract of October 27th, made defendant's compliance with it impossible, canceled the contract and notified them to remove such property of theirs as was then at its factory. This the plaintiffs did and thereafter sued for damages. In their first cause of action they seek to recover \$50,000 for breach of contract on account of defendant's failure to manufacture and sell the machines and pay the stipulated royalties. They aver that had the defendant proceeded with the performance of its contract, they would have sold 5,000 of the combined machines, in consequence of which they would have received royalties in the sum so claimed as damages. The second cause of action is for \$2,750, being profits alleged to have been lost through the defendant's failure to make and deliver the 50 machines for sale to the New York trade in 1907, and for expenses incurred by plaintiffs in preparing to care for such trade and in the performance of their contract prior to its cancellation. The third cause of action is for damages for breach of contract in failing to supply the plaintiffs with machines for the New York market, exclusive of the 50 machines above mentioned. They allege that they could have realized a profit of \$50 on each machine sold, and could have netted a total profit of \$50,000.

The answer, among other things, denies the utility of the machines, and the defendant's obligation to make more than 50 of them for the trade of 1907, or to make any metal patterns, core boxes, dies, and templets, and charges a failure on the part of plaintiffs to furnish such articles in time to permit the construction of the machines at the time stipulated. It also charges misrepresentation as to the plaintiffs' financial responsibility, a refusal on their part to extend the time for the building of the machines, and the making, on February 18th, of a new

contract for their construction, for \$3,150 cash in advance, and the repudiation of such contract by the plaintiffs.

The question for decision is: Did the court err in directing a verdict as above mentioned? As the answer to this question must be wrought out from the incidents connected with the plaintiffs giving bond for the 50 machines to be delivered March 1, 1907, and from their respective duties and acts as regards the making of the metal patterns, core boxes, dies, and templates, these subjects will be considered in their order.

Standing alone, the obligation given by Nelson to furnish bond for the 50 machines to be made and delivered for the New York trade, if an investigation proved that he was not financially responsible for their cost, was personal to him, and the bond, if required, would have been timely, if given at any time before the goods were delivered. An examination promptly conducted by the defendant resulted in a demand for additional security, with which demand Nelson, with equal promptness, promised to comply. He wrote:

"Before you are required to manufacture any of the machines I will furnish you such security as may be satisfactory."

Fearing that his associate, Bell, who had wasted his estate on patents and whose relation to him as regards this transaction was that of a partner, might not respond to his portion of the liability for the machines or bear his just part of the expenses to be incurred in launching and maintaining the contemplated New York selling agency, and deeming it unwise to make any definite arrangements as to security until Bell had heard from a relative who was to furnish him financial backing, Nelson sought and finally obtained the defendant's consent to accept security from him for one-half only of the cost of the machines and from Bell for the residue. The defendant from the first and at all times interpreted the contract to mean that the bond was to be furnished before it began the manufacture of the machines, and although Nelson on different occasions requested the defendant to take the preliminary steps necessary to the procurement of stock for the building of the machines, both he and Bell at all times acquiesced in and never disputed the correctness of that interpretation. Moreover, the evidence of both Nelson and Stahl reveals an understanding that the bond or security was to be given upon its being ascertained that Nelson was not financially responsible. Ordinary prudence on the part of the defendant, who was about to engage in the manufacture of an article of whose practical utility comparatively little was known on account of the slight use to which it had been put, would suggest this protecting precautionary course of procedure. Notwithstanding the apparent meaning of the language of his obligation of October 27th, considering it in the light of the circumstances which surrounded its execution, evidence of which was admissible (Page on Contracts, § 1123), and the construction uniformly placed upon it by all the parties throughout their voluminous correspondence and the whole of their dealings with each other, it must be held to mean, on the record submitted, that the security it called for was to be furnished the defendant before it entered upon the manufacture of the machines.

[1] The parties having placed on their contract a practical con-

struction which harmonized with their understanding at the time of its execution, that construction became a part of the contract itself and the court will therefore adopt it. *Insurance Co. v. Dutches*, 95 U. S. 269, 24 L. Ed. 410; *Gorrell v. Home Life Insurance Co.*, 63 Fed. 371, 378, 11 C. C. A. 240; *Seymour v. Warren*, 179 N. Y. 1, 6, 71 N. E. 260.

[2] Although the instrument plainly calls for a bond to be delivered by Nelson, and although the defendant made repeated urgent appeals, down to and including January 23d, for its early delivery, that it might proceed with its performance of the contract, Nelson attempted in one of his letters of December 3d to cast on defendant the responsibility of procuring from Bell his portion of the security to be furnished, and sought to substitute first one thing and then another as security for himself, and wrote the defendant to notify him what it required in that respect, even after it had plainly written him that it would accept a satisfactory bond from each of the plaintiffs for one-half of the total amount of the cost of the machines. He did not forward his bond until January 25, 1907, some three weeks after Bell, against whom he wished to protect himself, had sent his bond to the defendant. There then remained but little more than a month in which to build and deliver the machines.

The machines could not be manufactured without the required patterns, core boxes, dies, and templets. The defendant was responsible for the procurement of the malleable castings, but as it was not equipped to make them, it contemplated having them made at the Malleable Iron Works at Marion, Ohio. Their production, however, must necessarily be subsequent to that of the metal patterns, and these latter were to be made from wood patterns, for which the plaintiffs were responsible. The controversy is as to who was to make the metal patterns. The first machine made under the patents was constructed in 1901, and only about ten or a dozen had been built prior to the date of the contract in question. Nelson testifies that at the time the contract was made he informed the defendant that he and Bell had some metal patterns which they had used in the manufacture of machines, but that some of them were lost and others were no longer serviceable, that some changes in the patterns would have to be made, and that he would ascertain what new patterns were necessary and would have a pattern maker then working for them to make such as were lacking. His statement contained in his letter of November 24th, that "In looking over our patterns we have found them in bad condition, and are now having many of them replaced by a pattern maker," reads, however, like the recital of a newly discovered fact. Stahl testifies that Bell told him on the date of the contract that while the machine worked satisfactorily in New York, he found that the soil and conditions and the methods of planting potatoes varied in different localities, and that he would have to make changes in the digger so that it would not choke up and would separate the potatoes from the soil. There is considerable evidence that the machine worked successfully in New York in a variety of soils. There is also considerable evidence that it worked quite imperfectly when tested at Bellevue; that

it choked up and failed fully to separate the potatoes from the earth, as Stahl says Bell told him it would do. Even portions of Bell's evidence point in the same direction. The parties, therefore, when they engaged in their joint enterprise, knew that changes would be made in the digger and consequently in the patterns, and if they did not then know, they soon learned, that old patterns would have to be replaced, and that such reasonable delay as would necessarily be incident to such changes and the making of new patterns, would occur. On November 8th, Booher, who was then, and until the following February 1st, the defendant's secretary, in urging Nelson to promptness in giving security, wrote:

"We would be pleased to hear from you by return mail, and would like to get at this part of the business at the earliest date possible, and as the malleable proposition is getting to be quite a serious one, and unless we can get to work on the patterns and get them in shape to go to the malleable people, we might be delayed in getting out this stock. We have practically 90 days in which to complete all arrangements and get things in shape."

Counsel are not agreed as to the construction to be placed on that language. Stahl says that after metal castings are prepared there still remains work to be done on them before they can go into the sand, and that this was work necessarily precedent to sending the castings to the defendant's shops and the malleable people, and was that to which the letter refers. The plaintiffs, however, contend that the language employed is an admission of duty on defendant's part to make the castings. On November 28th, Booher wrote Nelson:

"We cannot impress you too strongly the importance of getting matters shaped around so that the malleables for the potato digger and planter can be put into the sand in order to insure our getting them promptly when you require them for the trade."

Nelson's reply was a request to vary the contract to the extent of constructing the planters for delivery March 1st, and the diggers later, for the reason that Bell had made and was working on some advantageous improvements in the digger which he desired to submit to the defendant before the diggers were built. This same request was repeated later, accompanied with a suggestion, which Bell disclaims as having originated from him, that the proposed improvements could not be tested until the frost was out of the ground. The inference which this suggests seems to be that Nelson did not then know and could not know what the ultimate form of the digger patterns would be, until the contemplated improvements were made and tested in the following spring. The defendant declined to comply with Nelson's requests. On December 1st, defendant asked for advice as to what improvements Bell contemplated and when the patterns and everything, manifestly meaning the bond, would be ready, as the patterns should go into the sand not later than January 1st, in order to have the 50 machines ready at the stipulated time, and urged diligence, as it did repeatedly in the course of their extended correspondence, in the submission of both the patterns and the bonds. Notwithstanding these urgent appeals for prompt action, on December 6th Bell wrote the defendant inquiring when it would need the patterns to commence manufacturing. He said

he had made some changes and mostly new patterns, and that part of them would have to be made into metal after reaching the defendant, as the plaintiffs had no facilities for making patterns of that kind. He said the patterns, which proved to be mostly wooden patterns, were then ready to ship. This letter does not consist with his later claim that the defendant had obligated itself to make the metal patterns, nor is Nelson's letter of January 24th helpful to the plaintiffs' contention, for on that date, while still promising to give satisfactory security and suggesting methods of furnishing it, he wrote that he had been informed by Bell that the defendant was unable to make the metal patterns, which he very much regretted, as he understood that it was to make them, and that that was why the patterns were hurried and forwarded. He added that he was informed by Bell, who was then at Bellevue, that he was obliged to have the patterns made by another man. He expressed an understanding that the defendant was to make the patterns, but there was no insistence on the existence of a contract to that effect. He acquiesced in the employment of another person to make them. This letter was in answer to that of Booher's of January 18th, in which he reported Bell's arrival and that:

"We find there will have to be metal patterns made, which is going to require considerable time and it will necessitate some tall hustling in order to get these machines in shape for use March 1st."

This language is consistent with the defendant's denial of a contract on its part to make the metal patterns, and also imports the discovery of an unexpected condition. The wood patterns were shipped to the defendant December 22d, with a promise from Nelson that the metal patterns would be forwarded on the following Monday. On December 28th, the defendant acknowledged receipt of the patterns shipped, and noted that the metal patterns would follow in a few days, and added, "This is all right." The metal patterns, however, did not reach it until Bell, who had gone to Bellevue in response to defendant's request of January 12th, arrived with them on January 17th. He took with him no dies or templets, and none were ever furnished, nor were any core boxes, other than wooden ones, supplied. He had some dies at Pittsburgh, which he proposed, some time after February 12th, to have forwarded, but says that one of defendant's foremen suggested that the defendant had certain dies which might be used in their stead, and that he therefore did not send for those at Pittsburgh. There is no evidence, however, that the foreman had authority to speak for the defendant, or that defendant did not have dies of the character mentioned. Stahl says that some of their dies for making shovels might have answered the purpose. The defendant had no templets available, but Bell says their use was not necessary until the machines neared completion. He further testified that on his arrival Booher told him "We would get to making the patterns right away," but delayed it and finally announced that they could not be made by the defendant, an announcement which drew no protest from Bell, though Hoyt says that Bell told him that he had expected defendant to make the patterns. Bell thereupon employed a pattern maker and began the making of patterns on January 28th, and delivered them on February 12th, which, ac-



cording to Hoyt, was as soon as they could have been completed by the defendant. The defendant assisted in this work by permitting the use of its men and shops after working hours, Bell paying for the material used and the services of the men. On January 23d, the defendant notified Nelson that the machines could not be gotten out by March 1st, that the delay was due to the failure promptly to deliver the patterns and give the required bond, and that Bell was uncertain about going forward in face of the fact that the machines could not be completed until two or three weeks beyond the agreed time, but said, while it might be a little late for them to get the machines into the hands of their agents, it believed there would be ample time for them to take care of their customers, provided there was no further delay about the patterns. Thereupon Nelson forwarded his bond on January 25th, which probably reached Bellevue the day following. On the 17th of February he visited that place. On substantially all material points, the evidence is conflicting as to what was said and done between the parties on the occasion of that visit. It sufficiently appears, however, that the defendant was willing to go forward with the construction of the machines, if a satisfactory extension of time could be had, but the evidence is not harmonious as to whether Nelson demanded compensation for the extension, or as to whether Stahl feared it would release the sureties on the bonds or guaranties given by plaintiffs. Nelson says he was willing to waive the delivery of the machines on March 1st, and this seems to be the logical inference deducible from his letter of January 23d. He further states that Hoyt at one time agreed to send the patterns by a special messenger to Marion and make a special arrangement for the early delivery of the malleable castings and to have the machines ready in a short time, but all this is denied by Hoyt. Following Nelson's visit the defendant took no further action until it notified the plaintiffs of the cancellation of the contract.

It is clear that, under conditions existing February 17th, the machines could not have been completed for delivery by March 1st. There is evidence that from 6 weeks to 60 days would have been consumed in preparing and returning the malleable castings to Bellevue, and that from 15 days to 3 weeks would have been thereafter required to prepare the machines for shipment. There is also evidence which tends to show that these estimates of time required are too great.

The learned trial judge rightly found that there was more than a scintilla of evidence that the defendant was obligated to make the metal patterns, but held that the submission of that question to the jury was unnecessary because the plaintiffs' failure to furnish the patterns, core boxes, dies, templets, and security forbade the delivery of the machines on March 1st, and hence the defendant was relieved of its obligation in that respect. He was further of the opinion that the defendant had so breached the contract, which was to run for a number of years, as to warrant a finding against it on the first cause of action, but that nominal damages only were recoverable on account of the uncertain and speculative character of the damages sought.

Notwithstanding Nelson's dilatory, vacillating and unbusiness like conduct, and the tardiness of Bell, and the further fact that the plain-

tiffs did not place the defendant in a position in which it could be put in default until after Nelson delivered his bond, was there, nevertheless, evidence from which the jury might have rightfully found that the defendant was obligated to make the metal patterns, that Booher said on Bell's arrival at Bellevue on January 17th that the defendant would at once begin the making of them, that Hoyt promised by special arrangement with the malleable people to get the castings and complete the machines at an early date, and that the defendant's conduct was not such as to relieve it from the construction and delivery of the 50 machines, or to warrant it in canceling the contract? Might not the jury, properly instructed, have found that the invention, possessed utility, that somewhat more than nominal damages had been sustained, that a tangible loss occurred through Nelson's inability to deliver to the New York trade only about a dozen of the 18 machines which he says he sold at a profit, and that the defendant awakened and fed the expectation and belief that it would perform and thereby induced the plaintiffs to engage in labor and incur expense, to their financial detriment? Might not the jury have found that the making of the metal patterns, if it held that the defendant was required to make them, would have entailed on it no loss? Nelson's testimony is that the plaintiffs were to pay for their making, and they did in fact pay for all materials and labor furnished by the defendant. The making of the patterns would in no wise have been a waiver of or militated against the provision of the defendant's contract that it should not be required to enter upon the manufacture of the machines, until the patterns were ready and the security for the machines given. Might not the jury have found that the plaintiffs so breached their contract that the defendant was entitled to substantial damages for loss of profits in the manufacture of the machines, as an offset against any injury the plaintiffs claimed and were found to have sustained? We think all of the above queries should be answered in the affirmative, and that from the facts in evidence fair-minded men might have drawn different conclusions. The questions, therefore, are not of law, but of fact, and should have been left to the jury for settlement, under proper instructions from the court. *Mason & O. R. Co. v. Yockey*, 103 Fed. 265, 43 C. C. A. 228.

The defendant, it is true, repeatedly warned the plaintiffs of the danger of delay in furnishing bond and patterns, but it persistently urged them to proceed with the contract, with a declaration of its purpose to perform. It informed them that the patterns should be in the sand by January 1st, and yet on December 8th expressed its satisfaction that the unshipped patterns would be sent in a few days. In that same letter it invited both Nelson and Bell to come to Bellevue to close up matters regarding the security and the patterns, and especially did it so request because Bell would have to come in any event to go over the machines with the defendant's purchasing agent, as well as with its manufacturing department. On January 12th it wrote that Bell should come at the earliest date possible "to take this matter in hand." When he arrived on the 17th its purchasing agent took up with him the matter of building the diggers and planters for the purpose of

ordering materials for their construction. It not only made no announcement then that it would not go forward with the contract or could not complete the machines in time, but on the day following wrote Nelson that Bell had given his portion of the security, inquired what kind of security he, Nelson, intended to give, and stated that "tall hustling" would be necessary to get the machines ready by March 1st. On January 23d, it first notified Nelson that the machines could not be completed within the time agreed. It was not the defendant that was then hesitating about going forward, but Bell, who feared that Nelson might not wish to proceed on account of the two or three weeks delay then thought to be inevitable in the completion of the machines. As late as January 28th, without warning Bell of the futility of making the metal patterns, it witnessed his beginning that labor and incurring the expense incident thereto. As the work progressed it lodged no complaint that the machines could not be put out on time. The patterns were delivered on February 12th. Whether they were accepted or not need not be determined, as there is evidence that they were not satisfactory and other evidence that the dissatisfaction was unreasonable. But the defendant did not then refuse to proceed with the contract or affirmatively do so until March 1st. During all the time that elapsed after the contract was made the defendant was so circumstanced as to be better informed than the plaintiffs as to the time the malleable people would require to supply the needed castings. It knew that the plaintiffs were making expenditures for wood patterns, had rented and were paying rent for a store room in which to transact the business of their New York selling agency, were getting out circulars for the trade, were incurring traveling expenses and the cost incidental to the manufacture of the metal patterns, and were relying on the fulfillment of the contract. In the third defense set up in its answer the defendant alleges that, on February 18th, the parties agreed that it should proceed with the construction of the machines for an advance cash payment of \$3,150, and that the plaintiffs repudiated the agreement on the following day. The significance of this defense is that down to and including the last-named date the defendant was still ready to perform.

[3] We are not called upon to say that, in the light of all the facts in evidence, a jury would have found for the plaintiffs, or that the trial court, having heard the evidence and having seen the witnesses who gave it, might not on a motion for a new trial, have held a recovery by the plaintiffs, had there been such, to a small amount, or even set the verdict aside, because there is a difference between the legal discretion of a court to set aside a verdict as against the weight of the evidence, and the obligation, which a court has, to withdraw a case from the jury and direct a verdict for insufficiency of evidence. *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596. It is not a proper test of whether the court should direct a verdict that the court in weighing the evidence would, upon motion, grant a new trial. On the contrary, it is the duty of a court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that the verdict

should be directed, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for that party. *Milwaukee Mechanics' Ins. Co. v. Rhea & Son*, 123 Fed. 12, 60 C. C. A. 103; *Rochford v. Penn. Co.*, 174 Fed. 83, 84, 98 C. C. A. 105; *Travelers Ins. Co. v. Randolph*, 78 Fed. 754, 759, 24 C. C. A. 305; *Standard Life & Accident Ins. Co. v. Thornton*, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116.

Applying to the evidence the settled rule that governs the direction of verdicts, we are constrained to hold that the defendant's motion for a peremptory instruction should have been overruled. The case is therefore remanded to the court below, with directions to set aside the judgment and grant the plaintiffs a new trial.

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**HUDSON v. NEW YORK & ALBANY TRANSP. CO.**

**EMPIRE TRUST CO. v. HUDSON.**

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 245.

**1. JUDICIAL SALES (§ 55\*)—VACATION—RIGHTS OF PURCHASER—EXPENDITURES ON PROPERTY.**

More than a year after vessels had been sold by a receiver in a creditor's suit against the owner, the sale was set aside under mandate from the appellate court because of misstatements inadvertently made by the auctioneer respecting liens subject to which the sale was made, which tended to materially lessen the bids, and the vessels were taken back and resold. In the meantime they had been in possession of the purchaser, which had used them, but without profit, and had also expended a large sum in repairs and betterments, which, as shown by the result of the second sale, had added more than that amount to their market value. *Held* that, under such circumstances, the purchaser was entitled to receive from the proceeds, in addition to the amount paid on its bid, the full amount expended on the vessels which contributed to such increase in value; that it was not chargeable for the use of the boats, from which it realized nothing.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 110; Dec. Dig. § 55.\*]

**2. JUDICIAL SALES (§ 55\*)—VACATION—RIGHTS OF PURCHASER—PAYMENT OF CLAIMED LIEN.**

A purchaser of vessels at a receiver's sale in a suit against an insolvent corporation, subject to such liens as should be established, who paid off a claimed lien which had been sustained by the master but was subsequently held invalid by the court, on a subsequent setting aside of the sale and a resale of the vessels was not entitled to be reimbursed from the proceeds for the amount so paid out, as against other creditors, but only to be subrogated to the rights of the lien claimant as a general creditor.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 110; Dec. Dig. § 55.\*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit by George P. Hudson against the New York & Albany Transportation Company; the Empire Trust Company, trustee, intervener. Complainant, the Farmers' Bank at Georgetown, the Trust Company, and Joseph H. Choate, Jr., receiver, appeal from decrees distributing a fund in court and allowing claims in favor of the Manhattan Navigation Company. Modified and affirmed.

The following is the opinion of the Circuit Court, by Hough, District Judge:

[1] The boats Frank Jones and Saratoga over which this litigation has been waged, having been sold pursuant to order filed herein September 16, 1910, and \$76,000 having been bid and paid for them, Manhattan Company, as substantially the purchaser at the sale of 1909, prays for whatever sum it is entitled to out of the present fund in the light of (a) the opinion of the Circuit Court of Appeals in this cause and (b) such other evidence as has been brought to this court's attention since mandate filed, and therefore unknown to the appellate tribunal.

The Manhattan Company having already been repaid the former purchase price of \$7,500, interpretation of the higher court's opinion is confined to a consideration of what "sums may have been expended on the boats in repairs and betterments" and a determination of "the amount expended in repairs, and the difference between the receipts derived from the operation of the boats and the expenses of operation, deterioration, etc."

In memorandum herein of September 1, 1910, it was held to be the fair meaning of the opinion under which the mandate issued that, while that court had not held that a person in the position of the Manhattan Company had no other rights, the only rights specifically accorded such person were those growing out of his care of the property and the bestowal of betterments upon it, of a nature which at least maintained, if not improved, conditions existing at the time of sale.

Applying this reading of the opinion to the facts then shown, it was further held that Manhattan Company's rights were strictly confined to repayment of what it had put into the boats as physical structures on the theory that by such expenditures the vessels had either been actually improved or at least maintained in good, serviceable, and salable condition. To these views I adhere without further discussion of a matter, upon which opinions have become wearisome to all concerned. If "betterments" be taken in its usual meaning, of something added to the value of a thing otherwise than by mere repair, it cannot be said to have been shown that either the Jones or the Saratoga was bettered during the 14 months' possession of Manhattan Company, in any other substantial respect than the rebuilding of the wheel boxes of the Saratoga. This was done, but at what exact cost is not shown, and the court is left between the estimate recently given of \$5,000 and the estimate of \$8,000 stated in the affidavit of MacLaurin, filed July 29, 1909.

In measuring, however, the value of what Manhattan Company did with and for these vessels, there are in my opinion some figures now incontrovertible which speak louder than anything else in the case. If there be considered (1) what competent persons thought the boats worth in July, 1909; (2) what any person was prepared to bid for the boats at the same time; and (3) what the boats sold for in September, 1910—some information is gained which is to me controlling.

On or about July 29, 1909, there were filed herein certain affidavits regarding the then value of the vessels, containing statements not since gainsaid nor added to; although it was provided by the order of August 24, 1910, that all parties should be at liberty to show "what is the value of said steamboats and both of them in the markets of the city of New York at the present time." The object of that section of the order referred to was to ascertain, if possible, what was the probability of a greater value, and therefore higher price in 1910, than in 1909. No testimony was offered, and it was agreed by counsel that the affidavits of the previous year fairly represented the agreement and divergence of those acquainted with the vessel market of this port.

It is interesting to sum up the result of said affidavits: Mr. Walmsley (for the receiver) deposed that Mr. Noble of the Joy Line and Mr. Barlow, a shipbroker, valued the Jones at not over \$40,000, and Mr. Barlow assigned \$10,000 as the worth of the Saratoga. Mr. Whitcomb, the president of the Jones' previous owner, was sure that that vessel had been worth \$100,000 in 1905, and, being acquainted "in a general way with her present condition," he believed that she was worth in 1909 from \$50,000 to \$75,000. Mr. Nichols, a vessel owner, had known the boats for about two years, and both together were in his judgment worth no more than \$28,000 to \$33,000. Mr. Gallaher of the Central Vermont Railroad valued the Jones at \$25,000 and the Saratoga at no more than \$7,500. MacLaurin of the Morse Company thought the Jones was worth at private sale about \$25,000, but that she could not bring at public auction more than \$20,000; while the Saratoga was worth nothing except to be broken up. And Mr. Frincke of the same company gave the sale price of both vessels together at \$25,000.

Doubtless several of these affidavits were made by interested parties; but it cannot be denied that they are statements on oath of a body of men whose opinions are entitled to consideration, and no better opinion evidence has been offered throughout this bitter litigation.

Let these statements be compared with the opinion entertained and acted on by Mr. Duval of the Manhattan Company, who by his own testimony was willing to give up to \$40,000 for the two vessels (free and clear), when he had immediate use for them in his own business. From this examination of the evidence I conclude that no reasonably careful man considered the sale price of these two steamboats in 1909 to be more than \$40,000 (free and clear of all liens).

Turning to the circumstances of the sale of 1909, it is obvious that, however erroneous were the statements of the auctioneer, it is more than doubtful whether any would-be purchaser was thereby deceived or discouraged, except possibly Mr. B. R. Robinson, attorney for the Hudson Navigation Company, who was willing to bid \$16,000 subject to liens, on behalf of a client having every motive to keep the Jones and Saratoga out of competitive business on the Hudson river. It does not appear that Mr. Robinson attended the sale, and it is a fair inference that he had ascertained before making his affidavit of July 29, 1909, what the probable amount of liens would be—a matter easily and quickly to be accomplished at the office of Mr. Wise. The result is that no one was willing in 1909 to pay as much as \$40,000 for these vessels free and clear except Mr. Duval; and the best bid from any one else, of which the record furnishes even a suspicion, is that of the Hudson Navigation Company, whose would-be bid meant not over \$34,000 (free and clear).

This being the proven condition of the market in 1909, no evidence has been given (though opportunity offered) that market conditions changed in a year; yet after most unusual competition these two vessels were sold for \$76,000 in cash, 14 months after Manhattan Company thought it had bought them for approximately \$23,000 (free and clear).

What has caused this great appreciation in value? If the vessels were worth \$40,000 in 1909, why were they worth \$76,000 in 1910? I think the answer plain. It has been shown that, within the meaning of repairs and betterments hereinabove set forth, Manhattan Company has expended therefor—on the Frank Jones \$14,169.29 and on the Saratoga \$17,263.93, a total of \$31,432.22. In other words, there is no other reasonable explanation for the increment in value of these vessels except this: That whereas in 1909 they were little more than rusty hulks, lying where they long had lain in a sort of marine graveyard under conditions which naturally affected their market value; in 1910 it had been demonstrated that they could be used, they had been kept in going and serviceable condition and were offered for sale without any preliminary period of rust and with a prompt obedience to the court's mandate as commendable as it was unexpected. My conclusion is that although (as above stated) it cannot be definitely shown, as to any very considerable fraction of this \$31,432.22, that the same was spent for what are technically betterments, yet the whole expenditure resulted in an increase in market value of these vessels greater than the total amount paid out, to wit: There was an increase in sale value of \$36,000 as a result of expenditures of less

than \$32,000. Therefore the Manhattan Company should be allowed in recoupment for betterments and repairs said sum of \$31,432.22.

This proceeding may be fairly described as intended to put back the two vessels into the receiver's hands that he might sell them as he should have sold them. But he has no right to expect to sell that which did not exist in 1909, without paying for it what the first purchaser laid out thereon.

But that which said purchaser laid out on the boats, if productive of no advantage to the second sale, does not seem allowable in recoupment. This leads me to deny any allowance to the Manhattan Company for insurance—an item which until lately seemed justified.

It has been strenuously urged that there should be charged against Manhattan Company in diminution of their repair and betterment bills some amount for (a) deterioration; (b) user of the boats; (c) consumption or destruction of a part of the ship's inventory or equipment.

No deterioration, however, has taken place, and the use of the boats did not result in any profit or advantage to Manhattan Company; on the contrary, they lost money by having them. As to equipment losses, it has been impossible to arrive at any basis of deduction because (1) no money value has been affixed to those items of equipment in which shortage exists, and (2) it is conclusively shown that in some items of equipment there is an overplus existing in 1910 as compared with 1909, and all that can be said regarding the comparative shortage and overplus is that these articles in which a surplus exists are apparently greater in intrinsic value than those in which there is a shortage.

On this point it is further worthy of consideration that (as above shown) there is a far greater appreciation in entire value than the amount of any suggested shortage.

It is further, however, urged that, irrespective of any actual profit or loss made or incurred by Manhattan Company, rent must be paid merely because the boats were used.

It can hardly be said that rental (or rather a charge for use and occupation) can be exacted for a thing which is intrinsically worthless unless there be a contract fixing such rent or charge. Whether a thing be worth anything or not depends not only upon the thing itself but upon the person who owns it. The true inquiry is: What was the rental value in the hands of the receiver of these boats? It appears to me that to state this inquiry is to answer it—the rental value was nothing, for the broken down hulks he had in 1909.

The theory of this proceeding is that, whereas the receiver did by inadvertence sell the boats for what was supposed to be about \$23,000 free and clear, he ought to have sold them in 1909, for about \$40,000 free and clear—and by boats is meant not only hull and machinery, but also tackle, apparel, and furniture. Under present conditions he has sold at that rate—and more. All the demands therefore made against Manhattan Company in diminution of the amounts repayable to them for betterments and repairs are denied.

A more perplexing question is that presented by the proven fact that within a few days after the sale of 1909, and before any exceptions to Mr. Wise's report had been filed, Manhattan Company paid \$12,500 on the alleged lien of the Morse Dry Dock & Repair Company, and subsequently and on October 1, 1909, paid a further sum which made the total payment nearly \$600 over the lien reported by the special master and now set aside by the court.

This matter has already been so often discussed that further argument in this court is useless. As intimated in the opinion on liens filed herewith, I am convinced that Capt. Hudson, as president of the corporation that owned the Jones and Saratoga, knew that the Morse Company's lien was in part good. It is not supposed that in believing this he had any especial familiarity with either the lien law of New York or the decisions thereunder, but he had been a seafaring man, he knew perfectly well the nature of a lien, and I am sure that he believed that he had made the boats responsible for the work that the Morse Company did upon them. The Manhattan Company acted on his advice, and in accordance with the only information, down to that time given the world by this court, in the matter of liens upon these steamers. That is, the court had appointed Mr. Wise (inter alia) to ascertain what liens or priorities existed, and the propriety of that appointment has not even yet been questioned. To be sure, it is hard to see why the master should have been

authorized to ascertain a lien or priority which the court could not, or would not, enforce. But those who deny any help to Manhattan Company in the finding of the master must hold either that he was appointed to satisfy curiosity (which is unthinkable), or the appointment was error (which has not yet been pointed out, and which I have no power to indicate or assert).

What was Manhattan Company then to do, about a lien which the duly appointed judicial officer of this court said was good, which the court itself would not transfer to any fund, nor divest by any sale, which was asserted by the concern having physical possession of the boats, and could only be put into litigation by giving stipulations for the whole amount claimed, or considerably more than had been declared valid; and against which lien if asserted in admiralty their only known witness was Hudson, who counseled payment.

It was indeed a hopeless litigation, that stared in the face the purchaser of 1909, and what made it seemingly hopeless was the action of this court.

The proverbial difficulties of selling pigs in pokes are scarcely greater than those of selling such singular property as ships subject to unknown liens; and therefore (it is presumed) were those liens ascertained as far as possible; and I, at least, decline to punish one who trusted the power of the court, and followed its recommendation.

It is therefore my opinion that, up to the extent of the amount reported by the master, equity demands that the Manhattan Company should be protected in their payment. They are therefore further entitled to be paid the amount of the Morse lien reported by Mr. Wise \$13,090.56, and also the lien of Burns Bros. allowed by the master and now confirmed by the court, there having been on exception filed thereto. This was \$808.50. Making a total of \$13,899.06.

If to this be added the amount previously allowed, \$31,432.22, the total allowance to the Manhattan Company is \$45,331.28.

The final contention of the bondholders who have so largely profited by the resale of these vessels rests upon facts first made to appear at the hearing of August, 1910. They are briefly recapitulated in the memorandum of September 1, 1910; it being there said that the complainant Hudson and the Manhattan Company were cognizant of a "scheme which through ignorance or deceit does constitute a plain deception of the court and a fraud upon the law." And the facts which constituted said scheme were "stated at considerable length because it may ultimately be held that they affect the equities of the situation." It is now asserted (to quote from one of the briefs submitted) that the "fraud on the court that was perpetrated or participated in by Manhattan Company precludes it from claiming the right to reimbursement for betterments and repairs on equitable grounds."

This very extreme contention requires some further investigation. It is admitted at once that a fraudulent purchaser is not entitled to any allowance for expenditures he makes upon that which he obtained by fraud; he is punished as a quasi criminal by being deprived of that which he tortiously obtained, and by losing everything that he put into it during his fraudulent possession. It is therefore necessary to look carefully into the circumstances revealed by the evidence and find out just what the fraud was referred to in the earlier opinion herein and who participated in it either by active assistance or keeping silent when the means of speech were obvious and at hand. The statement of facts made on September 1st need I think be only amended by pointing out that Duval finally agreed to settle with Hudson not upon the basis of \$50,000, but on that of \$40,000 only.

In the mere fact that Hudson and Duval attended the sale of July, 1909, in the belief that the steamboats were worth to them at least \$40,000, and with the intention of getting them for as much less than that sum as other bidders permitted, there was of course no fraud whatever; any one had a right to get the boats as cheaply as possible. When, however, a motion was made to set aside that sale and the grounds of motion alleged to be (a) inadequacy of price and (b) the "inadvertence of the auctioneer," Hudson came forward with the affidavit already sufficiently described. The powerful influence of that affidavit is more than plain from the opinion of Ward, J., filed July 29, 1909. Here was the fraud, and the only fraud, for the Manhattan Company had gotten, as it had a perfect right to get, what looked like a good bargain, and it was entitled to use all fair means to maintain the ad-



vantage thus gained; but this affidavit was not fair or true. It is apparent from the affidavits submitted on the motion to set aside the first sale, and from all the testimony taken since, that, as long as the sale was made subject to liens, no substantial improvement in price could be expected; so that when the party which knew all about the liens, and knew through Hudson whether they were really good or bad, advanced the proposition that  $\frac{18}{20}$  of the bondholders of the defendant corporation were satisfied with the sale, they were using an argument unanswerable if it were true; and I remain of the opinion that, if Hudson and Duval did not know that what Hudson said was untrue, they had no right to make their ignorance the excuse for such an assertion.

But who was acting with Messrs. Duval and Hudson? At that time the Georgetown Bank was through Hudson endeavoring to gain an illegitimate advantage for its \$70,000 par value of bonds over all other bondholders, and they had made Hudson their agent to accomplish the scheme. Mr. Townsend, representing the Baltimore Trust Company, was entirely satisfied with the scheme and knew all about it at the time of sale. In other words, apparently \$81,500 par value of these bonds were actively interested in putting Hudson forward as that which I cannot persuade myself he really was or had any right to believe himself to be, i. e., the owner of \$180,000 of defendant's bonds.

Yet the owners of those very bonds, having changed front with the decision of the Circuit Court of Appeals, now appear with new counsel and profess a virtue as vociferous as unconvincing.

Substantially all the rest of the bonds appear from this record to have been in the possession of the Empire Trust Company, whose attorney set forth in his affidavit of July 29, 1909, that that company was acting "at the request" of the holders of \$85,000 of the bonds of the defendant corporation, and that subsequently the owners of \$21,000 more had deposited their bonds with the intervening trustee. In other words, the face of the record as it stood in July, 1909, showed that Hudson could not own and control \$180,000 par value of the bonds in question, unless he owed (owned) and controlled nearly all of the \$106,000 par value in the physical possession of the intervener, and that intervener knew that Hudson did not control them.

Thus there was a deception of the court promoted by the legal owners of nearly half the bonds of defendant corporation, and acquiesced in by the trustee which controlled nearly all the rest; for nowhere in the assignment of errors upon the appeal herein does any reference appear to the conclusion drawn by the court from Hudson's affidavit. This conduct on the part of the intervener is strangely inconsistent with the position of innocent trustee now asserted and lends more color to Hudson's curious notions regarding "ownership" in bonds than has hitherto appeared.

Upon the whole, I am unable to see why, when, as a result of this tragedy of errors, all bondholders of every class have realized a fund in 1910 far greater than they had any reasonable expectation of ever seeing in 1909, there is any ground for visiting upon that offender, who was no more ignorant or reckless in assertion than the other parties to this case, such a frightful penalty as is contended for by the quotation from argument last made above.

Manhattan Navigation Company may take an order for the payment to it of \$45,331.28, upon condition of its abandoning in writing every portion of its appeal now pending, except so much thereof as claims the right to be reimbursed or compensated for expenditures other than those upon the hull or fabric of the vessels; and an order may also be taken referring the distribution of the fund now in court (after payment as aforesaid to Manhattan Navigation Company) to a master for consideration and report to the court.

Cowing, White & Wait (Henry Crofut White, of counsel), for Empire Trust Co.

Herbert J. Bickford, for receiver.

J. Parker Kirlin, for complainant bondholders.

Kelley & Connelly (A. I. Elkus, M. E. Kelley, and C. S. Lorentzen, of counsel), for Manhattan Navigation Co.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. This litigation was before us on a former appeal, and reference may be had to the opinion then filed. 180 Fed. 973, 104 C. C. A. 129. It will be sufficient now briefly to state the sequence of events which resulted in the decrees appealed from.

A stockholder of the New York & Albany Transportation Company having brought suit to have its assets marshaled and distributed, the Empire Trust Company, as trustee under a mortgage, intervened and filed bill of foreclosure. A receiver of all the property of defendant was appointed, and he took possession of the same. Various creditors filed claims against the estate; some of them claiming to have liens of one sort or another. The defendant owned two river steamboats, the Saratoga and the Frank Jones, which it was decided should be sold forthwith, as they were likely to deteriorate in value unless kept in commission. The court ordered these two vessels to be sold at public auction, "subject only to maritime liens or liens under a state law for supplies, labor, or materials furnished on the credit of said vessels." The vessels were sold, subject to such liens, on July 27, 1909, for \$7,500, to Edward C. Burns, concededly acting for the Manhattan Navigation Company. The sale was duly confirmed by the Circuit Court, and from the order directing a sale and the order confirming the sale appeals were taken.

It appearing that at the sale the auctioneer had made a statement as to the probable amount of maritime liens and liens under state law, which the purchaser would have to satisfy, which was greatly exaggerated and calculated to deter prospective bidders from making offers to purchase, the order confirming the sale was reversed. As to the order of sale, it was left to the Circuit Judge to determine, after investigation, whether there was any likelihood that a resale would produce a substantial increase in the price paid for the boats. As a result of such investigation, the boats were resold at a net advance of over \$20,000. The purchaser paid \$76,000 in cash. The present appeal concerns the disposition which the Circuit Court has made of the proceeds of this sale.

Except as to a single item we concur with Judge Hough as to the disposition of the proceeds and do not find it necessary to add anything to his exhaustive and careful review of the facts, or to his statement of the reasons which induced the conclusions he reached.

[2] The item in question is a claim of the Morse Dry Dock & Repair Company for \$13,090.56, which had been paid as a claim secured by lien, by the purchaser at the first sale. Repayment of this amount was ordered to be made to such purchaser. The Morse Company's claim was for work done and materials furnished at the home port of the vessel; no maritime lien under the general admiralty law was claimed—none, in fact, could be claimed—but it was asserted that, by compliance with the state statute, the creditor had obtained a lien under the law of the state of New York. When the suit was brought an order was made that all creditors of the defendant should file their claims with the receiver and that all claims filed which might be disputed and all for which any priority is claimed be referred to a spe-

cial master "to take proof of the amount of such claims and of the priorities thereof, if any, and report the same to the court." Thereupon the claim of the Morse Company was filed; it claimed priority by reason of its alleged lien, and it appeared and introduced testimony in support, not only of its claim, but also of such lien before the special master. Subsequently to the entry of the order confirming the sale, the special master reported that the Morse Company had liens on the respective vessels for the amounts named. Exceptions were duly filed to his report, and it was eventually held that, because of its failure to comply with the requirements of the statute, the Morse Company had not acquired any lien under the state law, but was merely a general unsecured creditor of the defendant to the amount named. Subsequent to the filing of the special master's report, and before the same came up for consideration by the court, the purchaser at the first sale paid this claim of the Morse Company.

Upon the former appeal we held that, if the first sale were set aside, "the property cannot be retaken from the purchaser without paying him the purchase price \$7,500 and whatever other sums may have been expended on the boats in repairs and betterments." It was intended, of course, to include as purchase price, in addition to the \$7,500, whatever the purchaser might have had to pay in order to extinguish existing maritime or state liens so as to perfect his title to the property. But it is only liens which, if not paid, would be a cloud on the title that should thus be provided for. The mere assertion of a lien, which could not be maintained by proof, was not sufficient to require its payment or to entitle the person paying it to reimbursement out of the proceeds. The first purchaser seems to have acted in good faith, in paying this Morse claim; the special master having reported that it was a valid lien, although the order which sent it to him apparently authorized him only to "take proofs and report the same." Moreover, the president of defendant told the purchaser that the lien was good and should be paid. But in paying it before adjudication as to its validity the purchaser took the chances. If the first sale had not been set aside, the payment by it to the Morse Company of a debt due to that company by the New York & Hudson Transportation Company, unsecured by a valid lien, would have resulted in a loss of the money so paid to extinguish another person's debt, except for what it might be able to obtain through subrogation, by prosecuting the claim of the Morse Company against the defendant's estate. So far, therefore, as this sum of \$13,090.56 is concerned, its situation is not affected by not being repaid that sum from the proceeds of the sale; it had already lost the money (before resale was ordered) except for what it might obtain by subrogation, and its right to prosecute the Morse Company's claim has been in no way affected by subsequent proceedings.

To repay this sum to the Manhattan Navigation Company out of the proceeds of the sale would be, in substance and effect, to give priority to the unsecured claim of the Morse Company over the bondholders secured by the mortgage.

With this modification the decrees are affirmed.

## NEW ORLEANS TERMINAL CO. v. HANSON.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,100.

## SALES (§ 302\*)—LIEN OF VENDOR—LOUISIANA STATUTE—EXTRATERRITORIAL ENFORCEMENT.

The privilege given to a seller of movable property by Civ. Code La. art. 3227, which provides that "he who has sold to another any movable property which is not paid for has a preference on the price of his property over the other creditors of the purchaser whether the sale was made on credit or without" is not a contract lien on the property but merely a preference over other creditors in the proceeds pertaining to the remedy or administration of the debtor's property, and cannot be enforced extraterritorially against a receiver appointed by a court in another state into which the property has been removed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 858; Dec. Dig. § 302.\*]

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

In Equity. Appeal by the New Orleans Terminal Company from a decree in a creditors' suit against the Gulf Compress Company denying it a preference claimed. Affirmed.

Caruthers Ewing, for appellant.

G. T. Fitzhugh (Fitzhugh & Biggs, on the brief), for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and DENISON, District Judge.

KNAPPEN, Circuit Judge. This is an appeal from a decree of the Circuit Court denying the lien or preference claimed by appellant (hereinafter called the claimant) for the unpaid purchase price of certain compresses and other property, sought to be enforced by intervening petition in the receivership proceedings hereafter referred to. The material facts are these:

The claimant, a Louisiana corporation doing business at New Orleans in that state, on September 6, 1907, sold to the Gulf Compress Company, which is an Alabama corporation having its general offices in Memphis, Tenn., two cotton compresses, together with boilers, pumps, piping and other appurtenances, all to be delivered f. o. b. cars at Port Chalmette, La., for the price of \$12,000, one-half to be paid in cash, and for the remaining \$6,000 the note of the Compress Company to be taken, due in one year with interest. Delivery was made, one-half of the purchase price paid in cash, and note for the remainder given, all as per contract. The agreement of sale, which was in writing, contained no reservation of title or lien. Indeed, by the express terms of the agreement of sale it was "covenanted and agreed on the part of the party of the first part (claimant) that it has the title to said compresses, boilers, etc., free from liens or incumbrances of every character, and that it has the right to make a sale to the party of the second part according to the terms of this contract." The Gulf Compress Company was operating in several states, in-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cluding Arkansas. The property in question was purchased from claimant for the use of the Compress Company "in whatever state it operated," and immediately after being so purchased it was by the Compress Company transported to and installed at Little Rock, Ark., where it has been continuously since said removal and installation, and was in the possession of the Compress Company at the time of the appointment of its receiver, since which time it has been in the possession of that officer. On May 29, 1908, and thus while the property in question was installed in the plant of the Compress Company at Little Rock, Ark., the appellee was appointed receiver of the Compress Company under a bill filed by certain creditors and stockholders of the company, alleging its financial embarrassment and actual insolvency, and the necessity of a receiver for the protection of the interests of creditors and stockholders of the Compress Company, as well as all parties concerned; and praying that the bill be sustained as a general creditors' bill, and for the administration of the property rights and franchises of the Compress Company as a trust fund; that creditors be required to prosecute their claims in the court in which such receivership was prayed; and for an injunction against separate suits by creditors and stockholders. The Compress Company answered, admitting the allegation as to its insolvency, its inability to further carry on its business, and the necessity for the appointment of a receiver. Thereupon a decree was entered adjudging that the bill "be sustained as a general creditors' bill, and as such inure to the benefit of all creditors and stockholders who may come in under the same by intervention or otherwise as the court may herein direct"; requiring creditors to file their respective claims with the receiver appointed by the decree, and requiring the corporation to convey to the receiver all its property, with provision for ancillary proceedings in other jurisdictions. The intervening petition alleged the appointment of ancillary receivers "in those jurisdictions in which the defendant operated its business." The receivership was thus extended over the property in question in Arkansas.

Article 3227 of the Civil Code of Louisiana contains this provision:

"He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser. So that although the vendor may have taken a note, bond, or other acknowledgment from the buyer he still enjoys the privilege."

It is under this statutory provision that the lien in question is claimed for the \$6,000 of purchase price represented by the note, and admittedly unpaid. The Circuit Court denied the claimed lien, being of opinion that the statutory privilege under the laws of Louisiana could not be enforced after the property had been carried beyond the territorial limits of that state and into the state of Arkansas, where it was being so held at the time of the assertion of the alleged lien by the receiver subject to the rights of creditors of the Compress Company. Claimant insists that the privilege given by the Louisiana statute can be enforced even extraterritorially, and against the property in the hands of the receiver, upon the ground that the latter took no higher right

than the Compress Company had. The question presented by the appeal relates to the correctness of this contention.

The fundamental inquiry relates to the nature of the "privilege" in question. This privilege, as existing under the Code of Louisiana, is unknown to the common law (*Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548); and we must therefore look to the provisions of the Code of that state. In Voorhies' Revised Civil Code of Louisiana an entire title, consisting of 94 articles, is devoted to the subject of "privileges." Reference thereto, in our opinion, clearly indicates that the term "privilege," as there used, relates to the preference or degree of preference between creditors in the distribution of the property or estates of debtors, as administered under the laws of Louisiana. The first four sections of the title in question read as follows:

"Art. 3182. Whoever has bound himself personally, is obliged to fulfill his engagements out of all his property, movable and immovable, present and future."

No question of vendor's lien as against the purchaser (as distinguished from a preference as between creditors) is thus involved in the vendor's privilege in question.

"Art. 3183. The property of the debtor is the common pledge of his creditors and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference.

"Art. 3184. Lawful causes of preference are privileges and mortgages.

"Art. 3185. Privilege can be claimed only for those debts to which it is expressly granted in this Code."

Article 3186 declares that:

"Privilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages.

"Art. 3187. Among creditors who are privileged, the preference is settled by the different nature of their privileges.

"Art. 3188. The creditors who are in the same rank of privileges, are paid in concurrence; that is, on an equal footing.

Article 3193 provides that "the debts which are privileged on all the movables in general" are (1) funeral charges (the reasonable amount thereof to be determined by the judge); (2) law charges (referring to such as are occasioned by the prosecution of a suit before the courts, with provision for the taxation thereof); (3) expenses of last sickness (to be "fixed by the judge, in case of a dispute"); (4) wages of servants for the current and past year (with provision that those for preceding years "form an ordinary debt, for which the domestics or servants come in by contribution with other ordinary creditors"); (5) six months' supplies of provisions (with provision that retail dealers as to all but the last six months "are placed on the footing of ordinary creditors"); (6) salaries of clerks and other persons of that kind; and (7) dotal rights due to wives by their husbands. Again, the privileges provided for are not always of the same class or attended with the same incidents. For example, the privilege of the lessor over the produce of the estate and the movables found thereon for his rent is declared by article 3218 to be "of a higher nature than mere privilege. The latter is only enforced *on the price arising from the sale of*

movables to which it applies. \* \* \* The lessor, on the contrary, may take the effects themselves and retain them until he is paid." (Italics ours.) And by article 3258 of chapter 6, relating to "the order in which the privileged creditors are to be paid," the lessor is given preference "over all the other privileged debts of the deceased, such as expenses of the last illness and others which have a general priority of the movables." Articles 3220 and 3221 relate to the privilege on the thing pledged, including the sale of the property for payment of the debt. Articles 3222 and 3223 relate to the "privilege of a depositor."

Article 3233 declares that "innkeepers have a privilege, or more properly a right of pledge, of the property of travelers who take their board or lodging with them, by virtue of which they may retain the property and have it sold, etc." The innkeeper "must apply to a tribunal to have his debt ascertained, and the property seized and sold for the payment of it." Some of these privileges are thus shown to be liens and others not. Article 3227, upon which reliance is had here, has been already referred to. The privilege of the vendor of movables is there defined as "a preference *on the price of his property*, over the other creditors of the purchaser." (Italics ours.) The same article gives a "special lien and privilege" to the seller of agricultural products of the United States in the city of New Orleans, to secure the payment of the purchase money for and during the space of five days only after the day of delivery, during which time the seller may seize the product sold "in whatsoever hands or place they may be found, and his claim for the purchase money shall have preference over all others." Section 126 of Garland's Revised Code of Practice of Louisiana provides for "conflict of privilege resulting from writs in several suits" as follows:

"Whenever a conflict of privileges arises between different creditors, all the suits and claims shall be transferred to the court, by whose mandate the property on which the privilege or right of mortgage is to be exercised, *was first served on mesne process, or definitive execution; and said court shall proceed to class said privileges and rights of mortgage according to their rank and dignity, in a summary manner, after notifying all parties interested.*" (Italics ours.)

Section 300 provides for enjoining the sheriff from paying to the plaintiff the proceeds of the property seized, in case a third person oppose the payment on the ground that he has a "previous hypothecation or privilege, or any other right by which he claims to be paid in preference to the plaintiff."

It is thus seen that the vendor's privilege as to movables is merely a preference over other creditors in the proceeds of sale of the property affected by that preference; and that by the Louisiana Code the privileges declared thereby are inseparably connected with administrative machinery for their enforcement. This idea of the nature of "privilege" as a preference between creditors in the distribution of the property of debtors is referred to in *Lee v. His Creditors*, 2 La. Ann. 599, where Chief Justice Eustis, in discussing the question of a claimed "lien or privilege" sought to be enforced against a boat under a law of Kentucky, quotes from the opinion of Judge Watts the state-

ment "that lien or privilege is part of the remedy seems clear, when we consider the purpose for which they are given. They are the means of enforcing a right, which right is always the payment of a sum of money; and a privilege or lien is the means of compelling such payment, and is analogous to a seizure or execution." While Chief Justice Eustis did not find himself "required to assent" to the proposition that the privilege in all cases pertained exclusively to the remedy, he did not dissent therefrom. His decision, however, seems to treat privilege as "a right or priority of payment."

The rule is well settled that priority or preference in the distribution of the estates of debtors, whether deceased or insolvent, is not a part of the contract, but pertains to the remedy or administration; that the statute laws of the state with respect to such matters have no extra-territorial force; and that the enforcement of such right of preference of priority is dependent upon the law of the place where the property lies and where the court sits. In *Harrison v. Sterry*, 5 Cranch, 289, 3 L. Ed. 104, which involved the distribution under a bill in equity of the effects of a bankrupt, the parties including assignees under both American and British commissions of bankruptcy, attaching and other creditors, Chief Justice Marshall, in holding that the United States was entitled to a claimed preference over all other creditors, notwithstanding the contract was not made within the United States or with American citizens, said:

"The law of the place where the contract is made is, generally speaking, the law of the contract; i. e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made."

In *Smith v. Union Bank*, 5 Pet. 518, 8 L. Ed. 212, where it was held, that the effects of the intestate in the hands of the administrator were to be distributed among his creditors according to the laws of Maryland, where administration was being had, and not according to the laws of Virginia, where the intestate resided, and where the debt in question was contracted, the doctrine stated by Chief Justice Marshall in *Harrison v. Sterry* was followed. See, also, *Scudder v. Bank*, 91 U. S. 406, 412, 413, 23 L. Ed. 245. In *Story on the Conflict of Laws*, the author, after discussing the conflict upon the question of recognition by foreign countries of the existence or validity of liens or privileges created by the law of the place where the contract was made, says (8th Ed. § 323):

"But the recognition of the existence and validity of such liens by foreign countries is not to be confounded with the giving them a superiority or priority over all other liens and rights acquired in such foreign countries under their own laws, merely because the former liens in the countries where they first attached had there, by law or by custom such a superiority or priority. Such a case would present a very different question, arising from a conflict of rights equally well founded in the respective countries. This very distinc-



tion was pointed out by Mr. Chief Justice Marshall in delivering the opinion of the court in an important case (referring to *Harrison v. Sterry*, supra). His language was: "The law of a place where a contract is made is, generally speaking, the law of the contract; i. e., it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege, dependent on the place where the property lies, and where the court sits which is to decide the cause." And the doctrine was on that occasion expressly applied to the case of a contract made in a foreign country with a person resident abroad."

The courts of Louisiana recognize the rule that priority of payment created by the laws of another state will not be recognized by the courts of the state in which the property is found; thus:

In *Lee v. His Creditors*, 2 La. Ann. 600, where it was held that "privileges" on steamers and other vessels established by the laws of other states, unless expressly recognized by the laws of Louisiana will not be enforced there, it was said:

"That a failure to acknowledge, or enforce, liens or privileges on movables created by foreign laws, cannot be considered as derogating from the comity which prevails among states in relation to the effect to be given foreign laws, is obvious. A nation within whose territory personal property is found, has as entire jurisdiction over it while there as it has over immovable property. Its exercise for all purposes is a question of policy, and may be co-extensive with its authority over the latter"; and again "So far as authority is considered in relation to conflict of laws in similar cases, and the comity which is to be observed in relation to the priority of payment created by the laws of the place where the contract is made, the decisions of the highest tribunal in the Union are directly and positively against its recognition. *Harrison v. Sterry*, 5 Cranch, 298 [3 L. Ed. 104]; *Smith, Administrator, v. Union Bank, etc.*, 5 Pet. 523 [8 L. Ed. 212]. In the distribution of insolvent estates under our laws, we are not aware of any distinction that is recognized among creditors, dependent on the place of the origin of the debts. The distribution is made according to the order of privileges and mortgages established in the Code, as of the proceeds of a common pledge."

In *Swasey v. Steamer Montgomery*, 12 La. Ann. 800, the question was presented whether a claim based on a statute of the state of Alabama, granting a privilege to demand toll of vessels passing through a channel, should be classed as a privilege in the distribution of the proceeds of the steamer. The claimed privilege was denied, the court saying:

"We consider it settled under the decision in the case of *Lee v. His Creditors*, 2 La. Ann. 600, that privileges must be regulated by the law of the forum, and that none can be claimed except such as are expressly granted in the Civil Code."

In *Gause v. Bullard*, 16 La. Ann. 107, 108, the intervener claimed a privilege by reason of the purchase of property in question in the State of Georgia, by a citizen of that state, and with funds raised therein. In denying this privilege the court said:

"It is perfectly immaterial whether, under the facts of this case, the intervener could claim a privilege in the state of Georgia; for this court has, on more than one occasion, said that we are to look to the provisions of our own laws for the existence and enforcement of privileges. *Lee v. His Creditors*, 2 La. Ann. 600; *Wickham v. Levistones et al.*, 11 La. Ann. 702; *Swasey & Co. v. Steamer Montgomery*, 12 La. Ann. 800."

Claimant invokes *Carlin v. Gordy*, 32 La. Ann. 1285, as holding that the vendor's privilege is not a matter of remedy or administration. It is true that in that case the court used this language:

"The privilege of the vendor is founded on the right of property. Payment of the price is essential to the vesting of the indefeasible title in the vendee. The vendor's rights to, and securities for, the payment of the price have always commended themselves to the favorable consideration of our courts."

This was said, however, in a case involving a contest in the Louisiana courts between the mortgagee of property and the vendor, who had levied "in execution of her judgment recognizing her vendor's privilege thereon," created by the laws of Louisiana. We see nothing in this decision opposed to the view we have taken of the nature of this privilege.

Claimant relies, moreover, upon the familiar rule that while the statutes of a state have in themselves no extraterritorial force, yet rights acquired under them are always enforced by comity in the state and national courts in other states, unless they are opposed to public policy or laws of the forum.

But as we have already said, we think the privilege relied upon here is not a right acquired by contract under the laws of Louisiana, but is merely a preference relating to the distribution of the property or estates of debtors, and as such only a matter of remedy or administration with respect to which the doctrine of comity has no application. The statutes of neither Arkansas nor Tennessee recognize the existence of the vendor's privilege claimed here, and of course provide no machinery for enforcing it under ordinary circumstances. In view of the nature and extent of the receivership proceedings, the question of forum as between the two states is immaterial.

In view of the conclusion we have reached as to the nature of the claimed privilege, it is not necessary to consider whether the enforcement of a vendor's lien created by contract would be opposed to the public policy of the State of Arkansas. Nor is it material to this inquiry that the Louisiana courts recognize, as is asserted, the doctrine of comity as to contract rights to the extent of making it a matter not only of judicial recognition, but of Code requirement. The views we have expressed make it also unnecessary to consider the proposition urged by the receiver, that the property in question has become immovable by reason of its being affixed to the real estate, and thus not subject to the privilege under the Louisiana Code through failure to give the notice required in order to preserve the privilege as to immovable property. Nor is it necessary to determine whether the receivership ordered under the bill in this cause operated as an attachment in favor of general creditors of the Compress Company. It is enough to say that the proceeding is one for the administration of the estate of an insolvent corporation, and that the privilege asserted relates to the assets of such insolvent corporation, so in the course of administration.

For the reasons we have stated, we are of opinion that the claimant had no privilege or lien upon the property in question enforceable in

the court to which application was made, and in which administration of the affairs of the insolvent corporation is being had.

It follows that the Circuit Court rightly denied the privilege asserted, and that its order should be affirmed.

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HUNTER v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,107.

**1. REMOVAL OF CAUSES (§ 86\*)—SUFFICIENCY OF PETITION—FRAUDULENT JOINDER OF DEFENDANTS.**

A petition for removal, filed by one of a number of defendants in an action for negligence, which charges that no grounds of action are alleged by plaintiff or exist against its codefendants, and that they were fraudulently joined to deprive petitioner of its right to remove the case, shows a right of removal on its face, where the requisite jurisdictional facts are stated, and, unless issue is joined on such allegations, a motion to remand is properly denied.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 172; Dec. Dig. § 86.\*]

Fraudulent joinder of parties to prevent removal, see note to *Offner v. Chicago & E. R. Co.*, 78 C. C. A. 362.]

**2. REMOVAL OF CAUSES (§ 86\*)—PETITION FOR REMOVAL—VERIFICATION.**

A petition for removal is not required to be verified.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 177; Dec. Dig. § 86.\*]

**3. REMOVAL OF CAUSES (§ 86\*)—PROCEEDINGS AFTER REMOVAL—LEAVE TO PLEAD TO PETITION—DISCRETION OF COURT.**

The denial of a motion for leave to plead to a petition for removal, not made until more than five months after a motion to remand had been overruled, and when the case was at issue and ready for trial on the merits, was within the discretion of the court.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 86.\*]

**4. MASTER AND SERVANT (§§ 285, 286, 289\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.**

Plaintiff's intestate, who was a brakeman in the employ of defendant railroad company, was killed in making a flying switch by a collision between the car on which he was riding and other cars standing on the switch track. A single box car was switched, with deceased on the top, and it was shown without contradiction that he attempted to stop the car by setting the brakes, but was unable to check it and it ran into an iron coal car. Deceased then got upon that and tried to set its brakes, but could accomplish nothing, and both cars crashed at high speed into a row of flat cars, causing the wreck in which he was killed. The brake mechanism on both the moving cars was found after the collision to be broken and inoperative. *Held*, that the evidence was sufficient to require submission to the jury of the question whether or not the defects existed prior to the collision as well as the questions of the negligence of defendant and the contributory negligence of deceased.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 285, 286, 289.\*]

5. MASTER AND SERVANT (§ 265\*)—ACTION FOR INJURY TO SERVANT—DOCTRINE OF RES IPSA LOQUITUR.

There is no hard and fast rule that the doctrine of *res ipsa loquitur* can in no case be applicable in a suit by an employé against an employer for negligent injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 881; Dec. Dig. § 265.\*]

In Error to the Circuit Court of the United States for the Western District of Kentucky.

Action at law by J. H. Hunter, administrator of S. V. Hunter, deceased, against the Illinois Central Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Newton Belcher (T. J. Sparks, Belcher & Sparks, and C. A. Denny, of counsel), for plaintiff in error.

Edmund F. Trabue, John C. Doolan, and Attila Cox, Jr. (Blewett Lee, C. L. Sivley, J. D. Atchison, Taylor & Eaves, and R. Y. Thomas, Jr., of counsel), for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SA-TER, District Judge.

KNAPPEN, Circuit Judge. The plaintiff in error brought suit in a circuit court of the state of Kentucky to recover damages on account of the death of his intestate while engaged as a brakeman in the employ of the Illinois Central Railroad Company in making a flying switch. The petition alleged, and the evidence tended to show, that the deceased was killed by being crushed in a collision between a runaway freight car on which he was riding and other cars standing upon a switch track, by reason of the failure of certain brakes to work. Both plaintiff and deceased were citizens of Kentucky. The Illinois Central Railroad Company (defendant in error) is a citizen of Illinois. The plaintiff joined as defendants one Bash, the conductor in charge of the switching operations in question, and the Greenville Coal Company, the owner of the switch track on which the accident occurred. Both Bash and the coal company were citizens of Kentucky. The plaintiff's petition alleged that the death of deceased was occasioned by the joint and concurring negligence of the three defendants. The railroad company filed in the state court a petition for the removal of the case to the federal court, upon the ground that there was presented a separable controversy as to it, and that the other defendants were joined for the fraudulent purpose of preventing removal of the cause to the federal court. The state court approved the removal bond, but denied the petition for removal. The transcript was accordingly filed in the court below. Without joining issue upon the petition for removal, the plaintiff moved in the court below to remand the case to the state court upon the face of the proceedings. The motion to remand was denied. Several months later plaintiff moved for leave to answer and plead to the petition for removal, which motion was likewise denied. The case proceeded to trial, and at the close of the evidence the court directed a verdict in favor of the defendant railroad company. The errors assigned bring up for review: First, the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

refusal to remand the case to the state court; second, the refusal to permit the filing of plea to the petition for removal; and, third, the directing of verdict and judgment for defendant.

[1] 1. In our opinion the motion to remand was properly denied. The railroad company is alleged, in the plaintiff's petition, to have been negligent in respect to the manner of operation of the train, engine, and cars upon which the deceased was working, and in furnishing a car equipped with brakes not in a suitable condition to stop or control the car. The conductor's alleged negligence related to the manner of the operation of the train, engine, and cars upon which deceased was working; it being also alleged that "he knew, and by the exercise of ordinary care could have known," of the defective and dangerous condition of the car. The coal company was charged with negligence in placing and allowing the cars to remain at the lower end of the switch, and at the same time leaving the switch open.

In the view we take of the case, it is unnecessary to decide whether plaintiff's petition on its face shows a joint liability on the part of the conductor and the coal company. The defendant's petition for removal alleged that "the plaintiff at the time he commenced said action well knew that he had no cause of action against said W. H. Bash or Greenville Coal Company, or either of them"; and, after alleging that plaintiff's petition states no cause of action against the conductor or the coal company, alleges that plaintiff—

"knew that the statement in his petition that the said injuries were caused by the gross negligence or by the concurring negligence or any negligence of said W. H. Bash or Greenville Coal Company concurring with any negligence on the part of this petitioner was untrue when he filed said petition, and your petitioner says that its said codefendants \* \* \* were not, nor was either of them, when this action was commenced, proper parties to this action, and neither of them has ever been a proper party to this action or has ever had any agency in causing said injury to \* \* \* plaintiff's intestate, and plaintiff well knew all said facts as herein stated to be true when he instituted this action, and your petitioner represents and states that when the said action was instituted that the defendant W. H. Bash was in no way responsible for the injuries complained of in the petition and had no part in causing same, and in like manner the Greenville Coal Company was in no way responsible for the injuries complained of in the petition and had no part in causing same, and the plaintiff well knowing these facts to be true, and showing by his petition that such facts were true, nevertheless stated in his petition that the injuries complained of therein were caused by the alleged gross negligence and carelessness of said" conductor and coal company.

The petition for removal further alleged that the plaintiff has invented and applied to the conductor and the coal company—

"various epithets imputing negligence and carelessness, but he has refrained from stating any facts showing such negligence or carelessness, and in his petition in this case the plaintiff by design invented and used the epithets imputing negligence and carelessness to said W. H. Bash and Greenville Coal Company with the pretext and for the fraudulent purpose of claiming a color of right to unite them as codefendants in this action with this defendant, but without any real intention to claim or expectation of recovering a judgment against said W. H. Bash or Greenville Coal Company, but with the sole purpose and intention of stating in his petition such a case as would seem to make said W. H. Bash and Greenville Coal Company or one of them joint defendants with this petitioner and thereby deprive this petitioner of the right to remove this action to the United States Circuit Court for the

Western District of Kentucky, and to defeat the right secured to this defendant by the Constitution and laws of the United States of America to have a separate controversy between it and the plaintiff in this action removed to and tried in the United States Circuit Court for the Western District of Kentucky."

The petition for removal also stated that defendant would "controvert all claims of negligence asserted against it by the plaintiff in his petition." If the facts alleged in the petition for removal were true, the state court had no jurisdiction over the case. It follows that a cause for removal was stated on the face of the petition therefor. *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430; *Dishon v. Cincinnati, N. O. & T. P. R. Co.* (Sixth Circuit) 133 Fed. 471, 474, 66 C. C. A. 345; *McAlister v. Chesapeake & O. R. Co.* (Sixth Circuit) 157 Fed. 740, 743, 85 C. C. A. 316; *Donovan v. Wells Fargo & Co.* (Sixth Circuit) 169 Fed. 363, 368, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250. We think there is nothing in *Illinois Cent. R. Co. v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208, in conflict with this view. That case, so far as concerns the question we are considering, turned upon the proposition that the facts alleged and proved against the lessee railroad made it and the lessor jointly liable as matter of law, under the decisions of the courts of Kentucky, and that the joinder of the lessor and lessee could thus not be fraudulent. Such question does not arise here. The questions of fact asserted in the removal petition were not triable in the state court. That court could only consider whether the petition upon its face showed a right of removal. Such right of removal being, in our opinion, as already stated, shown upon the face of the petition therefor, the state court lost jurisdiction over the removing defendant, and the court below, by the filing of the transcript, obtained such jurisdiction. *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765; *Illinois Cent. R. Co. v. Sheegog*, 215 U. S. 308, 316, 30 Sup. Ct. 101, 54 L. Ed. 208. Had plaintiff denied the allegations of fact in the petition for removal, the burden of proving the same would have rested upon defendant.

[2] It is urged, however, that a petition for removal, unsupported by proof showing that the joinder was fraudulent, is insufficient, and that the motion to remand should prevail, without denial of the facts stated in the petition for removal. In fact, the petition for removal in this case was verified under oath (but upon belief) by the principal officer of the railroad company in Kentucky. We do not, however, understand the rule to be as contended by plaintiff. In *Dishon v. Cincinnati, N. O. & T. P. R. Co.*, supra, the petition for removal was verified by the affidavit of the general manager of the railroad company. As to some of the allegations of fact in the petition the manager could have had personal knowledge. As to others he manifestly could not have had such knowledge. In *McAlister v. Chesapeake & O. R. Co.*, supra, it does not appear from the report that the petition was verified. In *Wecker v. National Enameling Co.*, supra, the questions of fact were tried out upon affidavits filed by each party. In *Donovan v. Wells Fargo & Co.*, supra, it was expressly held, and we think rightly, by the Circuit Court of Appeals of the Eighth Circuit, that a removal

petition is not defective because not verified, as the statute requires no verification. The motion to remand amounted practically to a demurrer to the petition for removal as stating no sufficient ground therefor, and, no issue having been made upon the averments in fact of fraudulent joinder and nonliability of the resident defendants, the motion to remand was properly denied. *Dishon v. Cincinnati, N. O. & T. P. R. Co.*, supra; *Kentucky v. Powers*, 201 U. S. 1, 33, 34, 26 Sup. Ct. 387, 50 L. Ed. 633; *Donovan v. Wells Fargo & Co.*, supra.

[3] 2. We think the circuit court did not err in refusing plaintiff's motion for leave to plead to defendant's petition for removal. The motion to remand was denied on November 22d, and on that day the case was continued for the term by consent. On the next day the railroad company filed its answer to plaintiff's petition, and issue was thus joined upon the merits of the action. On May 2d following, and on the same day on which plaintiff's amended petition was filed, and when the cause was, as we infer, upon the calendar of the May term for trial, being the day before the trial was actually entered upon, motion was presented for leave to answer the petition for removal and to plead thereto in abatement. The bill of exceptions contains the following with reference to the denial of the motion:

"The court overruled the motion upon the ground that at the last term the plaintiff moved the court to remand the action, which motion, after argument, was overruled. The plaintiff had the option to proceed this way or to file an answer to the petition for removal. He chose the former, and thus made his election to make the motion to remand without answering the petition for removal and denying its allegations. He had his day in court on the question of remanding the case. He should be bound by the election, and the court was of opinion that it would be bad practice to permit parties thus to speculate upon its action upon any proposition. There can be no object in making the present motion except as the basis of another motion to remand the case. This matter was adjudicated and closed at the last term, and the court thought it would be an abuse of discretion to reopen it at this term."

The court also expressed a doubt whether plaintiff's petition states a cause of action against the conductor and the coal company. We think that in denying the motion to plead, under the circumstances shown, the court did not abuse its discretion. The request to join issue upon the petition for removal was delayed upwards of five months after the denial of the motion to remand upon the face of the record, more than five months after the continuance of the case by consent to the next term of court and the joinder of issue upon the merits, and upon the very eve of trial upon the merits. No excuse for the delay is suggested by the record. Assuming, without deciding, that the plaintiff should have been permitted, upon a seasonable motion, to plead to the petition for removal, notwithstanding the denial of the motion to remand upon the face of the record, such request to plead should have been seasonably made. We think it was not seasonably made when presented at the late date and under the circumstances above stated. In such case permission to join issue upon the facts contained in the removal petition was, at the most, addressed to the discretion of the court, and it does not appear that such discretion was not properly exercised in denying the motion. It is true that the district judge who

denied this motion had, in the case of *Boatner v. American Express Co.* (C. C.) 122 Fed. 714, stated that it was the practice in his district "to treat allegations in a petition for removal that defendants were joined for the sole purpose of removal, in fraud of the jurisdiction of the court, as traversed, without an express denial, and, on a motion to remand, to place the burden of proving such allegation on the defendant." But the existence of such practice did not, under the circumstance of this case, require the granting of leave to plead under the circumstances presented here. Moreover, the *Boatner* Case was decided previously to the decisions of this court in *Dishon v. Cincinnati, N. O. & T. P. R. Co.* and *McAlister v. Chesapeake & Ohio R. Co.*, *supra*. Had it appeared upon the trial of the case upon the merits that there was no separable controversy as to the removing defendant, it would have been the duty of the court to remand the cause. But such question does not arise upon this record.

[4] 3. In our opinion, however, the court erred in directing verdict and judgment for the defendant. The plaintiff's testimony tended to show that in making the switch the deceased was upon a box car and apparently making vigorous efforts to stop it by working the brakes; that he was unable to check the car, which ran into an iron coal car; that decedent then got upon the coal car and attempted to stop it by working its brakes, but was unable to accomplish anything; that the two cars so out from under control ran rapidly down the track until they dashed into one of a row of flat cars, killing the decedent almost immediately. The jury had the right to infer from the testimony not only that the deceased was using his best efforts to stop the box car, but that upon his failure to do so, and in continuance of such efforts, he went upon the iron coal car and attempted to apply the brakes to that car without effect; and that his death was caused in spite of his efforts to save himself and to prevent the imminent collision. It is urged that, had he remained upon the box car, he could not have been seriously injured, and that, had he kept off the front end of the coal car, he would not have been caught in the collision of that car with the flat car. But, in view of the emergency which plaintiff's testimony tended to show, the considerations suggested were, at best, addressed to the jury. We cannot say that the jury could not properly have found that the deceased acted with prudence under the existing emergency in leaving an uncontrollable runaway car, and seeking to accomplish its stoppage by checking the car in front of it; nor that the deceased acted improperly, even if his death occurred in the attempt to leave the coal car after failing to control it, and in order to avoid collision with the flat cars. And what we have said answers the contention that the defective brakes of the box car could not have been the proximate cause of the accident. There was testimony that upon an examination of the box car following the accident the brakes were found "hanging from the wheel," and that, according to the testimony of two witnesses, a brake shoe was gone from one side of the box car, and, by the testimony of a third witness, that a brake was missing from the other side of the car; also, that the brake chain on the coal car was, immediately following the accident, found broken.



There was testimony that the box car had been brought in for the purpose of taking on and hauling out certain household goods. The examination of the box car was made by two witnesses the day after the accident. It does not affirmatively appear when the examination by the third witness was made; but his testimony is consistent with an examination on the day of the accident. Indeed, defendant's counsel, in their brief, say that some of the witnesses who examined the box car "saw it the same day of, and others the day after, the accident." The defendant offered no testimony. The trial judge in directing verdict for the defendant cited *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, *Carnegie Steel Co. v. Byers*, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677, *Moit v. Illinois Central R. Co.*, 153 Fed. 354, 82 C. C. A. 430, and *Patton v. Illinois Central R. Co.* (C. C.) 179 Fed. 530. These cases establish the proposition that in the case of an accident to an employé the fact of the accident raises no presumption of negligence on the part of the employer.

[5] As pointed out, however, by this court in *Byers v. Carnegie Steel Co.*, 159 Fed. 347, 86 C. C. A. 347, 16 L. R. A. (N. S.) 214, there is "no hard and fast rule that the doctrine of *res ipsa loquitur* can in no case be applicable in a suit by an employé against an employer for negligent injuries." We think, however, that plaintiff was not compelled, in order to entitle him to go to the jury, to rely upon the doctrine referred to. In view of the uncontradicted testimony that deceased was unable to produce any effect upon either the box car or the coal car by the application of the brakes, the jury would have been justified in inferring that the brakes upon both cars were defective previous to the accident. And, in view of the fact that there was no testimony whatever of any inspection of the cars in question by the railroad company previous to the accident, we think that in the case of the car just brought in, and lacking at the time of the examination not merely one, but two, brake shoes, and in view of the fact that the coal car likewise had a broken brake chain, it would have been open to the jury to infer that the railroad company was negligent with respect to the missing brakes upon the box car.

The judgment of the circuit court should, accordingly, be reversed, and a new trial ordered.

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GRAHAM et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. June 19, 1911.)

No. 1,014.

1. TRIAL (§ 110\*)—PRESENTATION OF EVIDENCE.

In an action by the United States on the bond of a contractor on which a surety company was surety, the admission in evidence of letters written by the surety company was not subject to any just objection because they were written on letter heads of its own showing that its capital was over \$1,000,000.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 110.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. SALES (§ 83\*)—CONSTRUCTION OF CONTRACT—GOODS BOUGHT F. O. B. CARS—DUTY TO FURNISH CARS.**

It is the general rule, in the absence of agreement or a practice to the contrary, that, where goods are bought f. o. b. cars, the obligation is upon the buyer to furnish the cars necessary in transportation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 224-227; Dec. Dig. § 83.\*]

**3. CONTRACTS (§ 262\*)—RIGHT OF RESCISSION—WAIVER OF BREACH.**

The right of a defendant, who contracted to dress building stone to be delivered to him by the other party, to rescind because of delay in delivery of the stone, was lost, where he failed to act promptly, but received and dressed a large part of the stone after shipments had been resumed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1181-1183; Dec. Dig. § 262.\*]

**4. UNITED STATES (§ 72\*)—CONTRACT FOR PUBLIC WORK—POWER TO ANNUL.**

Act March 3, 1903, c. 1007, 32 Stat. 1102, making an appropriation for a new building for the Smithsonian Institution, authorized the Superintendent of Buildings and Grounds, Library of Congress, to make the contracts for the work and disburse the money therefor. He entered into a contract with defendant to do certain work, which provided that on defendant's failure to faithfully prosecute the work the superintendent or his successor should have power, "with the sanction of the regents of the Smithsonian Institution," to annul the contract. The regents include the Chief Justice and Vice President of the United States and Senators, and meet only about three times each year, leaving all matters of detail to the secretary. *Held*, that an annulment of the contract by the Superintendent of Buildings and Grounds with the concurrence of the secretary of the institution was legal and effective.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 55; Dec. Dig. § 72.\*]

**5. UNITED STATES (§ 67\*)—CONTRACTOR'S BOND—DISCHARGE OF SURETY—CHANGE IN CONTRACT OF PRINCIPAL.**

A bonding company, which for a monetary consideration becomes surety for the performance of a contract to do work for the United States, will not be released from liability because of changes made in the contract, in accordance with its provisions and with the assent of the contractor, unless it is shown that it was injuriously affected by such changes.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.\*]

In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore.

Action at law by the United States against Frank F. Graham and the Guaranty & Surety Company. Judgment for plaintiff, and defendants bring error. Affirmed.

In the Sundry Civil Appropriation Act, approved March 3, 1903, c. 1007, 32 Stat. 1102, Congress enacted:

"To enable the Regents of the Smithsonian Institution to commence the erection of a suitable fireproof building with granite fronts, for the use of the National Museum, to be erected on the north side of the Mall, between Ninth and Twelfth streets, Northwest, substantially in accordance with the plan A, prepared and submitted to congress by the Secretary of the Smithsonian Institution under the provisions of the act approved June twenty-eighth, nineteen hundred and two, two hundred and fifty thousand dollars. Said building complete, including heating and ventilating apparatus and elevators, shall cost not to exceed three million five hundred thousand dollars, and a contract or contracts for its completion is hereby authorized to be entered into subject

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to appropriations to be made by Congress. The construction shall be in charge of Bernard R. Green, Superintendent of Buildings and Grounds, Library of Congress, who shall make the contracts herein authorized and disburse all appropriations made for the work, and shall receive as full compensation for his services hereunder the sum of two thousand dollars annually in addition to his present salary, to be paid out of said appropriations."

On October 23, 1906, Frank F. Graham entered into a contract with Bernard R. Green, "acting under the direction of the Regents of the Smithsonian Institution, for and in behalf of the United States of America," whereby he (Graham) agreed to "transport from the quarry, cut, box and deliver complete, all the Bethel granite," to be furnished by Green "free on board cars at the quarry at Bethel, Vt., required for that portion of the South Pavilion above the first floor level of the said building for the National Museum in Washington, District of Columbia, described as part 'C' in the specifications, the drawings therein referred to, and the instructions and general conditions, all for the gross sum of one hundred and forty nine thousand dollars." To secure the performance of his contract Graham executed bond in the penalty of \$50,000 with the Title Guaranty & Surety Company as surety. This contract, among other things, provided that, if Graham failed "to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then Green or his successor legally appointed should have power with the sanction of the Regents of the Smithsonian Institution to annul this contract by giving notice in writing to that effect" to Graham. That the United States should have the right to recover whatever sums might be required to complete the contract after such annulment, in excess of Graham's contract price, and apply to such completion of the work any sums not paid over to Graham at the time for work done by him. On March 18, 1908, Green, alleging that Graham had stopped work and failed to prosecute it faithfully and diligently as the contract required, gave notice to Graham in writing of its annulment, and subsequently the work was done and completed by the government under Green's supervision at a cost in excess of Graham's contract price, after taking into account prior payments, of \$56,080.75. Thereupon the United States instituted this suit upon Graham's bond and after a protracted jury trial, on June 25, 1910, secured a verdict for \$50,000 against Graham and the surety company, upon which verdict judgment was entered by the court on June 28, 1910, for said sum of \$50,000 and \$280.19 costs of suit. To this judgment this writ of error has been sued out.

Charles F. Harley (George R. Gaither, John B. A. Whelple, and Burdette B. Webster, on the brief), for plaintiffs in error.

John Philip Hill, U. S. Atty., and J. Craig McLanahan, Asst. U. S. Atty., for the United States.

Before PRITCHARD, Circuit Judge, and DAYTON and CONNOR, District Judges.

DAYTON, District Judge (after stating the facts as above). Graham filed some 14 and the surety company 15 pleas in defense of this suit. The first 14 filed by the surety company are substantially the same as those filed by Graham, and both sets could have been well reduced to 4, one the general issue, the other 3 setting forth the charges: First, that the contract was not annulled lawfully by Green; second, that Green had not performed the conditions of the contract required of him in the furnishing of the granite properly to Graham, whereby and by reason whereof he had broken the contract, and Graham was entitled to abandon it; third, that the expenditures after annulment of the contract by Green in the completion of the work were not reasonable and fair. The fifteenth plea filed specially by the surety company set forth that, without its knowledge and assent, material alterations had been made in the contract, whereby it became released

of its surety obligation. Thus analyzed it will be perceived that of these three substantial defenses, other than the general issue, set up by these defendants jointly in their multitude of pleas, the last two presented wholly questions of fact which were proper to be submitted to the jury under instructions of the court. During the course of the trial, extended over some 28 days, 39 separate bills of exception were taken, and 47 assignments of error are now here made.

[1] It could hardly be expected of us to consider these exceptions, and assignments in detail. The great majority relate to the action of the court in admitting and refusing testimony, and to remarks of the court and opposing counsel in the course of trial. Especial stress is here made by counsel in argument and brief on the fact that the government's counsel was permitted to introduce in evidence written communications from the surety company, which set forth upon their printed heads the fact that its capital and surplus was over \$1,000,000, because it is asserted in the brief that:

"It is difficult for a person, natural or artificial, to secure a fair trial in a case of this kind against the United States, and the line against evidence and argument of this character should be fairly and firmly drawn."

We are not prepared to concur in the assertion of fact contained in this proposition. Nor can we quite see what line can be firmly drawn against the introduction of a letter headed communication which letter head has been promulgated, published, and used by the surety company for no other purpose that we can conceive of than that of furnishing a brief, accurate description of itself, its address, its responsible officers, the nature of its business and its financial ability to conduct such business, and it is far from clear to us how such defendant could be prejudiced by this its own act, especially before a jury charged, as in this case, by the court that:

"The same principles of right and justice which prevail between individuals should control the construction and carrying out of contracts between the government and those who contract with it or its agents."

A careful examination of all this kind of exceptions has convinced us that they present no just ground of complaint on the part of the defendants, and they will be dismissed without further consideration. Others of these exceptions relate to the refusal of the court to give to the jury 27 special instructions or special prayers. The very number of these was calculated to confuse and mislead the jury, and a number were not at all warranted by the evidence. The court, we think, very wisely, concluded to give a general charge touching the matters in controversy, and, so far as we can see, fairly and impartially submitted to the jury the determination of the facts in dispute.

In this view of the matter but few legal propositions remain in the case for us to consider. First, under the terms of the contract, was the obligation upon Green, acting for the government, to furnish Graham with the railroad cars necessary for the transportation of the granite blocks from the quarry in Vermont to his yard in Baltimore?

The contract, as hereinbefore stated, required Graham to "transport from the quarry, cut, box and deliver complete" the granite

which was to be furnished by Green "free on board cars at the quarry." At the beginning a car famine existed, and Graham complained of the delay resulting therefrom. It is insisted that Green's obligation to deliver the granite "free on board the cars" required him to furnish the cars. On the other hand, it is insisted that Graham's obligation "to transport from the quarry, cut, box and deliver complete" required him to furnish the cars.

The court seems to have taken a middle ground and told the jury that:

"In a contract of that kind, I think there was an obligation on both parties to furnish cars, that reasonable efforts should be made to accommodate each other."

[2, 3] It seems to us, without entering into an extended discussion of the question, that the lower court's construction of the law was very fair and liberal to defendants, for the general rule is pretty well established that, where the goods are bought f. o. b. cars, the obligation is upon the buyer to furnish the cars necessary in transportation. See 35 Cyc. 197, and authorities cited; also, note to Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co., in 62 L. R. A. 795, where the proposition is discussed. A sound reason for this rule is apparent. The transportation company becomes by law agent or bailee of the buyer, in consequence the buyer, under all ordinary conditions and in the absence of contract provisions to the contrary, should be permitted to select the agent of his choice. It is true that this general rule may be shown to have been modified or reversed by the agreement or conduct of the parties, but there is nothing in the case here to cause us to believe that it was. But aside from this, Graham, if he desired to rely upon this delay as ground for abandonment of his contract, was required to act promptly at the time. For some months he complained of it, then, the car famine being over and the stone arriving in large quantities, he proceeded with the work and did a large part of it. This must be held in any event to be a waiver of any right he had, if any, to rescind.

[4] Second. Was this contract legally annulled by Green, whereby he was authorized, on behalf of the government, to finish the work at the contractor's cost?

It is most earnestly insisted by counsel for these defendants that it was not because, it is alleged, the rescission was not made "with the sanction of the Regents of the Smithsonian Institute."

It seems clear from the evidence that Graham proceeded with the work he had contracted to do during the whole time limit of the contract, and until it had, by tacit consent, been extended by Green for some months, then he discharged his men and told them to seek other employment, was requested by Green by letter to proceed with the work to the completion of the contract, and replied, through his attorney, that he had stopped work "for his financial welfare in view of the fact of the damage he has sustained \* \* \* by reason of the manner in which this matter has been gone on with on the part of the government, and their agents in the matter." This was on March 14, 1908. On February 10, 1908, he had stated in a letter to

Green, "I intend to devote my entire yard to museum work, until I see the job about completed." It is true that in his attorney's letter, from which we have first above quoted, the statement is made that "if this matter can be in any way amicably adjusted he should be glad to do anything that may be fair and equitable between the parties." What did he mean by this adjustment, the completion of the contract? Hardly, for he had discharged the men by whom the work would have had to be done and told them to seek other employment. Could he have meant anything else than that he had thrown up the contract, but was ready to compromise and adjust his claim of damages for delays for changes for larger stone furnished under the terms "net dimension blocks" and for times of payment? If this question is to be answered in the negative, then here was a clear abandonment of the contract which rendered its annulment by Green unnecessary. It must have been known by Graham that his remedy, after having gone on so far toward the execution of the contract, was not in its abandonment, but in its completion and the assertion afterward of claim for extra compensation because of such damages for which the Court of Claims was open to him to seek recovery.

But, in addition to this, it is argued with much force by counsel for the government that the clause in the contract limiting Green's authority to annul only with the consent of the Regents of Smithsonian Institute was void because the act of Congress conferred upon Green, and Green alone, the power to contract, and he had no authority to either delegate to or share with any other this power, all of which it was incumbent upon Graham by law to take notice of at the time of contracting. In support of this contention the case of *Whiteside et al. v. United States*, 93 U. S. 247, at pages 256, 257 (23 L. Ed. 882), is cited, where it is said:

"Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government. *Story's Agency* (6th Ed.) § 307a; *Lee v. Munroe*, 7 Cranch, 376 [3 L. Ed. 373].

"Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public. *Mayor v. Eschbach*, 18 Md. 282.

"Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. *State v. Hayes*, 52 Mo. 578; *DeLafield v. State*, 26 Wend. [N. Y.] 228; *People v. Bank*, 24 Wend. [N. Y.] 431 [35 Am. Dec. 634]; *Mayor v. Reynolds*, 20 Md. 10 [83 Am. Dec. 535.]"

But, aside from all this, after carefully considering all the testimony and facts relating to this matter, we prefer determining it squarely upon the grounds and for the reasons given by the court below. In its charge it said:

"The proof is that the regents are a body of men who are constantly occupied, including the Chief Justice of the United States Supreme Court, the Vice President of the United States and United States Senators, and these men do not meet over three times a year, when they probably discuss and determine the general policies of the institution. It was said, and there was no proof to the contrary, that the practice is to leave all matters of detail and matters such as this to the secretary of the institution. For a long time they have allowed him to exercise those powers. Could it be said now that he has not the right to exercise those powers, and that the parties who deal with him in this way are not dealing with the proper person? The secretary, acting for the regents, gave his consent to the annulment in the proper manner. Mr. Green stated that in his judgment the contract should be annulled because of the failure of the defendant, and therefore the annulment was made. I can see no ground for saying to the jury that the contract was not annulled. I grant those prayers which say that there is no evidence to support the plea that the annulment was without the sanction of the Regents of the Smithsonian Institute. There is no evidence, in my judgment, to show that the annulment was the result of any bad faith on the part of Mr. Green. Mr. Green has acted within his rights, and as the agent of the government it was his duty to protect the interests of the government. I do not think he has gone beyond the limits of his powers."

[5] Finally, were such changes and alterations made in the contract without the surety company's consent as maintained in its special defense in this regard and which entitled it to release from its surety obligation?

This question, although elaborately argued, will need but brief consideration. The contract which the surety company guaranteed performance of in express terms provided that changes and modifications could be made and compensation should be allowed for extra work performed or material furnished. These changes and alterations were provided to be required in writing, it is true, and the letters produced in evidence between Green and Graham seem to us to be sufficient to meet all requirements in this particular. It is also shown that Graham and Green agreed on a sum of \$4,000 for extra compensation for the extra labor performed and that he was given credit for this sum. In *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. 690, 90 C. C. A. 274, this court has determined that the rule of *strictissimi juris* will not be recognized as applying to contracts underwritten by these bonding corporations whose business it is to insure, for a monetary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in the contract guaranteed by it, operated injuriously to affect its right and liabilities.

We agree fully with the court below that there is no evidence in this case to support such plea.

There is no error in the judgment of the court below, and it will therefore be affirmed.

## JOHN KITCHEN, JR., CO. v. LEVISON.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1911.)

No. 1,900.

## 1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—MANIFOLD BOOK.

The Levison reissue patent, No. 12,005 (original No. 694,103), for a manifold book, discloses patentable invention, especially in view of the recognized defects in the devices of the prior art which were remedied in that of the patent and its commercial success, and is also valid as against the claim that the reissue is a departure from the original. Also, *held* infringed.

## 2. PATENTS (§ 148\*)—REISSUES—PRESUMPTION OF REGULARITY OF PROCEEDINGS.

From the reissue of a patent it is to be presumed that the law was complied with, and the proceedings can only be impeached for fraud.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 221, 222; Dec. Dig. § 148.\*]

## 3. PATENTS (§ 236\*)—INFRINGEMENT—LEAVES "BOUND" IN BOOK.

A manifold book, in which the carbon sheets are attached to a card-board stub having a notched edge, the teeth of which may be pressed between the staples which bind the edges of the leaves together to hold the sheets in place, although such sheets are removable, does not escape infringement of a patent because the sheets are described therein as "bound" in the book.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 236.\*]

For other definitions, see Words and Phrases, vol. 1, p. 851.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Suit in equity by Alexander Levison against the John Kitchen, Jr., Company. Decree for complainant, and defendant appeals. Affirmed.

The appellee was the complainant in the court below in a suit to enjoin infringement of letters patent No. 12,005, issued to him on July 1, 1902, for an improvement in manifold books. The court below sustained the patent, and enjoined the appellant from infringing the same. The invention relates to an improved manifold receipt and record book for mercantile, railway, express, or other business uses. The manifold book is formed in sections, each section comprising in order, first a carbon sheet of about two-thirds the width of the book, and, second, record sheets with stubs divided into three substantially equal parts by vertical lines of perforations, said parts having suitable printed matter and blank lines whereon to inscribe the desired record. The carbon sheets are carbonized on both sides, and are bound in the book, and extend over the first two of the divisions of the record sheets. In use the outer third of the record sheet is folded to the left on the line of perforations. It then covers about one-half of the carbon sheet. It is again folded in the same direction on the second line of perforations so that the carbon sheet is folded inside the record sheet. The record is then written upon what was the back of the middle portion of the sheet before it was folded. The carbon sheet being carbonized on both sides, a copy of the record will be made upon each of the two terminal parts of the sheet, also a backhand copy of the writing will be formed on the back of each part except the inner one. The claims held to be infringed are as follows:

"(3) A manifold book comprising in order a double carbon sheet, and a plurality of recording sheets, the record sheets outside the stubs being divided into three substantially equal separable parts, and the carbon sheet extending the width of two of said parts, said recording sheets having stubs to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



which they are attached along lines of perforations, said stubs and one side of the carbon sheet being all bound together to form a book, substantially as described.

"(4) A manifold book comprising in order a double carbon sheet, and a plurality of recording sheets, each of said sheets outside the stubs being divided into a plurality, not less than three, of substantially equal separable parts, and the carbon sheet extending the width of said parts except the outermost, said recording sheets having stubs to which they are attached along lines of perforations, said stubs and one side of the carbon sheet being all bound together to form a book, substantially as described.

"(5) A manifold book comprising in order a double carbon sheet, and a plurality of recording sheets, each recording sheet outside the stub being divided into a plurality not less than three of separable parts joined along lines of perforations, each part being not greater than the part next it on the side toward the stub, and the carbon sheet extending the width of the whole of said parts except the outermost, said recording sheet having stubs to which they are attached along lines of perforations, said stubs and one side of the carbon sheet being all bound together to form a book, substantially as described."

Chas. E. Townsend, for appellant.

John H. Miller and Wm. K. White, for appellee.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant assigns errors to the decree of the court below on the ground: First, that the device of the appellee did not involve invention; and, second, that the appellant has not infringed the same. It is urged that the improvement which the appellee made on the prior art was simple and obvious. It may be conceded that it was simple, but that fact alone does not deprive the invention of patentability. There may be the highest form of invention in some of the simplest improvements on the prior art. What was the prior art in this class of inventions was shown by the record. For many years manifold receipt books had been used in connection with carbon sheets. One form of such books consisted of three sheets of different colors, one above the other; each having the same form of receipt printed thereon. To secure three copies of the receipt, two loose sheets of semicarbonized paper were inserted. Another form shows one corner of the original and one corner of the duplicate receipt cut off at different lengths to facilitate the handling of the loose carbon sheets. Another form shows the use of a sheet of yellow paper, then a sheet of thin transparent paper, and then a sheet of pink paper. On each of the sheets is printed the same form. The manifolding is done by the use of a single sheet, carbonized on both sides, inserted between the transparent sheet and the third sheet of the series. But the device which is principally relied upon by the appellant is shown in the patent to H. G. and J. B. Barlow of April 29, 1884. This patent anticipates the appellee's patent in every feature except one. Instead of having their carbon sheet bound in the book as in the appellee's patent, it was loose. The patentees pointed out the defects in the books of the prior art, in which two detached sheets of copying paper had

been necessary to obtain two duplicates of the written matter. They said:

"The old method is objectionable on account of the number of sheets to be adjusted and cared for, and to the shipping clerk, who carries the sheets from place to place, the handling and care of the sheets is a source of great annoyance."

Eight years after the issuance of the Barlow patent, the appellee conceived the idea of binding carbon sheets with the stubs of the record sheets of the book, so that the carbon sheets would always be in their place. He also conceived the idea of inserting the sheets in the book at such intervals as the use and wear of the same would justify. The patent to James Bengough of January 28, 1896, shows a bound manifold salesbook, the first half of which is a series of single leaves which are one-half the length of the leaves of the remaining half. In the center between the two series of leaves are bound two carbon sheets of the same size as the leaves of the first half of the book. The book is used by beginning at the middle thereof. The first of the long leaves is folded over the second of the carbon sheets. The last of the short leaves is brought over the first carbon sheet. By writing thereon, two duplicates are made upon the two halves of the folded sheet. It is apparent that, long before the whole of the book is used, the carbon sheets are so separated from the leaves on both sides thereof that copies cannot be successfully taken. The patent to G. E. Doughty of October 11, 1898, is similar to the Bengough device, excepting that the carbon sheet, instead of being bound by stitching in the book, is held therein by a clamp. The patent to H. P. Brown of August 31, 1897, consists of the application by printing or other means, to the under surface of a sheet, of a nondrying transparent ink which serves to duplicate, upon the sheet below, any entry or mark made upon the face of the first sheet; a pad or cardboard being interposed below the last sheet on which it is intended the mark should be made. The evidence shows that the book was not received favorably for the reason that, as the back of each sheet was covered with the nondrying ink, the sheets smutted any paper or thing with which it came in contact.

In addition to the presumption which arises from the issuance of the patent to the appellee, there are to be taken into consideration, as sustaining his patent, the further facts that, when his invention was made, there was a want in the art for such a device, that in the prior art there were well recognized and admitted defects, and that the appellee's device eliminated those defects and went into general and successful use. In view of all these considerations, we find the evidence insufficient to overturn the finding of the court below that the appellee did exercise inventive faculty in devising the book for which he obtained his patent.

It is contended that the reissue of the patent is void as being a departure from the original, and not for the same invention, and as containing new matter not authorized by the statute. The argument is that in the original patent there is no claim for three separate substantially equal parts, and that in the original specification there is

nothing to indicate that the divisions of the record sheets shall be equal. It is true that in the original patent it is not said, in either the specifications or the claims, in express terms, that the sheet is to be divided by the perforations into substantially equal parts; but the drawings in that patent are identical with the drawings in the reissue patent. In those drawings it is plainly to be seen that the parts are substantially equal. The specification describes the record sheet "divided into three parts by vertical lines of perforations," and describes the carbon sheets as of sufficient width to cover two of said parts, and it says, when the record sheet is first folded, it covers about one-half of the carbon sheet. It is too obvious to require argument that the device in both patents is the same. A patentee by a reissue is not permitted to extend the invention which he described and intended to be protected in his original patent. In the original patent in this case the features of the appellee's invention are clearly described. One of them is the use of the cardboard backings. The other is the arrangement of the record sheets and the carbon sheets. Both are covered by a single claim, but the patent did not cover the use of either when not combined with the other. Therein was its defect. In applying for his reissue, the appellee in his affidavit set forth the facts constituting the inadvertence by reason of which the claims of the original patent were not commensurate with the scope of his invention.

[2] From the reissuance of the patent it is to be presumed that the law was complied with, and the proceedings can only be impeached for fraud. In *Seymour v. Osborne*, 11 Wall. 516-543 (20 L. Ed. 33), it was said:

"Where the commissioner accepts a surrender of an original patent, and grants a new patent, his decision in the premises in a suit for infringement is final and conclusive and is not re-examinable in such a suit in the Circuit Court unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and the new patent that it must be held as matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original patent."

[3] A more serious question is presented in the appellant's contention that the court below erred in holding that the appellant has infringed the appellee's patent. There is force in the argument that the appellee's invention, in view of the prior art, lies in a narrow compass, and that the appellant's carbon sheets, if they are bound in the book, are bound in a different way from those of the appellee. But, after all is said, it nevertheless is apparent that the appellant's carbon sheets are bound in the book. It is true that they are not permanently bound, and that they may readily be removed; but the appellee's claims do not in terms call for a permanent binding. The appellant's book is made up of recording leaves, each divided into three sections by vertical lines of perforations, as are those of the appellee. The leaves and cover of the book are bound together by staples. The double carbon sheets are attached at one end to a cardboard strip with notches opposite the staples to allow of their being inserted in the book. They are pushed in underneath the cover of

the book, and between and on either side of the staples. In the appellant's patent which was issued on February 9, 1909, it is said:

"The pressure on the points 11 of the stub strip, after the latter has been inserted, will hold the carbon permanently in position."

And again it is said:

"They are held firmly in place just as though they had been bound in the book originally."

According to the evidence, there are various known methods of binding, as by binding by a clamp, by glue or paste, or by pressure, as well as by sewing or stitching. In the appellant's patent no specific means for binding or holding the carbon sheets in the recording sheets is described. The claims are broad enough to cover any binding means. The patentee of the appellant's patent, testifying as to the Doughty patent, in which the carbon and stubs of the recording sheets are held in a wire frame which is attached to the cover of the book, said that the carbon sheet in that patent is "bound in the book" by a spring. We think that it is immaterial that the carbon sheets in the appellant's patent are detachable from the book, or that they are bound in the book after the book is made up. They are to all intents and purposes, when the book is in use, bound in the book within the meaning of the appellee's claims.

The decree is affirmed.

# GENEVA MFG. CO. et al. v. NATIONAL FURNITURE CO. et al.)

(Circuit Court, N. D. Illinois. March 27, 1911.)

No. 29,138.

## 1. PATENTS (§ 311\*)—SUIT FOR INFRINGEMENT—CONSTRUCTION OF BILL.

Where the complainants in a suit for infringement explicitly state in their bill that all infringements by defendant were since a certain date, when they became assignees of the patents in suit and rights thereunder, general allegations in an amendment that defendant has infringed at divers times since the patents were issued do not entitle complainants to prove infringements prior to the time alleged in the original bill.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 311.\*]

## 2. PATENTS (§ 138\*)—REISSUES—VALIDITY.

A reissue patent issued on an application filed as soon as the patentee discovered that his original claims had inadvertently been made too broad, and which narrows them to his actual invention, is valid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 201-203; Dec. Dig. § 138.\*]

Grounds for reissue of patent, see note to General Electric Co. v. Richmond St. & I. Ry. Co., 102 C. C. A. 145.]

## 3. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—SOFA BEDS.

The Rolph reissue patent, No. 11,831 (original No. 585,122), the Weyer patent, No. 624,591, and the Rolph patent, No. 637,976, all relating to sofa beds, are valid and meritorious, but do not disclose any new principles or modes of operation, being merely combinations of old elements in a new relation by which their operation is improved. As so construed

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

*held* not infringed by the structure of the Deimel patent, No. 863,365, which embodies some, but not all, of the same elements, and has a different mode of operation.

In Equity. Suit by the Geneva Manufacturing Company, S. Karpen & Bros., and the Seng Company, against the National Furniture Company and the Deimel Sofa Bed Fixture Company. On rehearing. Decree for defendants.

Dyrenforth, Lee, Chritton & Wiles, for complainants.

William R. Rummmler and John W. Hill, for defendants.

SANBORN, District Judge. This is a suit brought June 23, 1908, for the alleged infringement of the Rolph reissue patent of June 19, 1900, No. 11,831, the Weyer patent of May 29, 1899, No. 624,591, and the Rolph patent of November 28, 1899, No. 637,976, relating to sofa beds. The Pullman car seat, which is a seat in the daytime and a bed at night, illustrates in a general way the structure in question here. Back and seat are hinged or pivoted together, so that when the double seat is pulled down the two opposite seats with the backs assume a horizontal position. It is remarkable that no improvement has been made in the Pullman car bed seat since Field and Pullman took out their patent in 1865. In the advanced sofa bed structures of to-day, to make up the bed the operator stands in front of the sofa, takes hold of the front of the seat, raises or pulls it out, thereby uncovering the bedding box arranged in the base position under the seat, and permitting access to the mattress and bed clothing. These are then taken out, and the seat raised to the perpendicular. The back portion, being all the time locked to the seat portion, is thus lowered to the horizontal, with the seat standing at right angles. By tilting the latter slightly backward, the two parts are unlocked, and the seat let down to the same horizontal plane of the back, so that the bed may be then made up. In the latest Rolph patent, called the "Rolph Automatic," the bedding box is automatically moved out when the seat is raised, so as to render the bedding more accessible. This is done by a system of links and pivots, connecting base, bed box, back, and seat, so that they all move as a unit when force is applied to seat, back, or bedding box. This feature is not present in defendants' sofa bed known as its fourth construction. Another important distinction between the two results from this form of construction. Defendants' seat and back portions are not mechanically joined or connected to the base or bed box portion, but slide or roll on small wheels resting on short tracks laid on the upper edges of the ends of the base portion, just as a hand car may be rolled along a railroad track when one end is lifted up. In other respects defendants' sofa bed is the same as that of complainants. Thus the question whether these differences enable defendants to escape infringement is presented; and is the important question in the case.

Sofa beds are said to be one of the necessities of life in flats and dwellings with small rooms, where economy of space is essential. Their manufacture is estimated to represent about a million and a quarter dollars a year. To a considerable extent they are replacing the folding bed, which is useless by day and is supposed to have a

tricky habit of shutting up without reason or warning, even when securely locked. Sofa beds should possess certain highly useful and desirable features, among which are the capacity to hold the bedding, and make it easily accessible for use, of being made up and put back by a person standing in front, and without pulling the sofa away from the wall or pushing it back to the wall, using the seat as a means of raising or lowering the back in converting from sofa to bed or vice versa, ability to lock the seat and back together, so they will swing as a unit, and to lock and unlock them automatically by merely tilting the seat, using the weight of the back to counterbalance the seat, and employing seat and back for the bed surface. As complainants' expert well says:

"All the progress of the art indicates that the desideratum is to quickly and easily increase the available bed surface by the extent, at least, of the size of the back."

As in most of the practical arts, sofa beds have had a period of growth and development, until they are supposed to have reached perfection. Before the inventions of Rolph and Weyer (now owned by complainants) a number of the desirable features referred to had been discovered and utilized by other patentees. Most of the elements found in the three patents in suit were old. The general form of sofa bed was well known. This comprised a base, bedding box, seat, and back portions hinged together (as in the Pullman car), locking means to hold seat and back at right angles to each other or in any other position, capability of front operation, automatic movement of base portion to the rear to support the back when horizontal, guideways or tracks for guiding the forward and backward movement of back and seat as a unit, and rollers or wheels pivoted to run on the tracks or ways. All these are found in the prior art, though Rolph and Weyer have so combined the best of these pre-existing separate elements, and so improved them, and as to some have so enlarged and extended their functions that they have made a considerable advance in the art. Fixtures of the patented structures sufficient to make a million and a quarter dollars worth a year are now being marketed. Conceding practical merit, commercial success, and meritorious advance in the art, it is further claimed by complainants that a new principle of operation was introduced, so as to bring the case within the rule of *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717, *Vrooman v. Penhollow*, 179 Fed. 296, 102 C. C. A. 484, and like cases. Novelty is denied by defendants; but, if that be found, they urge that the differences referred to so distinguish the various structures as to avoid infringement. Validity of the Rolph reissue is also denied, chiefly on the ground that it was not applied for in proper time.

The main question just stated relates to defendants' fourth construction, so called, commenced in 1907. Another question presented relates to the first, second, and third constructions, made in 1901, 1902, and 1903. As to these there is no question of infringement, if the bill of complaint, and proposed amendments thereto, cover these earlier infringements; so that this branch of the case presents only a question of the construction of a pleading. In order to properly un-

derstand these allegations, it is necessary to refer to certain assignments, transfers, and licenses by the patent owners, substantially as follows: All of the patents were assigned to complainant Geneva Company, by various mesne transfers, August 21, 1903. The assignments, and all of them, are alleged in the bill to have been "prior to the acts of infringement hereinafter complained of." Litigation arose between the complainants in respect to these patents, and certain others, which was settled by an agreement providing that the Geneva Company should have certain exclusive rights under all the patents, complainant S. Karpen & Bros. should have certain other exclusive rights thereunder, and complainant Seng Company should have the exclusive right to sell fixtures under the Karpen patent (not here involved), and the Weyer patent. This agreement for exclusive rights was made December 12, 1904. The proofs thus show acquisition of title to the patents by one of the complainants, the Geneva Company, on August 21, 1903, and the making of exclusive licenses to the other complainants, as well as the retention of exclusive rights by the owner, the Geneva Company, on the 12th of December, 1904.

In respect to infringement, the original bill, together with certain proposed amendments (indicated by italics), contains the following: After August 21, 1903, and since the patents issued in 1899 and 1900, and since the acquisition of such exclusive rights December 12, 1904, at divers times and occasions *since the grant of said patents and each of them and prior to filing the bill, and also at divers other times and occasions since the grant of the patents and within six years of the filing of the bill*, defendant National Company has infringed, and since December 12, 1904, defendant Deimel Company has made and sold fixtures infringing the patents, and is a contributory infringer. It further appears that on May 22, 1908, the patentees assigned to complainants all choses in action arising out of prior infringement to complainants jointly.

Defendant National Company commenced its first, second, and third constructions in 1901, and continued them until March or April, 1903. All these were infringements of complainants' patents, or some of them. It further appears that from 1902 to 1907 complainant Seng Company sold to National Company 13,219 sets of the unpatented fixtures going with the patented sofa beds covered by complainants' patents. These sales were made with the expectation that the fixtures should be used by the National Company in complete sofa beds of the kinds covered by the patents in suit; but the Seng Company did not know whether or not such complete sofa beds were of the same general style as the patented structures. In an agreement made November 10, 1900, between the owners of the Rolph reissue and the Karpen patent, it was provided that the National Company should not be licensed under those patents; but, after the infringements by the first three constructions in 1901 to 1903, the Seng Company induced the National Company to adopt its fixtures, whereupon the latter company "did discontinue making the devices which we (Karpen and Seng) considered infringements, and used only the devices which they (National Company) purchased from the Seng Company." The

National Company paid royalty on these fixtures. Sofa bed fixtures can be supplied to the trade by the Seng Company, sufficient to meet all demands, and the annual business in sofa beds made with these fixtures is estimated at \$1,250,000, being furnished to nearly every sofa bed manufacturer in America.

From the facts stated, and under the pleadings, it is contended by defendants that they cannot be held for any infringement by the first three constructions, and they moved to strike out all evidence relating thereto.

[1] 1. Infringement by first three constructions is not within the amended bill. With all the general allegations of infringement at divers times and occasions, and within six years of bringing suit, there is nowhere any negation of the prior averments that the transfers of August, 1903, were prior to all acts of infringement, or that such acts were since December, 1904, when the agreement creating exclusive rights was entered into. Here are positive and definite statements that no infringement is claimed after certain dates. Even a liberal construction of the general allegations, and having in mind that the latter were brought in by amendment, will not overcome such explicit averments. This construction is aided by the evidence referred to, showing that the National Company was persuaded to stop the earlier infringement, purchase the patented fixtures to the extent of 13,000 sets, and pay royalty thereon. This indicates complainants' purpose not to sue for the prior infringements. No suit was actually brought for five years. It is indeed true that the National Company abandoned the purchase of the fixtures, and put out its fourth construction, thus affording some reason for saying that circumstances had so changed that it would not be inequitable to hold the National Company for its earlier infringement. If the fourth construction were a palpable infringement, there would be much force in this suggestion; but there is no reason for doubt that defendants regard their last construction so distinguishable from the Rolph and Weyer designs, and so close in track and roller construction to the Hale patent of 1897, No. 595,913, as to justify them in adopting it. Moreover, they are operating under the Deimel patent of 1907, No. 863,365, which seems on its face to authorize their specific fourth construction. Entirely apart from these considerations, however, complainants' positive allegations that the assignments of August, 1903, were prior to any infringement, and that all infringement has been since 1904, clearly show an unmistakable intention to claim nothing for the earlier infringements, and treat them as satisfied.

[2] 2. Validity of the Rolph and Weyer patents: All the patents in suit are meritorious and valid. Rolph applied for the reissue just as soon as he discovered that his original claims had inadvertently been made too broad. The reissue limits them, and the new claims conform to his actual invention. It was within the express terms of the statute, and no good reason can be discovered for refusing its validity. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Moneyweight Scale Co. v. Toledo Computing Scale Co.*, 187 Fed. 826; *McDowell v. Ideal Concrete M. Co.*, 187 Fed. 814.



[3] In regard to all three patents, it is claimed they introduced a new mode of operation, and are therefore entitled to liberal construction, and a reasonably wide range of equivalents. Rolph, it is said, conceived the idea of employing the seat as a medium for manipulating the back, both in changing from sofa to bed and vice versa. The back and seat are thus made to counterbalance each other, resulting in easy operation from the front, rendering it unnecessary to go behind the structure. This new method of complainants' three patents was not wholly secured by locking seat and back together, which many others had done, but in discerning the possibility and great importance of using the balanced seat as the center of the system, and building around this feature very much that is valuable in the present day art. If this were new with Rolph, it would show a high degree of invention, and be entitled to liberal protection. Rolph, however, had no automatic means for unlocking the mechanism, using for that purpose a pull on a rope. Weyer supplied this defect by again using the seat to do the unlocking, thus utilizing and improving on Rolph by employing the same central feature of seat manipulation to carry out the original conception. As yet, however, no means, it is said, had been discovered to avoid moving the sofa bed away from the wall when changed to bed form, and pushing it back when restored to sofa form. This feature was supplied by Rolph himself in the third patent sued on, called the "Rolph Automatic." In this final form the seat, back, base, and bed box are so tied together by an ingenious arrangement of pivoted levers or thrust links that when the locked seat and back are moved as a unit, up or down, the bed box will move automatically with them. Upward movement of the seat pulls the back away from the wall, and downward movement towards the wall. There is not the slightest doubt of the validity of these three patents, nor of their complete operativeness, utility, and well-deserved commercial success. It is, however, equally apparent that they did not introduce any new mode of operation, but are simply to be classed as exceedingly meritorious combinations of old elements co-operating to produce new and improved results.

The new mode of operation asserted, by which the seat is made to operate the back as in the Rolph reissue, and which is the central idea of the whole Rolph-Weyer system, is most certainly found, and most explicitly described and illustrated, in the German patent for a single sofa bed, issued to Felix Breyer, September 8, 1890. The inventor says that:

"The back is connected with the sitting frame by triangular links in such manner that on turning over the seat for forming the bed it lays itself under the same, but straightens itself up again automatically when the seat comes uppermost again."

The object of the inventor being to construct a single, instead of a double, bed, there is, of course, no attempt to arrest the movement of the back when it reaches the horizontal, but simply to get it out of the way, below the horizontal seat and bed surface; but the central Rolph principle, which is automatic movement of all other parts by seat manipulation alone, is so unmistakably present, and so fully

illustrated and described in this German patent, as to remove Rolph's invention, good as it was, from the field of newly discovered principles or modes of operation. Nor does the record show any other new method of operation, simply a practical and meritorious combination of old means in a new relation with beneficial results, and better operation.

3. Does defendants' fourth construction infringe? In order to fully apprehend this question, it is necessary to state the elements which work together in the Rolph, Weyer, and Deimel constructions to produce the results obtained. In the reissue these co-operating elements are the base box, seat, back, uprights, or standards rising from the base box, seat, and back pivoted or hinged on the uprights, and locked together, and unlocking means (shown to consist of a releasing lever worked by a rope, chain, or strap). All that Weyer did was to dispense with the hand manipulated rope, chain, or strap, and so change the locking devices that they could be locked and unlocked by tilting the seat when it is close to a right angular position in respect to the back. And all that Rolph added by his last patent was to so connect seat, back, and base that when the seat is lifted the back will move outward, away from the rear of the frame, or from the wall, and the bedding box will do the same. Thus, there are seven elements in Rolph's reissue, seven in Weyer, and eight in Rolph's automatic device.

Turning now to defendants' fourth construction, we find eight elements, only five of which at first sight are in the three patents in suit. There are no uprights or standards rising from the base box, nothing hinged or pivoted thereon, no connection whatever between base and seat or back, except as everything on the earth is connected with the earth by the attraction of gravitation. Defendants have indeed taken over bodily the cardinal principle of the Rolph invention, the automatic and balanced control of the sofa back by means of the seat, and the locking and unlocking of seat and back by the same means. But for the uprights defendant has substituted a railroad, and for hinges or pivots carried by the uprights it has car wheels. Moreover, it took its railroad from Hale, Field & Pullman, Marso, and Breyer, all in the prior art. Deimel put it together with other elements, old from the standpoint of his claims or counts, into a patentable combination, unless the railroad is the mechanical equivalent of the standards or uprights, and the car wheels of the pivots carried thereby.

Defendants' seat is also distinguished from that of Rolph and Weyer by a different method of operation. One is compound, the other simple. A hand car may be shoved along the track by a mere push, but a switch standard can be moved only in the arc of a circle. The first is a simple motion; the second the compound result of applied force and pivoted connection. Just so with the two seats in question. The Deimel frame can be pulled out horizontally in the same plane, lifted straight up by taking it off the rails, raised through a circular arc, or raised and slid at the same time; but the Rolph frame, like the switch, admits of only one of these three motions. As said by the

Supreme Court in *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100:

"If the device \* \* \* shows a substantially different mode of operation, even though the result of the operation remains the same, infringement is avoided."

In the marketed form of defendants' fourth construction there is also a different result, as compared with the Rolph automatic design. It will be remembered that Rolph's last improvement was to so connect the parts as to avoid the necessity of pulling the sofa away from the wall. Only in part is this accomplished by defendants' form. If the tracks were long enough, the results would be the same; but defendants have so shortened them as to make it necessary to have the sofa at least eight inches from the wall in order that their device may operate.

It is urged, however, notwithstanding these differences, that the Rolph combination is so meritorious and successful as to be entitled to a range of equivalents broad enough to include the Deimal construction. It cannot be reasonably denied that Rolph made a distinct advance, in clearly discerning the important fundamental law of the sofa bed structure. While Breyer discovered it, he neither understood nor practically applied it. All he did was to turn a sofa seat upside down for a single bed, and at the same time get the sofa back out of the way. The real development of the sofa bed of to-day is due to Rolph's first invention; the two later forms being mere natural successive steps dependent on the original conception. Properly relying on these considerations, counsel insist that there is nothing in the Rolph reissue claim sued on which confines him to a stationary or nonshiftable pivot. Why not broaden out the uprights or standards and run the pivots in slots, which are only elongated bearings at the most? Counsel refer to the Wernicke bookcase pivot, which shifts the whole depth of the case, as clearly in point. Reliance is also placed on the language of the claims of the Rolph automatic patent which are in suit. On their face, and without reference to the drawings and description, it must be admitted that the claims are broad enough to include defendants' construction. When the claims refer to controlling and supporting *connections* to permit seat and back to be bodily moved to and from the wall with the sections maintained in their raised angle relation, the words are possibly general enough to cover shiftable connections. When they count on means adapted to move seat and back bodily outward, and turn or swing them in such movement, or means for pivotally mounting and suspending them to permit outward and inward movement bodily, and to be raised and swung or turned on the pivots, it is urged that this suggests a movable pivotal connection, as clearly as a stationary one. The claims are admirably drawn, with a view to exhaustively cover the whole invention; but even in the broadest ones the idea of non-detachable connection between the upper and lower parts is clearly apparent. So, also, the words "connections," "means adapted to move the parts," and "means for pivotally mounting," etc., clearly denote automatic or mechanical means.

When the description and drawings are consulted, all uncertainty and ambiguity in the wording of the claims disappear. Nowhere in the specifications or cuts is there a suggestion that a sliding pivot was contemplated, or anything but a rigid connection between seat and back portions and base. A patent, being a contract, "is within the cardinal rule that the manifest intention of the parties must govern its construction." *Seaman, J., in Louden Machinery Co. v. Janesville Hay Tool Co.*, 148 Fed. 686, 78 C. C. A. 548. It seems clear that to construe the claims so as to cover defendants' fourth construction would violate this cardinal rule of construction.

If a new mode of operation had been produced by Rolph, a different structure performing the same functions might be an infringement, as in *Winans v. Denmead*, above cited. But in the absence of this, and with a different mode of operation in defendants' device, it does not infringe, even though the Rolph-Weyer claims should have a fairly liberal construction; even though Rolph be considered a "primary improver." He took the last and successful step, but his invention was an improvement only, a combination of old elements. Moreover, defendants leave out at least one element of that combination, and adopt a prior art suggestion.

The motion for rehearing is denied, and the bill dismissed, with costs.

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COVER v. AMERICAN THERMO-WARE CO. et al.

(Circuit Court, N. D. Illinois, E. D. April 25, 1911.)

No. 29,383.

1. PATENTS (§ 21\*)—INVENTION—SUBSTITUTION OF MATERIALS.

The making of a device in whole or in part of materials better adapted to the purpose for which it is used than materials of which those of the prior art were made, and for that reason better and cheaper, unless the mode of operation is thereby changed, does not constitute patentable invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. § 21.\*]

2. PATENTS (§ 328\*)—VALIDITY—REISSUES—EYE-GUARD.

The Cover reissue patents, No. 12,924 (original No. 845,696) and No. 12,817 (original No. 850,997), for an eye-guard or goggle, are void (1) as reissues not based on errors in the originals arising through inadvertence, accident, or mistake, (2) as being broadened reissues applied for after the intervention of adverse rights, (3) for lack of patentable invention in view of the prior art, and (4) for anticipation by a prior publication.

In Equity. Suit by Harvey S. Cover against the American Thermo-Ware Company and S. L. Gates. On final hearing. Decree for defendants.

Parker & Carter (Francis W. Parker and Donald M. Carter, of counsel), for complainant.

Joseph L. Levy, Solicitor and of counsel, for defendants.

Jones, Addington, Ames & Seibold, Local Solicitors, for defendants.

KOHLSAAT, Circuit Judge. This cause is before the court on final hearing upon bill alleging infringement of claim 5 of reissue patent No. 12,817, granted June 16, 1908, out of original patent to Cover for an eye-guard, granted April 23, 1907, and numbered 850,997, and claim 2 of reissue patent No. 12,924, granted March 2, 1909, being the second reissue patent out of patent No. 845,696, granted to said Cover February 26, 1907, for an eye-guard, said claim 2 being identical with claim 2 of the first reissue, No. 12,816, which was granted on June 16, 1908, upon application filed March 23, 1908. The claims read as follows, viz.:

"2. An eye-goggle consisting of two lenses, a flexible piece embodying two lens-holding portions, each consisting of a ring of elastic material adapted to constrictively hold one lens, a flat flexible annular cushion adapted to bear upon the flesh of the wearer about the eye, a thin compressible and elastic tubular flange connecting the ring and cushion and a flexible bridge between the lens-holding portions."

"5. An eye-guard consisting of two lenses, an elastic piece embodying two lens-holding portions, each consisting of a ring of elastic material adapted to constrictively hold one lens, a flat flexible annular cushion adapted to bear upon the flesh of the wearer about the eye, a thin compressible and elastic tubular flange connecting the two flat annular cushions which bear upon the flesh of the wearer."

Primarily, it is insisted by defendants that both claims in suit are void on the grounds: (1) That they and each of them are not based upon errors in the original patent arising through inadvertence, accident, or mistake; (2) that by reason of the delay in seeking the reissue, i. e., about 14 months in the one case, No. 12,817, and more than 14 months in the other case, other rights had intervened; (3) that the reissues are at variance with the subject-matter of their respective original patents; (4) and that the substance of said claim 2 of No. 12,924 is shown in original patent No. 850,997 aforesaid, almost two years prior to the reissue 12,924.

As to the first primary defense, it appears that the inadvertence, accident, or mistake claimed consisted in the ignorance of counsel employed. This excuse is given as a reason for a reissue in all of the reissues, i. e., the ignorance of counsel in procuring patent No. 845,696 was asserted in procuring reissue No. 12,816, and as still existing at the time of making application for the second reissue. There can be no claim that both original patents were not operative devices for what they severally purported to cover. It appears that the reissues were taken out, not to make the device of the original patents operative, but to procure alleged inventions of those patents not claimed at the times of issue—something in addition to what was claimed. To say the least this was an extremely doubtful proceeding on the part of the patentee. It further appears that at the time reissue 12,924 was applied for there was outstanding an agreement between the patentee and third parties whereby Cover on August 24, 1908, granted, subject to certain reservations, an exclusive right to manufacture and sell the products of said reissues Nos. 12,816 and 12,817, which fact is not made to appear in the file wrapper and contents as having been disclosed to the commissioner. While, perhaps, this matter is one for the licensee, or other party affected thereby, to raise, the practice is

not to be commended. Returning to the consideration of the substance of claim 2 of reissues Nos. 12,816 and 12,924, and contracting the one claim of the original patent, No. 845,696, which reads as follows, viz.:

"An eye-guard embodying lens portions each consisting of a solid ring member having an integral annular flange projecting substantially at right angles to the plane of the lens, and gradually tapering in thickness and terminating in a flat, yielding, outwardly-extending cushion which is disposed in a plane substantially parallel with the lens, and an integral bridge-piece connecting the ring members to provide a recess for the nose between the flanges and cushions, substantially as described"

—with said claim 2, it becomes evident that an attempt was made to enlarge the original claim by reissue, both in reissues Nos. 12,816 and 12,924. Complainant does not seek to restrain defendants from infringing the claim of his original patent No. 845,696, which claim is made claim 1 of reissue patents Nos. 12,816 and 12,924, whereby it seems fair to assume that defendants' device does not infringe that claim. The substance of claim 1 of reissue No. 12,924 is all that is covered by the claim, specification, and drawings of patent No. 845,696. The flexible lens-holding portions "each consisting of a ring of elastic material \* \* \* having a thin compressible and elastic tubular flange," as claimed in the reissue, are substituted for the "solid ring member having an integral annular flange \* \* \* and gradually tapering in thickness" of the original patent No. 845,696, and of claim 1 of the reissue. If there be any novelty in making the substitution, it is not suggested in the specification, drawings, or claim of the original patent. It appears from the testimony of defendant's witness Wolfstein that prior to the application for reissue patent No. 12,816, and therefore prior to the application for reissue patent No. 12,924 in suit, viz., as early as May, 1907, there was on the market in this country a goggle known as complainant's Exhibit American Thermo-Ware Company goggle. This device defendants claim to have been selling ever since 1907. There is no patentable distinction between the device of claim 2 of reissue patent No. 12,924 and said Thermo-Ware goggle. If this be true, then, as defendants' counsel say, this exhibit may have suggested the necessity of the reissue.

It hardly seems possible to bring claim 2 in suit within the requirements of the rule laid down in the cases of *Parker & Whipple Co. v. Yale Clock Company*, 123 U. S. 95, 8 Sup. Ct. 38, 31 L. Ed. 100; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665; *Dobson v. Lees*, 137 U. S. 265, 11 Sup. Ct. 71, 34 L. Ed. 652; and *General Electric Company v. Richmond Street & Interurban Railway Company*, 178 Fed. 84, 102 C. C. A. 138. Can it be said that there was inadvertence, accident, or mistake in the original patent, or that the one claim thereof discloses an inoperative device, or that the reissue in suit does not expand rather than narrow the claim, or other rights did not accrue prior to the applications for the two reissues of patent No. 845,696? The same may be said as to reissue patent No. 12,817. The only difference between the two reissues in suit consists in the place of attachment of the bridge. In No. 12,924 this connects the lens-holding portions; in No. 12,817, it connects the two flat

annular cushions. In each case, of course, the ears or tabs to which the holding bands are attached must align with the points of attachment of the respective bridges. This difference obtains in the two original patents, Nos. 845,696 and 850,997. Reissue patent No. 12,-817 differs from original patent No. 850,997 in that it too does away with the thick rubber walls of the lens-holding members, which taper to the cushion and substitute a thin compressible and elastic tubular flange connecting the ring and cushion.

Assuming, however, that the reissues were granted in accordance with the statute and the several decisions construing it, do they constitute invention in view of the condition of the prior art.

As early as 1896, a British patent, No. 23,095, was granted to Morris and Wilson for an eye-protector in which fine gauze was used in place of a lens. "Hitherto," say the inventors, "glass goggles have been generally used for this purpose, but these have been liable to break and become useless. We substitute for this glass, fine metallic gauze which is fitted and secured in rings made of vulcanite or other suitable material, these rings being attached in any suitable manner to a band of India rubber or other fabric for holding the eye-protectors securely to the wearer's head." The vulcanite rings are shown to be concave, as is also the wire gauze, forming somewhat of a dome. The drawings show a one-piece web of rubber or other flexible fabric composing the frame and bridge, the bridge being connected between the ring or lens-holding members and the ears being in alignment therewith. Substituting rubber as one of the suitable substances mentioned in the patent, we have a goggle very closely resembling the devices in suit, though the method for securing the lens is not made plain. The lens held constrictively by means of slots or grooves in soft rubber are shown in the Crofutt patent, No. 152,215, dated June 23, 1874.

A comparison of the structure described in the claims in suit with the devices of the prior art shows that any novelty to which the Cover device might lay claim must rest entirely upon the qualities of the material used in its construction. In other words, strike out of the claims "flexible," "elastic," "constrictively," "compressible"—words which describe soft rubber (the only material having these qualities practicable for the use described, of which we have any knowledge)—and there remains nothing in the claims patentably differentiating the Cover goggle from Morris & Wilson British patent, No. 23,095, dated October 31, 1896; Genese patent, No. 295,242, dated March 18, 1884; Pozdena patent, No. 476,486, dated June 7, 1892; and many others. In making this statement, the court does not overlook the fact that the words "flat" and "annular" would remain in the claim, nor that the words "\* \* \* piece embodying" would imply integrality. But flatness of the cushion would be a demerit rather than a merit (see, for instance, the Morris & Wilson flat vulcanite rings) were it not for the flexibility and elasticity of the soft rubber used in the construction of the goggle. Annularity does not distinguish the cushions from those of the prior art. Indeed, both flatness and annularity are found in the Morris & Wilson British patent, No. 23,095, *supra*. And that annular eye-pieces or cushions are a perfectly obvious departure from

the oval or other shaped cushions of the art is evidenced by the statement of the Morris & Wilson specification that:

"The metallic gauze *A* could be cut either in a round shape as shown in the drawing or in an oval or eye shape, whichever was found to be most suitable and convenient, the rings of vulcanite or other suitable material *B* for holding the gauze being of the necessary shape and section."

The integrality implied in the word "piece" is a result of the use of soft rubber, because soft rubber is the only material practicable for this purpose and having the other qualities called for by the claim, which can be moulded.

If the claims should be sustained as valid, it would be impossible (unless the doctrine of equivalents is to be absolutely ignored) for a manufacturer of an all rubber goggle of any sane shape to escape a charge of infringement. It therefore seems a fair conclusion that what the claims attempt to cover, and what they were intended to protect, was the idea of making a goggle entirely of soft rubber.

[1] The law is well settled that the making of a device, in whole or in part of materials better adapted to the purpose for which it is used than materials of which the old one is constructed, and for that reason better and cheaper, cannot entitle the manufacturer to a patent. "It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more." *Hotchkiss v. Greenwood*, 11 How. 248, 13 L. Ed. 683. The substitution of a "new material discovered by the substitutor does not affect the identity of a machine unless its mode of operation is thereby changed." *Bailey Washing Machine Co. v. Lincoln*, 4 Fish. Pat. Cas. 379, Fed. Cas. No. 750. Even the fact that the material substituted was never before used for the same purpose is of no consequence. *Rushton v. Crawley* (1870) L. R. 10 Eq. 522; *Jordan v. Moore*, L. R. 1 C. P. 624.

In the case at bar, Cover was by no means the first to conceive of the advantages of the use of soft rubber in goggle construction. The Morris & Wilson British patent, No. 23,095, utilized the flexibility of soft rubber almost to the same extent as did Cover. The bridge-piece (upon which the fitting of the face so largely depends) is as flexible as that of Cover's device, and one lens portion can be folded upon the other, either in forward or backward position as readily as can that of the patent in suit. Construct the Morris & Wilson rings of soft rubber (which is surely within the purview of the patent as a "suitable material"), and it is believed nothing more than colorable differences remain to distinguish it from the construction of the patent in suit. It is true the compressibility of the tubular flange of the patent in suit would be absent on account of the thickness and heaviness of the Morris & Wilson rings; but it requires only a careful examination and trial of the Cover goggles to demonstrate that this tubular flange would perform its function just as well if made of non-compressible material, for its compressibility is not called into play in the use of the goggles. Even when folded as shown in Figure 4 of patent No. 12,924, it is seen that the compressibility of the tubular flange is not utilized.



"Soft and flexible india rubber" is the material mentioned in the Crofutt patent, No. 152,215, dated June 23, 1874, for construction of "eye and lung protectors" of that patent. This is also true of the Pozdena patent and the Genese patent heretofore cited.

The principal value of soft rubber in this art rests, as it does in numerous other arts, upon the fact that the material can be molded, and thus the article made in one piece. This, perhaps, makes a cheaper and more durable article, and consequently a better seller; but these results flow, not from a new combination of elements, but from the skill and judgment of the manufacturer in selecting the material.

There has been introduced in evidence on behalf of defendant a book entitled "Bareme Universal Rozard," being an instruction manual for the use of metal workers, and containing principally lists of tables showing how screw threads should be cut. This book has been shown to have been published in Paris, France, in 1903, some 2,000 volumes having been printed, and to have been immediately placed within reach of the general public by being deposited in the National Library at Paris, as well as by being sold by its compiler to booksellers and by them distributed to the general public. Next to the last page of this publication appears an advertisement illustrating and clearly disclosing an all rubber goggle varying only in the most insignificant details from the goggle illustrated in Figure 2 of patent No. 12,817. From printed matter accompanying the illustration, the goggle is described as being made entirely of black rubber and being therefore very flexible, and by reason of its elasticity permitting the instantaneous replacing of the eyeglasses. Cover does not attempt to carry his invention back of September, 1904, and the disclosure of this advertisement seems to constitute such a publication as should have precluded the granting of the Cover patent.

[2] The court is therefore of the opinion: (1) That the letters patent in suit are void as reissues because not based upon errors in their originals arising through inadvertence, accident, or mistake; (2) that they are void as being broadened reissues applied for after the intervention of adverse rights; (3) that in view of the prior art the claims in suit do not disclose patentable invention; (4) and that, even if invention be assumed, the patents should not have been granted because the subject-matter thereof was described in a printed publication before applicant's invention or discovery thereof.

The bill may be dismissed for want of equity.

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In re FERRERI.

(District Court, E. D. Louisiana, Baton Rouge Division. June 27, 1911.)

No. 217.

**1. BANKRUPTCY (§ 482\*)—EXPENSES—FEES—BANKRUPT'S ATTORNEY.**

A referee in bankruptcy is entitled, and it is his duty, to reduce the amount named for fees of the bankrupt's attorney, if such amount in the referee's opinion is too high.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. BANKRUPTCY (§ 482\*)—MORTGAGES—ATTORNEY'S FEES.**

Where a mortgage executed by a bankrupt provided for the payment of attorney's fees of the mortgagee in case he was required to employ counsel, the mortgagee was entitled to an allowance for a reasonable attorney's fee for services required in proving the mortgagee's claim and lien against the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876; Dec. Dig. § 482.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Joseph Ferreri. On appeal from a referee's ruling reducing fees allowed the bankrupt's attorney, and refusing to allow bankrupt's fees in connection with the payment of a mortgage on the bankrupt's property. Affirmed in part and reversed in part.

T. Jones Cross, for Provident Building & Loan Ass'n.

FOSTER, District Judge. In this matter appeal has been taken from the ruling of the referee: First, as to his action in reducing on his own motion the fee of the attorney of the bankrupt; and, second, for disallowing the claim of the Provident Building & Loan Association for attorney's fees in connection with the payment of its mortgage on the bankrupt's property.

[1] There can be no doubt that the referee has the right, and it is his duty, to reduce the amount allowed by the trustee as fees of the attorney for the bankrupt, if too much. The law provides for one reasonable attorney's fee, and the referee is by long odds in the best position to determine what is reasonable in the premises.

[2] The question as to whether or not the attorney for the mortgage creditor shall be allowed the fee stipulated in the act of mortgage seems to be well settled by the jurisprudence of Louisiana. There are a number of cases in which such fees have been denied, but in each instance it was due to the peculiar circumstances of the case. In the case of Mullan v. His Creditors, 39 La. Ann. 397, 2 South. 45, however, which was decided in the instance court by his honor, Mr. Justice Monroe, and affirmed by the Supreme Court, the court said:

"The claim of the mortgage creditor for attorney's fees incurred by him, after the maturity of the note and for services rendered to secure payment of his note, is well founded.

"It was agreed by the act of mortgage that the mortgagor bound himself and his assigns to pay the holder of the note all attorney's fees, as he may incur, in the event of the nonpayment of the notes at maturity.

"The evidence shows that, after the sale of the mortgaged real estate, the syndic ruled the mortgagee to show cause why the inscription of his act of mortgage should not be canceled to give a title to the purchaser.

"The mortgagee was thus constrained to employ counsel to represent him and see that, if the amount went to the syndic, it would be secure in his hands. This was not a mere formality. Responsibility rested on the counsel, for which the mortgagee, under the clause, is entitled to recover the compensation, as fixed in the contract."

I do not find that this decision has ever been questioned or overruled in the slightest degree, and it applies with the same force to proceedings in bankruptcy as it did to proceedings under the in-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

solvent laws, as no valid title to mortgaged property can be delivered by the trustee without bringing the mortgagee into court in practically the same manner.

And it is also well settled that the attorney's fees, when due, are considered capitalized and recoverable by the mortgagee, of course, for the benefit of the attorney to whom they must ultimately be paid, and no doubt usually are.

The ruling of the referee as to the reduction of the fees allowed the attorney for the bankrupt is approved and affirmed. His ruling with regard to the fee claimed by the Provident Building & Loan Association is reversed.

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In re SHEAR.

(District Court, W. D. New York. June 13, 1911.)

No. 3,963.

**1. BANKRUPTCY (§ 241\*)—CONTEMPT—JURISDICTION TO PUNISH.**

The judge of a bankruptcy court has jurisdiction to summarily punish for contempt misbehavior of the bankrupt and the giving of false testimony.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.\*]

**2. BANKRUPTCY (§ 241\*)—EXAMINATION OF BANKRUPT—FALSE TESTIMONY—CONTEMPT.**

Where a bankrupt swore falsely in his testimony and endeavored to conceal property, his conduct was contumacious and punishable as for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.\*]

In Bankruptcy. In the matter of proceedings against Wilson M. Shear. On motion to punish for contempt. Granted.

Dolson & Dolson, for bankrupt.

Carleton H. White, for trustee.

HAZEL, District Judge. Referee Hamlin has certified to me as judge of the court of bankruptcy, pursuant to section 41 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437]), that the bankrupt, after taking the prescribed oath, refused to be examined according to law, in that on the examination before him he gave willful, evasive, and false testimony, and that he was guilty of contempt of court for refusing to be examined according to law. The asserted false oath was made during the course of the examination of the bankrupt (section 7, subd. 9), and related to the conduct of his business and whereabouts of his property. The matter now comes regularly before me on petition and order for summary hearing.

[1] I have carefully perused and considered the evidence submitted by the certificate of the referee and the answering affidavit of the bankrupt, and it is difficult to escape the conclusion that the bankrupt willfully testified falsely and evasively. The power of the judge to summarily punish for contempt for mis-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

behavior and giving false testimony is undeniable. In re Fellerman (D. C.) 149 Fed. 244; In re Bick (C. C.) 155 Fed. 908; In re Singer (D. C.) 174 Fed. 208; In re Schulman (D. C.) 167 Fed. 237; In re Gordon (D. C.) 167 Fed. 239; In re Gitkin (D. C.) 164 Fed. 71; In re Bronstein (D. C.) 182 Fed. 349.

[2] The disobedience certified is one of the gravest known to the administration of justice, and the evils of false swearing in our courts, and specially in bankruptcy proceedings by bankrupts in their endeavor to conceal property, is so great as to require the severest condemnation and punishment in a plain case. The bankrupt has not only been evasive and disingenuous in his replies to questions properly put to him before the referee, but in utter disregard of the truth and solemnity of the proceeding he has asseverated untruths and given false testimony, the falsity of which is thought directly established. Abundant opportunity was given him to explain or purge himself, by withdrawing his false testimony, and to testify truthfully. He did not do so, and therefore he is adjudged in contempt of court. The contention that the bankrupt is entitled to trial by jury is untenable. In re Debs, 158 U. S. 594, 15 Sup. Ct. 900, 39 L. Ed. 1092.

The record shows that to interrogatories upon the subject relating to the property and business affairs of the bankrupt he repeatedly testified that in the month of December, 1910, he had given to his stenographer 20 shares of St. Lawrence & Cobalt Consolidated Mining Company stock, being certificate No. 718, and that such stock had always been in her possession; that he had never given such stock to one Nora Hurd, and did not know it was in her possession. Subsequently it appeared that he had previously given such stock to Nora Hurd, and, to comply with the direction of the referee to produce the same at some future time, he wrote Nora Hurd, asking her to surrender it to him. The false oath evidently consists of his repeated statements that the stock was in the possession of his stenographer, and that it was not in the possession of Nora Hurd, indicating his intention to conceal such stock. As the bankrupt estate has not suffered any loss by the false oath, and as the 20 shares of mining stock, in relation to which the false oath was made, have been delivered by the bankrupt to his trustee, and, furthermore, as the value of such stock was not large, as is presumed from what is contained in the record, the punishment will not be attended with imprisonment, unless the bankrupt fails to pay the fine imposed herein.

The bankrupt is sentenced to pay a fine of \$100 within 10 days, and for his failure to pay he will stand committed to the marshal of this district, to be imprisoned in the Erie county jail for a period of 30 days, or until the further order of this court.

So ordered.

## WATERPROOFING CO. v. NEAL FARNHAM, Inc., et al.

(Circuit Court, S. D. New York. January 4, 1911.)

## TRADE-MARKS AND TRADE-NAMES (§ 95\*)—INFRINGEMENT—PRELIMINARY INJUNCTION.

A motion for preliminary injunction against the infringement of a trade-mark will not be granted where the use of the trade-mark complained of in an advertisement was only for a week and has been discontinued, but leave will be granted to renew the motion if the defendant continues to use the name in advertising.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.\*]

In Equity. Suit by the Waterproofing Company against Neal Farnham, Incorporated, and others. On motion for a preliminary injunction. Denied.

D. A. Usina, for complainant.

F. Warren Wright, for defendants.

COXE, Circuit Judge. This is a motion for an injunction restraining the infringement of the alleged trademark "Hydrolithic" which was registered June 12, 1910. This trademark has never been adjudicated; its validity is in dispute. The affidavits do not show a case of general acquiescence. The particular act of infringement complained of is the publication by the defendant J. P. Beck of a program of a Cement Exhibition given during last month at the Madison Square Garden in the city of New York. This program contains an advertisement by the defendant Neal Farnham in which the words "Hydrolithic Waterproofing for Sub-Structural Walls" are inserted. This exhibition lasted but a week or so and was finally closed in the latter part of December. No future damages can therefore be attributed to this particular act. Whatever damages there are have already accrued and cannot be affected one way or the other by an injunction. The defendant Farnham does not sell his product under the name of "Hydrolithic" and does not use that name upon boxes, packages or bundles. His product is sold under the name of "Waxin." It is not at all unlikely that two fair and intelligent business men will reach a settlement of so inconsequential a dispute, but even should the case go to a final hearing it will in the usual course be decided on its merits before any serious damage can be suffered by the complainant. Upon proof that the defendant continues to advertise by using the name "Hydrolithic" as in the catalogue of the Cement Show, a renewal of this motion may be had. As at present presented, the case is not one for a preliminary injunction.

The motion is denied.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. June 19, 1911.)

## RECEIVERS (§ 91\*)—LEASES—RENT—REDUCTION.

Where receivers of a railroad company rented a building for a hotel with the privilege of renewal and the lessee accepted a renewal at the same rent many months after a change by the receivers in the street railway facilities in front of the hotel, and the receivers, subsequent to the renewal of the lease, had done nothing to affect the lessee's business, he was not entitled to a reduction of the rent because of such change.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 91.\*]

In Equity. Suit by the Pennsylvania Steel Company against the New York City Railway Company and another. Application by lessee of building used for a hotel for reduction of rent. Denied.

Byrne & Cutcheon, for complainant.

Jas. L. Quackenbush, for New York City Ry. Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers.

Bowers & Sands, for Simpson, Thatcher & Bartlett.

LACOMBE, Circuit Judge. This is an application by the lessee of a building near the Twenty-Third street westerly terminal for a modification of the lease, by reducing the amount of rent reserved. The lease was entered into April 30, 1909, for a period of five years, with a privilege reserved to the lessor to terminate it on the 1st day of May or November in any year upon giving six months' notice. It was in renewal at the same rent of a prior lease to petitioner or his brother, and petitioner was himself in possession for some time before the execution of the new lease.

Under the various orders and decrees the receivers had abundant authority to make such a lease, without first securing the specific approval of the court. The business conducted on the premises is that of a hotel. Petitioner states that the receipts of the business have fallen off materially in consequence of the operation of the cars run to that terminal. Heretofore they stopped at two stubs and a switch quite near the hotel. Now they run by the hotel, without stopping, upon a loop which sweeps around near ferry entrances. The difficulty with his application, however, is that the change in mode of operation was made many months before the new lease was entered into. Nothing has been done by receivers subsequent to renewal to affect his business in any way. It is thought that the court should not, under these circumstances, deprive creditors of whatever may come to them by the enforcement of the lease.

Motion denied.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## COANE v. NETTER.

(Circuit Court, E. D. Pennsylvania. July 3, 1911.)

No. 699.

**1. TRADE-MARKS AND TRADE-NAMES (§ 95\*)—UNFAIR COMPETITION—PRELIMINARY INJUNCTION.**

The court, in a suit based on unfair competition by the use of a label, will not order a preliminary injunction, where defendant has discontinued the use of the label and does not intend to use it again; but plaintiff may renew his motion for an injunction on defendant using the label.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.\*]

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lake v. Harper & Bros., 30 C. C. A. 376.]

**2. TRADE-MARKS AND TRADE-NAMES (§ 95\*)—UNLAWFUL USE OF TRADE-MARK—PRELIMINARY INJUNCTION—SECURITY FOR DAMAGES.**

The court, in a suit based on the unlawful use of a trade-mark, will on complainant's motion grant a preliminary injunction, unless defendant will enter into security to respond in damages if it should be determined that the trade-mark is valid and that it has been infringed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.\*]

In Equity. Suit by Robert Coane against David Netter. Motion for preliminary injunction conditionally denied.

Horace Pettit, for complainant.

Loughlin & Bracken, for respondent.

J. B. McPHERSON, District Judge. [1] So far as concerns the charge of unfair competition by the use of the label complained of, I do not see that the plaintiff needs protection at present. The defendant has discontinued the use of the label, and I accept his statement that he does not intend to use it again; but, if he does so use it, the plaintiff has leave to renew this motion. The jurisdiction of the Circuit Court to entertain the charge of unfair competition—both parties being citizens of Pennsylvania—need not now be determined.

[2] As to the trade-mark, "No. 6," I am unwilling to decide its validity now. No harm, I think, can be done by deferring the decision until final hearing; but I think the defendant should enter security to respond in damages, if it should be determined hereafter that the trade-mark is valid and that he has been infringing, before final decree.

It is therefore ordered that the defendant enter security within five days in \$1,500, with condition as just stated. If this be done, the clerk will enter an order that the preliminary injunction is refused. If the security be not entered, a preliminary injunction will be granted, restraining the use of the trade-mark "No. 6."

I may add that one of the judges of the Circuit Court will hear this case at an early date in the fall after issue has been joined, the time to be fixed upon application.

## UNITED STATES v. WARNER.

(Circuit Court, S. D. New York. June 16, 1911.)

COMMERCE (§ 47\*)—INTERSTATE COMMERCE—IMMORAL PURPOSES—STATUTES—CONSTITUTIONALITY.

Act Cong. June 25, 1910, c. 395, 36 Stat. 825, making it a criminal offense for a person to transport, or assist or pay for transportation, from one state to another, of any woman for an immoral purpose, though apparently interfering with the police power of the state, is not unconstitutional.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 47.\*]

John Warner was indicted for transporting a woman for immoral purposes from one state to another, in violation of Act Cong. June 25, 1910, and demurs. Overruled.

Henry A. Wise, U. S. Atty., and Daniel Day Walton, Jr., Asst. U. S. Atty.

Charles W. Bacon, for defendant.

HOLT, District Judge. This is a demurrer to an indictment. The indictment is brought under the act of June 25, 1910, making it a criminal offense for a person to transport or assist or pay for the transportation from one state to another of any woman for an immoral purpose. The ground of the demurrer is that the act is unconstitutional.

If this were an original question, my opinion would be that the act is unconstitutional. I do not believe that the framers of the Constitution ever imagined that the power conferred upon Congress by the Constitution to regulate commerce between the states would authorize the enactment by Congress of such a statute. Under this statute, if a man takes a woman for an immoral purpose from New York across the North River to Jersey City, he is guilty of a crime punishable by imprisonment for five years and a fine of \$5,000. If the same man takes the same woman for the same purpose from New York across the East River to Brooklyn, he is guilty of no crime at all. This statute, in my opinion, in effect attempts to exercise a purely police power of the state, under the guise of regulating commerce. If this statute is constitutional, it is in the power of the federal government to make it a criminal act for any person to go from one state to another while engaged in any crime, fraud, or object which may be deemed objectionable by Congress. But in view of the decisions of the Supreme Court in the Lottery Case, 186 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, holding that Congress had authority to prohibit the transmission of lottery tickets between the states; of the Passenger Cases, 7 How. 283, 12 L. Ed. 702, holding that the transportation of passengers is a part of commerce, of Judge Wolverton, in U. S. v. Westman (D. C.) 182 Fed. 1017, holding the statute constitutional, and the general tendency of legislation and of judicial decisions in recent years upon cognate subjects, I think it is sufficiently doubtful

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



whether the act in question will be held unconstitutional by the United States Supreme Court to make it improper for a court of first instance to hold it to be so.

The demurrer is overruled.

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AMERICAN PIN CO. v. BERG BROS.

(Circuit Court, S. D. New York. May 31, 1911.)

TRADE-MARKS AND TRADE-NAMES (§ 95\*)—UNLAWFUL COMPETITION—PRELIMINARY INJUNCTION—DECEIT.

Where complainant sold hooks and eyes on a card, the style of which was adopted in 1902, since which time complainant had enjoyed a large trade in different parts of the United States, it was entitled to a preliminary injunction restraining defendant's sale of similar hooks and eyes, though under another name, on cards so closely resembling complainant's that purchasers would be liable to be deceived, without proof of specific instances in which an individual purchaser had been deceived.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.\*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. Suit by the American Pin Company against Berg Bros. Application for preliminary injunction to restrain unfair competition in trade. Granted.

Wetmore & Jenner, for complainant.

Katz & Sommerich, for defendant.

LACOMBE, Circuit Judge. The acts complained of are sales by defendant of hooks and eyes fastened on cards, which are imitations of the complainant's card, called the "Dorcas." It is alleged that defendant's cards, called the "Comet," so closely resemble complainant's that purchasers are liable to be deceived, and to mistake the one for the other. Samples of the cards are in evidence, and are far more illuminative of the issue than any written description could possibly be.

Complainant's affidavits sufficiently show that its style of card was gotten up in 1902, and that since then they have been sold in very large numbers in many different parts of the United States. These averments are not controverted by the affidavits of defendant's witnesses to the effect that there are many department stores in which they are not to be found on sale. It is contended that complainant is not entitled to a preliminary injunction, because no proof is given of specific instances in which some individual purchaser has been deceived. Such proof is not necessary, where the imitation is so close that it is apparent that confusion must result. That is the situation here. No closer simulation of the form, coloring, lettering, and general features of the package has been found in any case which has come before this court in very many years.

Preliminary injunction may issue as prayed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## In re WIEDMANN.

(District Court, W. D. New York. June 30, 1911.)

No. 3,608.

**BANKRUPTCY (§ 409\*)—DISCHARGE—OBJECTIONS—CONCEALMENT OF BOOKS.**

A bankrupt, having kept books of account during all the time he was engaged in business, on being examined before the referee, was requested and promised to produce his books at a subsequent hearing. The hearing was adjourned several times at his request, until six months after the first hearing he testified that his wife had kept the books and that they could not be found. *Held*, that such explanation was unsatisfactory and warranted a denial of a discharge, on the ground that he had destroyed or concealed his books with intent to conceal his financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Charles Wiedmann. On motion to confirm the report of the special master, providing for denial of the bankrupt's discharge. Affirmed.

Charles Newton, for bankrupt.

Lincoln A. Groat, for objecting creditor.

HAZEL, District Judge. The bankrupt should be denied his discharge on the ground that he has destroyed or concealed his books of account with intent to conceal his financial condition. It is conceded that he kept books of account during all the time he was engaged in business. He was examined before the referee, and requested to bring his books at a subsequent hearing, which he promised to do. Subsequently the hearing was adjourned several times at his request, until in October, 1910, six months after the first hearing, he appeared before the referee, pursuant to subpoena, and testified that his wife had kept the books, that they could not be found, that his wife had been careless, that he had looked for the books, and could not find them.

The proffered explanation is entirely unsatisfactory. The presumption arises that the bankrupt has concealed his books to keep from his creditors his actual financial condition, which presumption finds strong support in the transactions prior to filing his petition and within four months prior thereto, by which certain of his property was transferred. Considering such acts, to which the referee attached importance in connection with the later concealment of his books, a disposition to hinder his creditors from in any way deriving any benefit from his property is strongly indicated. It would be a singular situation if a bankrupt, who takes advantage of the privilege given him by the bankrupt act, could thus thwart his creditors and refuse them any knowledge of his financial affairs, on his uncorroborated testimony that his books had been lost since he had been requested to exhibit them, and with a wave of the hand place the responsibility for their loss and his inability to produce them upon his wife. It is not necessary that direct evidence of concealment or destruction be given. The bankrupt's testimony is manifestly unreliable, and a discharge will

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be denied him, on the ground that he has destroyed or concealed his books of account by which his actual financial condition could be ascertained.

The special master also found that the bankrupt, within a period of four months before filing his petition, transferred and concealed his property; but this objection, in view of the foregoing, need not be passed upon.

So ordered.

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In re ROSS.

(Circuit Court, M. D. Pennsylvania. July 29, 1911.)

No. 1,544.

**1. ALIENS (§ 62\*)—NATURALIZATION—QUALIFICATIONS.**

Where an alien, applying for admission to citizenship, has not behaved as a man of good moral character while residing in the United States, the court, in the exercise of a sound discretion, will refuse his petition, though his behavior has been good during the five years preceding the petition; and the court must determine, taking into account the whole conduct of the petitioner, whether he possesses the necessary qualifications for citizenship.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123-125; Dec. Dig. § 62.\*]

**2. ALIENS (§ 62\*)—NATURALIZATION—QUALIFICATIONS.**

An alien, pleading guilty to murder in the second degree, will not be admitted to citizenship, though before the offense, and for more than five years after the expiration of the term of imprisonment, his conduct reveals no cause for censure.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123-125; Dec. Dig. § 62.\*]

Petition of Leonard Ross for admission as a citizen of the United States. Petition denied.

A. B. Dunsmore, U. S. Atty.

WITMER, District Judge. [1] If it is made to appear that an alien, applying for admission to citizenship, has not behaved as a man of good moral character while residing in the United States, the court, in the exercise of a sound discretion, may refuse his petition, notwithstanding the applicant's good behavior during the five years preceding his application. It is the duty of the court to determine, taking into account the whole career and conduct of the applicant, in so far as it is made to appear, whether such a one possesses the necessary qualifications, moral and otherwise, to entitle him to the rights of citizenship.

[2] The petitioner is a discharged convict, having on February 10, 1896, pleaded guilty to the charge of murder in the second degree, for which crime he was sentenced to imprisonment at hard labor for a period of 11 years and 6 months. The actual term of his imprisonment was about 9 years, and at the time of filing his petition he had been at liberty more than 5 years. Before the commission of the offense, and since, the conduct of the petitioner reveals no cause for

censure, and if his personal welfare alone was entitled to consideration the conferring of the rights of citizenship might be considered as proper aid and encouragement. This matter, however, is not to be determined along such narrow lines. The evil resulting from such practice would immeasurably exceed the personal benefits conferred from such attempts at dispensing charity. Citizenship is not to be debauched by conferring on the criminal class its sacred privileges. The crime of which the petitioner admitted his guilt is so abhorrent to human nature and society that this court will not bestow on him the rights of an American citizen, notwithstanding the great liberality of our federal government.

The petition is dismissed.

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In re DE LONG FURNITURE CO.

(District Court, E. D. Pennsylvania. July 3, 1911.)

No. 3,677.

**BANKRUPTCY (§ 355\*)—ASSIGNMENTS OF CONTRACTS—PERFORMANCE OF CONTRACTS BY RECEIVER AND TRUSTEE—EFFECT.**

Where a party to a contract assigned to his creditor the money to become due under the contract, and the party's receiver and trustee in bankruptcy carried out the contract, the money becoming due must be used to discharge the debt due the creditor, though on the failure of the receiver and trustee to complete the contract there would have been no money to which the assignment could apply.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 355.\*]

In the matter of the bankruptcy of the De Long Furniture Company. On certificate of referee concerning the claim of the Kutztown National Bank. Referee's order affirmed.

Joseph R. Dickinson, for trustee.

J. H. Marx, for Kutztown Nat. Bank.

J. B. McPHERSON, District Judge. The only question presented by this certificate is the correctness of the referee's order directing the trustee to pay to the bank \$508.80 in partial discharge of the furniture company's admitted debt. The company did not really assign to the bank the contracts in question, but (whatever the mere form of the transaction may have been) merely assigned the money to become due under these contracts. This is conceded to have been valid in equity as an executory agreement to assign, and, if the furniture company had continued to do business and had carried out the contracts, the bank's right to receive the money when it became due would be clear. But insolvency under the state law, and afterwards bankruptcy, intervened while the contracts were still uncompleted, and it is this fact that introduces the disturbing element. In my opinion, however, the referee came to a proper conclusion. Neither the receiver nor the trustee was bound to adopt and complete the contracts, and, if neither had undertaken to complete, there would have been no money to which the furniture company's assignment could apply, and the bank

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

would have been compelled to accept the situation. But the receiver and the trustee did adopt and did carry out the contracts, and in my opinion they stepped thereby into the furniture company's shoes, and became bound in equity, as the company was already bound, to devote the proceeds to the object agreed upon between the company and the bank.

The order directing the trustee to pay \$508.80 to the bank is therefore affirmed.

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In re A. & J. M. ESMARK.

(District Court, E. D. Pennsylvania. June 3, 1911.)

No. 3,779.

**ESTOPPEL (§ 68\*)—CLAIMS—RIGHTS OF CREDITOR—INCONSISTENT POSITIONS.**

Claimant, having received the bankrupts' judgment notes for money advanced, afterwards distrained for rent due him as landlord from the bankrupts, and levied on certain property as belonging to them. *Held*, that he could not in bankruptcy thereafter claim title to such property as having been purchased by the bankrupts with claimant's funds, under an agreement that he should hold the title until the money was repaid.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

In Bankruptcy. In the matter of bankruptcy proceedings against A. & J. M. Esmark. On certificate of a referee concerning the disallowance of the claim of Louis Stecher. Affirmed.

Henry N. Wessel, for claimant.

Julius C. Levi, for trustee.

J. B. McPHERSON, District Judge. The referee (David W. Amram, Esq.) in a careful and elaborate report has disallowed this claim. I think his order finds ample support in the inconsistency of the positions taken by the claimant at one time and another with regard to the personal property that produced the fund in question. The property was bought by the bankrupts with money furnished by the claimant, and his present position is that he and the bankrupts agreed verbally that he should be the owner until the money should be repaid. Repayment having never been made, he lays claim to the fund that arises from the sale of his own property. This contention is at least intelligible—it should be noted in passing, that the bankruptcy antedates the amendments of 1910—but unfortunately for the claimant he has heretofore taken a wholly irreconcilable position. He received the bankrupts' judgment notes for the money advanced, and thus apparently admitted the transaction to be a loan; and, moreover, he afterwards distrained for rent due to him as landlord by the bankrupts, and levied upon the very property as theirs that he now asserts to have been his own. Acts speak more loudly than words, and I have no hesitation in relying upon these significant acts, rather than upon the verbal agreement that is now set up.

The order of March 23, 1911, is affirmed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**WEISS v. ARNOLD PRINT WORKS.**

(Circuit Court, S. D. New York. May 1, 1911.)

**CORPORATIONS (§ 448\*)—LIABILITY FOR BREACH—PERSONS LIABLE.**

The defendant corporation is not liable on a contract made before it came into existence by plaintiff with another corporation of the same name; and, though the promise of the officers of the defendant corporation before it came into existence might bind them individually, it could not bind the defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789–1792; Dec. Dig. § 448.\*]

At Law. Action by Charles Weiss against the Arnold Print Works. Heard on complaint and demurrer thereto. Demurrer sustained, with leave to amend.

Goldsmith, Rosenthal, Mork & Baum, for complainant.

Joline, Larkin & Rathbone, for defendant.

COXE, Circuit Judge. The defendant, though bearing the same name as the corporation which made the contract, is a totally distinct corporation. All of the agreements alleged in the complaint were made before the defendant came into existence. The promise of the officers of the existing corporation might bind them individually, but could not bind a corporation not then in esse. If A. agrees to secure the employment of B. by C. and C. does not employ B., B. has no cause of action against C. Assuming the agreement to be valid and upon sufficient consideration, B. might have an action for damages against A., but in order to hold C., it must be shown that he was a party to the contract. If B. does work for C. with the latter's knowledge and consent, C. might be sued upon a quantum meruit for the value of B.'s services but not upon a contract, for the reason that C. has made no contract.

The demurrer is sustained with costs, with leave to the plaintiff to amend within 20 days after entry of order on paying costs of demurrer.

. NOTE. How does this court get jurisdiction? The defendant is alleged to be a Massachusetts corporation but I am unable to find any allegation as to the citizenship of the plaintiff.

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**Ex parte AVAKIAN.**

(District Court, D. Massachusetts. November 2, 1910. On the Merits, November 26, 1910.)

No. 346.

**1. ALIENS (§ 54\*)—IMMIGRATION—ARREST—DEPORTATION WARRANT.**

A letter written by a United States immigration commissioner in Canada to a commissioner at Boston, requesting the issuance of a warrant for an alien's arrest in Massachusetts, and stating facts tending to a

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

conclusion that when the alien was admitted at Halifax she must have been diseased, was insufficient to show, as a basis for the secretary's warrant for the alien's arrest, an application therefor complying with Immigration Regulations, rule 35, par. 3b.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.\*]

**2. HABEAS CORPUS (§ 29\*)—ALIENS—ARREST—PROCEEDINGS.**

Where neither the application for the warrant of arrest, nor any of the papers on which it was issued, were shown to an alien or her counsel during the hearing, and before the passing of an order for deportation, as required by immigration rule 35e, she was entitled to a writ of habeas corpus to determine the validity of her detention.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 29.\*]

**On the Merits.**

**3. ALIENS (§ 54\*)—IMMIGRATION—WARRANT—APPLICATION.**

Where a warrant to arrest an alien alleged to be illegally in the United States was issued on an application made to the department by the immigration commissioner at Montreal, accompanied by a certificate as to the landing of the alien, and a letter transmitting the application and certificate, the warrant was issued on an application duly made in substantial conformity with the rules of the department, and was valid.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.\*]

**4. HABEAS CORPUS (§ 97\*)—SCOPE OF HEARING—GROUNDS SUBSEQUENT TO WRIT.**

On habeas corpus to determine the legality of the detention of an alien in deportation proceedings, the only question for review is the legality of the alien's detention on the return day of the writ, and matters subsequent thereto are not proper in a traverse to the return.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 97.\*]

**5. HABEAS CORPUS (§ 92\*)—SCOPE OF INQUIRY—DEPORTATION PROCEEDINGS.**

In habeas corpus to review an alien's detention, the court could consider the record of proceedings subsequent to the return to the writ, only as tending to establish the truth of the return, and hence, if the alien was being held under a warrant issued since the return day, no question as to the validity of that warrant could be considered.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 92.\*]

**6. ALIENS (§ 54\*)—DEPORTATION PROCEEDINGS.**

Where, in a habeas corpus proceeding to determine the legality of an alien's detention, it did not appear that a letter written by the commissioner requesting petitioner's arrest was ever transmitted to the department, or was before the department when the warrant of arrest was issued, it could not have constituted evidence on which the warrant was issued which the immigration officers were required to disclose to relator or her counsel during the hearing, by immigration rule 35e.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.\*]

Habeas corpus on petition of Hagop Avakian to obtain the discharge of Haiganoosh Avakian from the custody of the Immigration Commissioner under deportation warrant. Writ discharged, and alien remanded.

See, also, 188 Fed. 694.

John W. Rorke, for petitioner.

William H. Garland, Asst. U. S. Atty.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
188 F.—44

**DODGE, District Judge.** Whether the writ is to be issued or not is to be determined in this case from the record of proceedings by the immigration authorities under warrants issued by the Secretary of Commerce and Labor, under sections 20 and 21 of the Immigration Act of 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 904, 905 [U. S. Comp. St. Supp. 1909, p. 459]), for the arrest and deportation of Haiganoosh Avakian. She is an alien, born in Turkey, alleged by the petitioner to be his niece. She entered the United States from Halifax, N. S., in July, 1910, and has since, according to the petition, lived at the petitioner's house in Cambridge as a member of his family.

She is now in the commissioner's custody under a warrant for her deportation issued October 12, 1910. In obedience to an order that he show cause why the writ prayed for should not issue, the commissioner has submitted the warrant and record of proceedings as justifying her detention.

It is not disputed that, as the record shows, the alien was first taken into custody under a warrant for her arrest, dated September 8, 1910, issued by the Department of Commerce and Labor to the commissioner; that this warrant was later canceled and another issued in its place, dated September 23, 1910; that meanwhile there had been hearings before a duly authorized inspector at Boston, and there was a further hearing on September 26th, at which the alien, represented by counsel, had full opportunity to show cause why she should not be deported; that the record of the hearings was duly submitted to the acting secretary; that on October 12, 1910, he issued the warrant under which she is now held; and that she was surrendered to the custody of the commissioner October 18, 1910, having been since the hearings paroled in custody of her counsel.

The petitioner contends that both warrants of arrest, the proceedings thereunder, and the warrant for deportation were and are in violation of law and of her rights and therefore void.

The only warrant of arrest which need be considered is that issued September 23d. It recites that from evidence submitted to the secretary the alien appears to have been found in the United States in violation of the immigration act of 1907 in the respects:

"That she was at the time of her entry into the United States afflicted with trachoma, a dangerous contagious disease; and that she was also, at the time of such entry, a person likely to become a public charge."

The petitioner does not dispute that it is his niece mentioned in his petition, to whom the warrant refers, nor that she landed at Halifax per S. S. "Uranium" on July 23, 1910, as the warrant also recites, and immediately came from Halifax into the United States. It is not disputed that she was duly examined and admitted by the immigration officers at Halifax before her entry into the United States as above.

The record as at first submitted here did not show that any papers were submitted to the secretary before he issued his warrant to take the alien into custody except a letter from the commissioner of immigration at Montreal to the commissioner at Boston, dated September 3, 1910. In this the Montreal commissioner states that he is asking



the department, under the same date, to issue a warrant for this alien's arrest, and he also states facts tending to the conclusion that when admitted at Halifax in July she must have been diseased. He asks that when arrested she be carefully examined by the medical examiner at Boston.

[1] The letter referred to is obviously insufficient to show that the secretary issued his warrant upon an application therefor complying with the requirements of rule 35, paragraphs (a) and (b), of the present Immigration Regulations. But it is unnecessary to consider whether a warrant issued without such an application would be illegally issued, because since this hearing began an application made to the department by the commissioner at Montreal under date of September 3, 1910, and an accompanying certificate as to the landing of the alien, also a letter to the department from the Montreal commissioner, transmitting these papers, have been added to the record submitted here, to which, of course, they properly belong. Thus complete, the record shows, in my opinion, that the warrant issued upon an application duly made and in substantial conformity with the rules above referred to.

[2] As to the warrant for deportation, the only question is whether the alien was afforded a proper hearing after her arrest and before the order for deportation was made. Rule 35e provides that:

"During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence upon which it was issued."

It appears that neither the application for the warrant of arrest nor any of the papers upon which it was issued were so shown to the alien or her counsel. The fact appears to be that they were not in the hands of the immigration officers at Boston when the hearing was held.

It seems to me doubtful whether, in view of this omission, a hearing according to law has been afforded the alien. Evidently the department's own regulations have not been complied with, and no excuse is shown for the failure to comply. Under the present circumstances, I think the writ should issue; but, if upon the hearing the evidence should stand as at present, I should not discharge the alien from custody until after the immigration officers had had a reasonable opportunity to hold another hearing in full compliance with the rules. The real question, of course, is whether the alien is or is not afflicted with the dangerous contagious disease alleged. It may well be that it makes no difference for the purposes of this question whether or not her counsel has been allowed to inspect all the evidence on which the warrant for her arrest was issued. I do not think, however, that I ought to find, as the case now presents itself, that it cannot make any difference in any event. The question should be decided by the immigration officials after due hearing according to their rules.

#### On the Merits.

A writ of habeas corpus was issued November 2, 1910, on grounds stated in a former opinion herein of the same date. It was return-

able November 5th. On that day the commissioner of immigration duly appeared with Haiganoosh Avakian in obedience to the writ and filed a return in which he set forth that he was then detaining her to enable her to show cause why she should not be deported under and by virtue of an order of the Secretary of Commerce and Labor issued to him November 1, 1910. A copy of the order is set forth in the return.

No traverse to the return was filed on the return day of the writ. It appearing that the alien was then detained, not under the warrant for her deportation, issued October 12, 1910, and considered in the former opinion referred to, as was the case when the petition for the writ was filed, but under a new warrant for her arrest later issued by the department, the matter was continued for further hearing by consent.

On November 26, 1910, the petitioner filed a paper entitled "Traverse to the Return." In this he denied that the warrant of arrest issued November 1, 1910, is good and valid, and says that it and all proceedings under it are null and void for the reasons:

"(1) Because the application for said warrant does not contain the full statement of the facts which show the presence in the United States of the said Haiganoosh Avakian to be in violation of the law as required by paragraph (b) of rule 35 of the Immigration Regulations.

"(2) Because said application is not accompanied by such a certificate of entry as is required by paragraph (c) of said rule, in that there is not attached to said certificate the verifying certificate of the officer having charge of the manifest containing the name of the said Haiganoosh Avakian.

"(3) Because said application does not contain a statement of facts sufficient to constitute 'probable cause' for the issuance of a warrant of arrest, nor is said application supported by oath or affirmation, as required by article 4 of the Amendments to the Constitution of the United States."

[3] I find that the warrant to arrest issued November 1, 1910, as above was issued upon an application made to the department by the immigration commissioner at Montreal, under date of September 3, 1910, an accompanying certificate as to the landing of the alien, and a letter from the Montreal commissioner to the department transmitting the application and certificate. These papers were first produced before me at the hearing on the petition for this writ, and are referred to in the opinion of November 2, 1910. I rule, as I then ruled regarding an earlier warrant to arrest this alien, that the warrant issued November 1, 1910, and referred to in the return, was issued upon an application duly made, in substantial conformity with the rules of the department, that it is good and valid, and that the proceedings under it are lawful and regular so far as any of these matters are concerned.

The "Traverse to the Return" further sets up that since November 5, 1910, there has been a hearing before the immigration officers under the warrant to arrest, and another warrant for the alien's deportation issued on November 19, 1910; also that these proceedings are null and void for the reasons:

"(4) Because neither the letter on which said application for the warrant of arrest was based, nor a copy thereof, was furnished to Haiganoosh Avakian or her counsel, although called for repeatedly, and required to be furnished by paragraph (e) of said rule 35.

"(5) Because the proceedings held under and by virtue of said warrant of arrest dated November 1, 1910, were not due process of law within the meaning of article 5 of said amendments to the Constitution of the United States."

[4] The only question before me at present is whether or not the alien's detention on the return day of the writ was lawful. The return made to the writ by the immigration commissioner does not and could not undertake to justify his detention of the alien by anything done after that time. What is set up on the alien's behalf in paragraphs 4 and 5 above quoted cannot be regarded as having any proper place in a traverse to the return on this writ, whether it affords ground for the issuance of another writ or not.

[5] The commissioner has submitted the record of the proceedings subsequently had before the immigration officers under the warrant of arrest described in his return. Except as it tends to establish the truth of the statement in the return that he was then holding the alien for hearing under the warrant for arrest above referred to, I am unable to consider it material for the purposes of this hearing. If a warrant for the alien's deportation has been issued since the return day, and she is now being held under that warrant, no question as to its validity is at present before the court.

[6] In view of what was said in the former opinion, however, it may be remarked regarding the record now submitted that the application made by the Montreal commissioner under date of September 3, 1910, and the accompanying certificate as to the landing of the alien, appear by it to have been shown at this hearing to the alien's counsel as required by rule 35e. In the application the Montreal commissioner stated that since the alien's admission a letter had been received stating that she was diseased at the time of her entry. The complaint made on behalf of the alien in paragraph 4 above is that this letter was not shown her counsel at the hearing. I find nothing to show that it was ever transmitted to the department or was before the department when the warrant to arrest was issued. If not, it cannot have been, in any view of it, evidence on which the warrant was issued, and it is not therefore within rule 35e.

As to paragraph 5 of the "Traverse to the Return," I have intimated to counsel, in regard to the similar proceedings had under the former warrant to arrest, that, except as stated in the former opinion, I saw no reason to doubt that they were regular and valid so far as this objection is concerned.

The "Traverse to the Return" further sets up that the alien in question has been married to a citizen on November 21st, and must now be regarded as herself a citizen and beyond the jurisdiction of the immigration officers. The determination of the question thus raised is reserved until it is regularly presented for decision.

As the case now stands, the writ must be discharged, and the alien remanded to the custody of the commissioner.

## Ex parte KAPRIELIAN.

(District Court, D. Massachusetts. November 29, 1910.)

No. 363.

## 1. ALIENS (§ 53\*)—ENTRY—RIGHT TO REMAIN.

For three years following an alien's entry, her right to remain is conditional only and subject to termination by proper action on the part of the immigration authorities.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.\*]

## 2. ALIENS (§ 54\*)—ENTRY—RIGHT TO REMAIN—MARRIAGE AFTER DEPORTATION ORDER—EFFECT.

Where, after an alien had been ordered deported because she was afflicted with a contagious disease, she married a citizen, she was not thereby relieved from the order of deportation, under Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268), providing that any woman married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.\*]

Habeas corpus on petition of Avedis S. Kaprielian, to obtain her discharge from arrest under deportation warrant. Denied.

John W. Rorke, for petitioner.

William H. Garland, Asst. U. S. Atty., for the United States.

DODGE, District Judge. This petition alleges that the petitioner is a naturalized citizen and that his wife is unlawfully detained by the immigration commissioner at Boston.

It appears from the petition that his alleged wife is the same person whose detention by the commissioner, under her maiden name of Haiganoosh Avakian, was complained of in a previous petition to this court by Hagop Avakian, 188 Fed. 688. A writ of habeas corpus was issued on that petition, November 2, 1910, upon grounds stated in an opinion dated the same day. After a hearing upon the writ it was discharged, for reasons stated in a subsequent opinion dated November 26, 1910. The docket number of the case is 346.

The present petition alleges that the detention now complained of is under a warrant of deportation issued November 19, 1910, by the Acting Secretary of Commerce and Labor.

The commissioner has appeared in obedience to a notice to show cause issued on the present petition. At the hearing upon that notice it has appeared that the order of deportation referred to is the same order, issued November 19, 1910, to which reference is made in the above opinion dated November 26, 1910. The record of the proceedings had before the immigration officers, which resulted in that order, and sets forth the order itself, was submitted as showing that his detention of Haiganoosh Avakian (or Kaprielian if that be her present name) is lawful.

I find in the record submitted no reason to believe that there was any defect in the proceedings or that the deportation order is not valid.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It further appears, and I find, that on November 8, 1910, pending the hearing under the writ issued November 2, 1910, Haiganoosh Avakian was released from custody by the commissioner, on a bond in the sum of \$1,000 to secure her surrender to him if it should be finally held that she was not entitled to remain in the country, and not entitled therefore to final discharge from custody. The surety on this bond has surrendered her to the commissioner's custody before this petition was filed, but on the same day. The bond referred to has been also submitted by the commissioner.

It thus appears, and I find, that the marriage alleged in the petition took place, if at all, after the order for the woman's deportation was made, pending its execution, and while the commissioner held security for her surrender to him in order that it might be executed.

The petitioner contends that under Rev. Stats. § 1994 (U. S. Comp. St. 1901, p. 1268), she ceased to be an alien and became a citizen by virtue of her marriage to him on November 22, 1910, so that the immigration authorities have now no power to exclude her from the country or detain her for that purpose. The marriage is not alleged to have been, on the part of either party to it, in ignorance of the pending proceedings or of the issuance of the deportation order. The mere fact of marriage to a citizen is relied on.

I am unable to believe that such a marriage is capable of having the effect claimed, in view of the facts shown. The deportation order was a final decision by the proper authorities that Haiganoosh Avakian was an alien belonging to one of the excluded classes and was in the country without right. She entered the country in July, 1910, as the record shows. [1] For three years following her entry her right to remain was by law conditional only and subject to be determined by such action on the part of the immigration authorities as has now been had. [2] It has now been determined, within the period referred to, that she had no lawful right to enter and has no lawful right to remain. Rev. Stats. § 1994, was enacted in 1855. *Kelly v. Owen*, 7 Wall. 496, 19 L. Ed. 283, holding that any free white woman is a woman who "might be lawfully naturalized" within the meaning of the section, was decided in 1868. The present act regulating immigration, passed in 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1909, p. 447]), repeals all prior acts or parts of acts inconsistent with its provisions. After a final determination, according to those provisions, that a woman belongs, and belonged at the time of her entry into the country, to a class of aliens forbidden by law to enter or to remain, it cannot be said that she is capable of being lawfully naturalized. It was no part of the intended policy of section 1994 to annul or override the immigration laws so as to authorize the admission into the country of the wife of a naturalized alien not otherwise entitled to enter, and an alien woman who is of a class of persons excluded by law from admission to the United States does not come within the provisions of that section; as has been held in the Circuit Court for this circuit in the district of Rhode Island. *In re Rustigian* (C. C.) 165 Fed. 980, 982.

In *Hopkins v. Fachant*, 130 Fed. 839, 65 C. C. A. 1, the deportation

order was held to have been arbitrarily and unlawfully issued, and the woman was married pending the decision on that question.

A marriage entered into under circumstances such as are here disclosed could hardly have been free from intent thereby to avoid deportation, whether otherwise in good faith or not. The bare fact of marriage to a citizen since the deportation order being all that is relied on, I must decline to issue the writ.

Petition denied.

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POSTAL TELEGRAPH-CABLE CO. v. LIVERMORE & KNIGHT CO.

(Circuit Court, D. Rhode Island. August 2, 1911.)

No. 2,752.

1. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—UNLAWFUL COMPETITION—MIMICRY—DECEPTIVE IMITATION.

Where defendant, manufacturing advertising specialties, put out an envelope similar to those used by complainant telegraph company to inclose bona fide telegrams, intending that the envelopes should be used for advertising purposes, the word "Telegram," printed thereon, being used to attract attention and to distinguish the envelope, which was intended to be sent through the mail, from ordinary mail matter, but it also appeared that the momentary deception that the envelope contained a telegram was immediately dispelled on opening the envelope and seeing that it was merely an advertisement, such similitude was mimicry, rather than deceptive imitation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 70.\*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—UNLAWFUL COMPETITION—BILL—ACTUAL INJURY—INFERENCE.

Defendant, manufacturer of advertising specialties, manufactured and sold envelopes in imitation of those used by complainant telegraph company for telegrams, intending that they should be used for advertising matter sent through the mail. Complainant sued to restrain such use, alleging that the envelopes were used to deceive the public and cause them to believe that they were the envelopes of the complainant, and that they contained messages transmitted over complainant's wires and delivered by complainant; that defendant's envelopes had been generally mistaken by the public, by the postal authorities, and especially by complainant's patrons, for the envelopes of complainant, and had induced the public and complainant's patrons to give to the envelopes that prompt and immediate attention which was usually given to telegraphic messages; and that the same would cause annoyance to complainant's patrons and an injury to complainant's business. *Held* that, since the use of such envelopes if deceptive at all, the deception was merely momentary and not deceitful, complainant's claim of injury was derived entirely from inferences based on another inference, and that the facts were insufficient to establish actionable injury.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 70.\*]

Unfair competition in use of trade-mark, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Bill by the Postal Telegraph-Cable Company against the Livermore & Knight Company. Demurrer to bill sustained.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edwards & Angell, for complainant.  
Comstock & Canning, for defendant.

BROWN, District Judge. The complainant charges the defendant with imitation of the envelopes in which complainant's telegrams are delivered.

Appended to the bill are Exhibits A and B of different styles of envelope used by the complainant. The alleged imitation is also appended as Exhibit C.

The imitation is not close, but upon demurrer the allegation that the defendant's envelopes have been mistaken for those of the complainant requires us to assume for this demurrer that the defendant's envelopes are somewhat imitative. While it is doubtful if the exhibits themselves establish a deceptive imitation, yet, if supplemented by evidence of actual deception, this might support the bill in this particular.

The defendant is a manufacturer of advertising novelties, and Exhibit C is an imitation of an envelope for telegrams. It is alleged that they are made in the likeness of the envelope of the complainant—"for the purpose of deceiving the public, and causing them to believe the said envelopes of the defendant are envelopes of the complainant, and to believe that said envelopes of the defendant contain messages transmitted over the complainant's wires and delivered by the complainant aforesaid."

The defendant makes said envelopes for sale to its customers to use for advertising purposes. They are so constructed that upon being opened they unfold, and upon the inside surface is a space for printing advertisements.

[1] It is evident from an examination of Exhibit C that the word "Telegram" is used to attract attention and to distinguish the envelope, which is intended to be sent through the mail, from ordinary mail matter. It is also apparent that, if there is a momentary deception and a momentary false belief that the envelope contains a telegram, this is immediately dispelled upon opening the envelope and seeing that it is merely an advertisement. This is mimicry, rather than deceptive imitation.

[2] From the allegations of the bill it is very clear that the defendant does not design to secure for itself or for its customers any of the telegraphic business of the complainant. It is doubtless intended by the manufacturer that an impression shall be created on the mind of the receiver by the word "Telegram," though it is doubtful whether it is within the design or purpose of the defendant that the receiver should gain the impression that it is a telegram from any particular company.

Assuming, however, that the envelope might convey both the impression of a telegram and the impression of a telegram from the complainant, we have to inquire whether, as the ordinary elements of a case for the infringement of a trade-mark or for unfair competition are wanting, the complainant has stated a case entitling it to equitable relief. The bill alleges that the—

"defendant's envelopes have been generally mistaken by the public, by the postal authorities, and especially by the complainant's patrons, for the en-

velopes of the complainant, and have induced the public and the complainant's patrons to give to said envelopes that prompt and immediate attention which is usually given to telegraphic messages of the complainant."

This feature, however, can hardly be attributed to any special imitation of complainant's envelope, but would doubtless be due to the fact that the envelope purported to contain a telegram, by whatever company transmitted and delivered. It is alleged that because of this prompt attention, and because of deception, there has resulted in the past, and is likely to result in the future, loss of time to the public, and especially to complainant's patrons. It is further alleged that the receipt of said deceptive envelopes has caused alarm in the past, and is likely to cause alarm in the future, to the public and the complainant's patrons; but it is obvious that no special alarm could arise from the false belief that the telegram came from the complainant company, rather than from any other company, and if imitation telegrams, like genuine telegrams, are likely to cause alarm to the receiver, this cannot be regarded as a substantial ground for the intervention of equity. To cause alarm by sending a real telegram or an imitation telegram under ordinary circumstances, and save for very exceptional surroundings, would be *damnum absque injuria*.

It is also alleged that the advertisements appearing upon certain of the envelopes have been of an offensive character. This, however, seems an irrelevant allegation, since there is nothing to show that the defendant is responsible for the special character of advertisements which its customers may place upon the advertising device.

It is alleged that by reason of the facts above stated the public, and particularly the complainant's patrons, have become hostile to these envelopes of the defendant and dislike to receive them, and are greatly displeased and annoyed thereby, and, further, that many of the recipients of said envelopes have believed, and many future recipients are likely to believe, that the complainant has permitted the use of said device by those whose goods are advertised, thereby permitting the public to be deceived and annoyed.

There is a certain inconsistency between the contention that there is any substantial deception, and the contention that receivers are likely to believe that the complainant has permitted them to be annoyed. The annoyance would result only when the receiver is undeceived and no longer believes that he has received a telegram.

Upon the face of the bill it is somewhat difficult to believe that a person who, upon opening the envelope, finds that it is not a telegram, should continue to believe that it was sent by the complainant, and not by the advertiser whose name or goods would necessarily be clearly displayed in order that the advertisement should have value. It can hardly be said that a belief that the complainant was guilty of annoyance to the receiver of the imitation telegram is a natural consequence of the defendant's act in putting the imitation envelopes on the market. Upon discovery of the fact that the pretended telegram was merely an advertisement, the natural conclusion would be that there was no connection with the telegraph company. Though it was stated at the bar that such belief had in fact been held, it would require proof



of repeated instances of this character to rebut the natural presumption that the advertisement would entirely discharge the complainant from all connection with the sending of the advertising device. The likelihood that an inference would arise in the mind of a person annoyed that the complainant was guilty of participation in this annoyance is followed up by the allegation that the recipients so believing are likely to become hostile to the complainant and to cease to use its service.

It must be admitted that these allegations upon their face, though skillfully phrased, are in substance but little more than inference, based upon inference, and rather far-fetched inference at that. The theory is that a man who receives a bogus telegram will be annoyed upon finding that it is not a telegram, that upon finding that it is not a telegram he will believe that the telegraph company is responsible for his annoyance, and that because of this belief he will not use the telegraphic service of the complainant, but will use some other company instead.

In *Cunard Steamship Company v. Kelley*, 126 Fed. 610-615, 61 C. C. A. 532, the Circuit Court of Appeals for this circuit had occasion to deal with the question of inferences from inferences, citing *U. S. v. Ross*, 92 U. S. 281-283, 23 L. Ed. 707; *U. S. v. Pugh*, 99 U. S. 265, 25 L. Ed. 322; *Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761; *First Nat. Bank v. Stewart*, 114 U. S. 224-231, 5 Sup. Ct. 845, 29 L. Ed. 161. While differing in circumstances, the criticism in these cases of the argumentative process of drawing inferences from inferences seems especially pertinent, in view of the fact that the present bill contains no allegation that any person has actually become so hostile to the complainant as to cease to use its service.

The complainant recognizes the necessity of establishing in this case some actual or probable injury to its property rights. It asserts that the acts of the defendant are calculated to cause irreparable damage to the good will of the complainant's business; and yet, after we have discarded the irrelevant allegations of the bill, the complainant's case, so far as the aspect of loss of patronage is concerned, is in substance this: One who receives defendant's envelope thinks he has a telegram. He opens it, and finds it is not, and that he has been deceived, and is angered. He thinks, in spite of the advertisement, that the complainant is a party to the trick which has been played upon him, and becomes so seriously offended that he will go to the trouble of avoiding the use of the complainant's telegraphic service.

It is further alleged that if the defendant is not enjoined the recipients of the imitation envelopes are likely to be so accustomed to receiving the same that they will no longer give to real telegrams the prompt attention they usually receive, and that genuine telegrams will be either discarded or examined at the addressee's leisure, where-by the complainant's service will be impaired.

The suggestion made by defendant's counsel at the argument is pertinent. Telegraphic messages are usually sent by messenger; the defendant's device invariably by mail. This reduces the likelihood of mistake of this character to a minimum.

The substance of the argument is, if the cry of telegram is repeated when there is no telegram, it will not be heeded when the telegram comes. The logic of *Æsop*, however, seems hardly applicable to the present case, or to make it at all probable that persons will give no heed to an envelope purporting to contain a telegram, because it is more probable that it is an imitation than a real telegram.

These are the only particulars in which it is suggested that the business associated with the complainant's envelopes is likely to be injured. The bill in my opinion is defective, in that it fails to show that any actual injury to the complainant in these particulars has occurred, though the defendant's envelopes have been upon the market about a year.

In the absence of actual injury in the past by loss of service or impairment of the attention to be given to its envelopes, the probability of future injury is too weak, and the bill must be regarded as a statement of far-fetched apprehensions which do not seem to be justified as inferences from any facts stated in the bill. It is difficult to believe that any serious apprehension of the impairment of complainant's business is the actual ground for bringing this bill. If the complainant's customers have been annoyed by the character of advertisements printed upon these advertising devices, if they have been put to trouble by being informed that they had received a telegram when there was no telegram but only an advertisement, if they are alarmed at telegrams, or if they are seriously irritated at small things, such as the momentary deception which would follow the receipt of one of these envelopes, all this may be a reason why the complainant desires to stop the defendant from making them; but it is hardly a reason for believing that the complainant will suffer in its property rights and be subjected to pecuniary loss.

While the complainant may deem it a duty to prevent the defendant from bothering the complainant's customers by this sort of mimicry, it can hardly accomplish this by a bill in equity, which is merely imitative of a bill for the protection of property rights, or for the prevention of pecuniary injury.

I have failed to find in the bill any allegations of an actual obstruction or interference with the complainant's business, or which tend to show that its business is at all likely to be obstructed or interfered with.

Cases may be imagined in which an unauthorized use of an envelope bearing a name or address which is not that of the actual sender would so probably lead to mistake, confusion, or actual deception as to justify an injunction, even though no actual harm had been done before the filing of the bill. The creation of many opportunities for actual injury to a complainant by such a course might establish a case of threatened injury which equity would enjoin. Such a case, however, is not presented by this bill.

The use of various kinds of imitative devices, to attract attention, is very common in the art of advertising. As the law does not take too seriously the mere puffing of goods, and expects the purchaser's common sense to guard him from statements which in ethics, though

not in law, may be classed as deceitful, so it should hardly give serious regard to such momentary deception as results from the ordinary imitative advertising device. A momentary deception generally causes amusement, rather than gives offense. Its effect as an advertisement depends upon surprise, and thus it is usually but short-lived.

In the law of deceit there is required not merely a false statement; justifiable reliance thereon is also an essential element. A false statement, made with the intent that it shall be immediately discovered to be false, may rob a man of a moment of his attention and may be classed as a good joke or a bad joke, but can hardly be put into the catalogue of legal deceit or legal or equitable fraud.

Upon the facts, as distinguished from the inferences and assumptions, I am of the opinion that, while the defendant's device is broadly imitative of a telegram, the complainant is not affected in any of its property rights in this respect; that so far as there are any imitative features, which might serve to point to the complainant as distinguished from other telegraph companies, the device is not calculated to deceive in the substantial sense in which that term has been used in the law. At most it is calculated to produce a momentary deception of such trivial character that any serious action based upon it prejudicial to complainant would not be a natural and probable consequence of such deception.

The novelty of this bill is admitted by the complainant. This, of course, is not a reason for denying relief, provided it is made to appear that complainant's rights or property are in such substantial peril that they need protection. I have considered, however, whether the complainant might not be able to aid its case by proofs; but we may accept the allegation that many persons have been deceived for the purposes of this demurrer as fully as if the complainant had produced many witnesses to a momentary deception. I have also considered the possible effect of proof that many of the recipients of said envelopes have believed that the complainant had permitted the use of said device; but this, to be of consequence, must be coupled with a finding that because of this belief they are likely to become hostile. I hardly think that proof, unless of the most extraordinary character, is possible that any considerable number of persons have both believed the complainant responsible and have actually become hostile. If such is indeed the fact, complainant may amend its bill by positive allegation to that effect. The allegation that many have so believed is all there is of fact; the likelihood that many will in future so believe and become hostile is a matter which is purely inferential, and which the court can deal with on demurrer.

In disposing of this case it should be said that the deception charged is merely of a momentary character, for the purpose of attracting attention, and that the defendant cannot be said to have contemplated, or to have been under the duty of contemplating or foreseeing, any impairment of the complainant's business, and has not designed to get any of the complainant's trade. So far as the bill states merely the apprehensions of the complainant, I am of the opinion that the

defendant had no reasonable cause to entertain the same apprehensions. That an imitation so slight, so momentary, could produce anything more than a mere trivial annoyance, not amounting to legal injury, it is difficult to believe.

It is perhaps unnecessary to say that it is not intended to hold broadly that no legal damage is possible from the unauthorized use of complainant's envelopes or other insignia in connection with telegraphic service, as distinguished from articles of merchandise. The use of a fraudulent badge to attract passengers for coaches was held a ground of liability in *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723. Neither is it intended to hold broadly that such imitation is always justifiable, where damage is not pecuniary. Cases may arise which would require the intervention of a court of equity to protect against repeated annoyances of a serious character; but so far as this bill is framed to protect the public from trivial deception, alarm, and such loss of time as may be expended in opening an advertisement, it is without a precedent and I think without merit. So far as it seeks to protect the complainant's good will, I am of the opinion that it fails to show any past impairment or any reasonable anticipation of future impairment.

The only injuries complained of are those which are to occur in the future, and I am of the opinion that, until the complainant has found by actual experience an instance in which its anticipations are fulfilled, the bill is prematurely brought. In other words, such remote possibilities of injury as are to be inferred from the facts stated in this bill do not constitute such substantial ground as is essential to invoke the intervention of a court of equity.

Demurrer is sustained.

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In re JUDSON et al.

(District Court, S. D. New York. May 12, 1911.)

1. BANKRUPTCY (§ 143\*)—ASSETS—INTEREST IN LIFE INSURANCE POLICY—ASSIGNMENT.

Bankruptcy proceedings having been instituted against a firm consisting of father and son, the father committed suicide prior to adjudication, leaving certain life policies, payable to his wife and children, share and share alike. He left him surviving a wife and three children, one of whom was a son also bankrupt. *Held*, that the son had an interest in such policies prior to his father's death which constituted property he was bound to schedule, and, being transferable by the son as a chose in action, such interest passed to the trustee in bankruptcy under Bankrupt Act July 1, 1893, c. 541, § 70a, subd. 5, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting a trustee with the bankrupt's title to all property which, prior to the filing of the petition, he could by any means have transferred; the policies not being within the proviso of such section relating to insurance policies having a cash surrender value payable to the bankrupt, his estate, or personal representatives.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.\*]

2. BANKRUPTCY (§ 138\*)—INSURANCE POLICIES—INTEREST TO BANKRUPT.

Where a deceased bankrupt had no valuable interest in certain policies of his life not voided by suicide, he having borrowed beyond his interest

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in all of them, the loans being admittedly valid, the bankrupt's executors and not his trustee were entitled to the proceeds of such policies in excess of the liens for loans held by the insurance company.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 138.\*]

**3. BANKRUPTCY (§ 138\*)—INSURANCE—RETURN PREMIUM.**

Where, on a bankrupt's suicide, certain policies of insurance on his life became void, and the insurance companies thereupon returned premiums paid thereon, such money was a refund of the bankrupt's own funds, and belonged to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 138.\*]

In Bankruptcy. In the matter of the bankruptcy proceedings of Alfred M. Judson and others, individually and trading as Judson & Judson. Proceedings to determine the rights to the proceeds of certain policies on the life of Alfred M. Judson, deceased.

An involuntary petition in bankruptcy was filed against the above-named firm and the individual members thereof on December 17, 1910. A subpoena was issued on the petition but no service ever effected. On December 23, 1910, Alfred M. Judson, the senior member of the firm, and his son Charles Y. Judson entered a notice of appearance for themselves and for the copartnership. The only other partner entered his individual appearance on January 6, 1911, and on January 9th following the firm and all its members were duly adjudicated bankrupts.

In the meantime Alfred M. Judson committed suicide on January 4, 1911. On February 9th following a trustee was elected and duly qualified.

Before the filing of the involuntary petition and continuously thereafter until his death the life of Alfred M. Judson was insured as follows:

(a) By policies aggregating \$15,000 payable directly to his wife and children share and share alike. He left him surviving a widow and three children, one of whom is the bankrupt Charles Y. Judson, whose share in said insurance is \$3,766.47.

(b) By a policy for \$10,000 payable to the insured's executors, administrators, or assigns. This policy had no surrender value, and became void by the suicide of the insured bankrupt.

(c) By two policies aggregating \$6,000 payable to the bankrupt, his executors, administrators, or assigns. The surrender value of these policies (at all times above mentioned) was \$63.80, and they were not avoided by suicide, but were subject to loans aggregating \$2,550 and interest.

(d) By a policy for \$10,000 payable to the bankrupt, his executors, administrators, or assigns, which policy was not avoided by suicide, was subject to a loan for \$5,240, and had a surrender value of \$5,030.

The trustee has received from the insurers Charles Y. Judson's share of the policies payable directly to the wife and children, viz., \$3,766.40; also, the net proceeds of the \$6,000 of insurance above mentioned, viz., \$3,462.42; also, the net proceeds of the \$10,000 policy not voided by suicide, namely, \$5,212.72; and from the insurer under the voided \$10,000 policy he obtained a rebate of premiums paid in advance of \$808.50. He thus received all told \$9,483.64, on policies whose aggregate surrender value at the time petition was filed was \$5,093.80, but on which the bankrupt owed more than that amount.

The amounts thus received by the trustee were paid without prejudice, and there are now filed two petitions: (a) One by Charles Y. Judson, claiming as his the \$3,766.47 to which he plainly would have been entitled if at the time of his father's decease a petition in bankruptcy had not been pending against him, and he had not been subsequently adjudicated; and (b) one by the executor of Alfred M. Judson, who claims the difference between the total recovery on the policies covering bankrupt's life and payable to his executor, less the surrender value thereof, or (as alleged) \$9,419.84.

The loans aforesaid were made by the insurers and on the policies as security.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ball & Ludlow, for petitioners.  
Philbin, Beekman & Menken, for trustee.

HOUGH, District Judge (after stating the facts as above). [1] The right of Charles Y. Judson to receive as his own the money asked for is based on the following assertion: He *acquired* the proceeds of the insurance maintained by his father for his wife and children before adjudication and after petition filed. The legal proposition said to justify this assertion is summed up in the syllabus of *Sibley v. Nason*, 22 Am. Bankr. Rep. 712, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520:

"Under the bankruptcy act of 1898 property *acquired* by a bankrupt between the date of the filing of the petition and the adjudication does not pass to the trustee."

See, also, *In re Harris*, 2 Am. Bankr. Rep. 359; *In re Pease*, 4 Am. Bankr. Rep. 578; *In re Elmira Steel Co.*, 5 Am. Bankr. Rep. 487.

It is not necessary to dispute or discuss this doctrine; if it be accepted as correct, the inquiry remains: What property did Charles Y. Judson have prior to petition filed on December 17, 1910?

The papers in this case show no power of revocation nor any reserved right to change beneficiaries existing in the father in respect of the policies made payable to wife and children. It may be inferred, or held as matter of common knowledge, that said policies would have lapsed if the insured had neglected to pay the premiums; but subject only to this contingency the language of *Washington Central Bank v. Hume*, 128 U. S. at page 206, 9 Sup. Ct. at page 44 (32 L. Ed. 370), applies:

"We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts which belong to the beneficiaries to whom they are payable."

Where a policy ran to a wife if she survived her husband, and in the event of her predecease then to him or his personal representatives, it was held that:

"Subject to such contingent, interest in (the husband) the policies and the money which became due under them belonged to (the wife), and it was beyond his power to transfer them to any other person or to surrender them." *In re Holden*, 113 Fed. 143, 51 C. C. A. 99 (reversed on another point 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018).

Again:

"A policy taken out by the insured on his own life and expressed to be for the benefit of his wife is, \* \* \* in the absence of any statutory provision, in the nature of an executory trust for her benefit of which she could not be deprived without her consent." *Boyden v. Massachusetts, etc., Life Ins. Co.*, 153 Mass. 544, 27 N. E. 669.

While in *Garner v. Germania Life Ins. Co.*, 110 N. Y. 269, 18 N. E. 131 (1 L. R. A. 256), it is said that the beneficiaries of a policy of insurance, being the children of the insured, have "a vested interest

in the policy \* \* \* measured and represented by its surrender value."

It follows that at all times during the continuance of these policies, and therefore down to the time petition was filed against him, Charles Y. Judson had a vested interest in the policies which produced the money now petitioned for; and that such interest should be scheduled **was held in** *Re Blalock* (D. C.) 118 Fed. 681, a case where the bankrupt had exactly the same species of interest as had the petitioner here.

Since, therefore, petitioner **had an interest**, and it should have been scheduled, then such interest was property, and the remaining inquiries are how that property is measured and **whether the trustee became vested therewith on adjudication.**

The answer to these inquiries depends upon section 70A, subd. 5, which declares that the trustee shall become vested by operation of law with the title of the bankrupt as of the date of adjudication to all "property which prior to the filing of the petition he could by any means have transferred." The proviso then following and relating to insurance policies only covers policies which have "a cash surrender value payable to (the bankrupt), his estate or personal representatives."

The petitioning bankrupt, however, had no insurance policy; he had an interest in an insurance policy on the life of another person, which is quite a different thing. Nor, so far as the papers submitted disclose, did the policy itself have any cash (or other) surrender value payable to Charles Y. Judson, and indeed there could be none in the very nature of the insurance because he did not own the policy, even though he owned a vested interest therein. Consequently the proviso of section 70 does not apply to him, nor to the kind of property represented by an interest such as his.

Before reaching the query whether petitioner's interest was transferable, there must be noticed a distinction sought to be drawn between the interest of the petitioner and the fruits of that interest, i. e., the moneys paid on the policy. No such distinction is tenable, for one who has an interest in property, even though contingent, owns not only the contingency but everything that may flow therefrom. He that owns a tree owns the fruit thereof. Thus, if a petition were filed against one having goods on warehouse receipt, the warehouseman obtaining insurance for the benefit of his customers, could it be said that, if the goods were destroyed after petition filed and before adjudication, the proceeds of the insurance would not flow to the trustee; it being admitted that a transfer of the warehouse receipt by the alleged bankrupt would have carried to the grantee the proceeds of the warehouseman's insurance? The interest of the petitioner in the policies in question and the proceeds of that interest are in law the same thing unless the statute draws a distinction. There being no surrender value payable to Charles Y. Judson, neither his interest nor the proceeds thereof are within the proviso of the act, and if transferable must pass to his trustee.

On the question of transferability, the view most favorable to the petitioner is to regard his interest in the policy on his father's life as a chose in action.

Under Personal Property Law of New York (Consol. Laws 1909, c. 41) § 41, it is not seen how the assignability or transferability of such an interest can be doubted. Yet it was early held, in *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34, that even at law it was sufficient to grant to the assignee of a chose in action a power coupled with an interest, while in 1851 it was asserted by the Court of Appeals of this state that:

"All choses in action embracing demands which are considered matters of property or estate are now assignable either at law or in equity. Nothing is excluded but mere personal torts which die with the party." *Hoyt v. Thompson*, 5 N. Y. at page 347.

Maryland has a statute certainly no wider than the above-quoted section of the personal property law, and under it *Hewlett v. Home for Incurables*, 74 Md. 354, 24 Atl. 324, 17 L. R. A. 447, is a case exactly like this.

This matter being in bankruptcy, it is enough to establish the assignability of choses in action in equity, and for this see *Peugh v. Porter*, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. Ed. 859. For these reasons the petition of Charles Y. Judson is denied.

[2] The petition of the executor of Alfred M. Judson must be decided in conformity with the doctrine clearly laid down in *Burlingham v. Crouse*, 181 Fed. 479, 104 C. C. A. 227.

The situation of the policies there considered was identical with those of the policies here before the court and not voided by suicide. There, as here, the policies had a certain surrender value to and beyond which the insured had borrowed from the companies themselves.

The doctrine of the case cited is that it is the object of the bankruptcy act "to place in the hands of the trustee for distribution among the creditors every dollar which the bankrupt could collect; therefore, if he has a policy on which money could be collected by surrendering it, he must turn over such policy to the trustee, who may thereupon surrender and collect."

It is true that too great stress can be laid upon the statutory words "cash surrender value," for the Appellate Court for this circuit has said that:

"If a Tontine policy (which has no cash surrender value) have but a day to run after the adjudication in bankruptcy, the trustee should not be deprived of it because it has no technical cash surrender value." *In re Coleman*, 14 Am. Bankr. Rep. 462, 136 Fed. 819, 69 C. C. A. 497.

This case is quite in accord with *Gould v. New York Life Ins. Co.* (D. C.) 132 Fed. at page 930, where "real cash value" is taken as the test even though there be no cash surrender value in the sense in which that phrase is commonly used in insurance matters. And this doctrine has been carried so far that a trustee has been authorized to offer for sale a policy of insurance having no cash surrender value because the bankrupt had some interest therein even though the act of sale (unless some purchaser having an insurable interest came forward)



would destroy the property which it is the object of the bankruptcy act to preserve for some one. In *re Hettling*, 175 Fed. 65, 99 C. C. A. 87. And see *In re White*, 174 Fed. 333, 9 C. C. A. 205, 26 L. R. A. (N. S.) 451.

This line of decisions, however, is not important here, because it is not shown or suggested that the deceased bankrupt had any valuable interest in those policies not voided by suicide; he had borrowed beyond his interest in all of them, and the loans so created are admittedly valid. Therefore, in conformity with *Burlingham v. Crouse*, supra, the trustee can take nothing because the bankrupt could get nothing.

[3] There remains for consideration the \$808.50 recovered by the trustee for unearned premiums on the voided policy. This money was obviously returned because the insured was dead and the policy died with him; it was a species of surrender of the policy. If it was a voluntary payment by the insurer, it was made to the trustee; if it was a payment in pursuance of the contract, the money paid was not insurance money. The object of the statute is to preserve to beneficiaries, legatees, or next of kin moneys which flow from the fulfillment of the insurance contract. This money comes from no such source; it is a refund of the bankrupt's own money, and under no view can it inure to any other person than the trustee who succeeds to the bankrupt's property.

The executor petitioner may therefore take an order for the return of the net proceeds of the unvoided policies payable to the bankrupt's executors, viz., \$8,675.14

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#### In re HURST.

(District Court, N. D. West Virginia.)

#### **BANKRUPTCY (§ 311\*)—FRAUDULENT CONVEYANCES—PARTICIPATION IN PROCEEDS.**

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), invalidating preferences made within four months of the filing of a bankruptcy petition, and giving the trustee a right to sue to set aside fraudulent transfers for the benefit of existing creditors, a grantee guilty of fraud in taking and concealing a conveyance until a few days before the bankruptcy of the grantor, executed in consideration of a specified sum, used by the grantee to discharge a liability of the grantor for which the grantee was surety, may, on the setting aside of the conveyance as fraudulent, participate in the proceeds of a sale of the property as to a debt not involved in the fraudulent conveyance and incurred before its execution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.\*]

In the matter of the bankruptcy of J. Garland Hurst. On petition by the executors of one Tearney, deceased, to revise the decision of the referee. Ruling of referee reversed.

Forest W. Brown and R. T. Barton, for Tearney's executors.

James M. Mason, Jr., for trustees.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

DAYTON, District Judge. Edward Tearney was the father-in-law of Hurst, the bankrupt. It is undisputed that Hurst, for borrowed money and security debts paid, owed Tearney (now deceased) a sum in excess of \$18,000; that after incurring this indebtedness Hurst, on December 4, 1896, by two deeds conveyed to Tearney his farm and his house and lot in Harper's Ferry for \$14,000, which sum was paid by Tearney to the state in discharge of Hurst's liability as sheriff, for which liability Tearney was bound as surety on his official bond; that Tearney did not put these two deeds upon record, but allowed Hurst to remain in possession of the properties, represent them to be his own, have them taxed in his (Hurst's) name, pay such taxes, take out insurance upon the buildings in his own name, and exercise other acts of ownership thereover for a period of nearly 6 years, until he (Hurst) had incurred large indebtedness, Tearney had died, and his executors were called upon to pay another security debt for Hurst, when, on September 12, 1902, these deeds were filed for record by such executors. Hurst was adjudged a voluntary bankrupt 11 days thereafter. By order entered in these bankruptcy proceedings the trustees were authorized and directed to institute suit to set aside these deeds as fraudulent. Such suit was instituted in the Circuit Court of Jefferson county, and, upon appeal taken, the Supreme Court of Appeals of the state (62 W. Va. 84, 57 S. E. 263) held these deeds to be fraudulent and directed the farm and the house and lot to be sold and the proceeds to be paid over to the trustees in bankruptcy. This was done. The Tearney original \$18,000 debt was proven in the bankruptcy proceeding, and dividends aggregating over \$4,000 were paid to the executors thereon. The trustees in bankruptcy have filed their petition, setting forth the facts, and praying that the executors be required to repay to them, for the benefit of Hurst's other creditors, the dividends alleged to have been paid out of the proceeds of sale of the farm and house and lot, because Tearney was the fraudulent grantee thereof of Hurst, the bankrupt. This relief, as prayed for, has been granted by the referee, and this petition has been filed by Tearney's executors to review his action.

The case has been ably argued orally and in briefs filed, and presents a new and novel question, which may be stated thus: Is Tearney's estate, by reason of his fraudulent conduct in taking and concealing the conveyances from Hurst of the farm and house and lot, precluded from participating in the distribution of the proceeds arising from the sale thereof after such conveyances were set aside as fraudulent, as to the \$18,000 debt, in no way involved in the fraudulent conveyances, incurred before they were made, and admitted to be just and unpaid? After long and earnest consideration of this question I am led to the conclusion that its solution will be found in a full understanding of the conflict existing between our state insolvency laws and the federal statutes.

Section 3099 of our Code of 1906 provides:

"Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given, with

intent to delay, hinder, or defraud creditors, purchasers, or other persons, of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

This is substantially the same as the statute of 13 Elizabeth, very generally adopted by the Legislatures of the several states of the Union. Under it, the courts of this state have very generally held that any simple contract creditor may institute, before securing judgment, his suit in equity to set aside such conveyance, and upon proof of the fraud it will be set aside only as to the debt of such creditor assailing it. Other creditors must sue either by original bill or by petition for the same purpose in order to secure its application to their debts, and priority is given creditors in the order of time of the institution of their suits. The fraudulent conveyance always remains valid as between the grantor and grantee therein. On the other hand, the Supreme Court has held in such cases as *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, and *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804, that no such suit can be instituted in a federal court until such creditor has reduced his debt to judgment, except in the case of a trustee in bankruptcy, who is held by the Supreme Court, as to such preferences and conveyances, to have "all the right of a judgment creditor as well as the power specifically conferred by the bankrupt act." *Dudley v. Easton*, 104 U. S. 99, 103, 26 L. Ed. 668; *Wall v. Cox*, 101 Fed. 403, 41 C. C. A. 408. By his appointment in bankruptcy proceeding the trustee is subrogated to the rights of creditors and may sue to avoid such conveyances. In fact, under only such extraordinary circumstances, before the appointment of the trustee, such as set forth in *Horner-Gaylord Co. v. Miller & Bennett* (D. C.) 147 Fed. 295, after bankruptcy proceedings instituted, can creditors institute suits to set aside such conveyances. It must be done by the trustee. *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43; *Trimble v. Woodhead*, 102 U. S. 647, 26 L. Ed. 290; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394. Thus it will be seen that the position of a trustee in bankruptcy, in several material particulars, is superior to that of a creditor, so far as these conveyances are concerned. Why is this? Can there be any doubt that it is so, because Congress designed in the bankruptcy act to prevent any creditor securing those preferences which he could procure under state laws by the mere institution of a suit, and, on the contrary, intended to secure the equal distribution of the property of the bankrupt of every kind among his creditors?

But let us go a step further. Section 3100 of our Code, as amended in 1895, is generally regarded as an act preventing preference of creditors. A careful analysis of it, however, makes very clear the fact that its purpose is to create *class* preferences. It provides, in effect, that all conveyances made by an insolvent debtor shall stand as security for the debts of the creditor secured by it and such others as shall (a) be at the time existing and (b) shall either institute, or

come into and unite in a suit instituted, "to set aside and avoid" the preference. Such suit must be instituted within one year after the conveyance, or if the conveyance is admitted to record within eight months then such suit must be instituted within four months after its recordation. In other words, it simply requires the creditor secured by the conveyance to share his preference with such existing creditors who comply with certain conditions required by the act, and to these, as a class, preference is given over all others.

It is needless to point out that under the bankrupt act no such class preference can be secured. On the contrary, every transfer, conveyance made by, or lien secured against, the bankrupt within four months prior to the institution of the proceeding, by force of the act becomes absolutely null and void, and the property conveyed vests in the trustee, not for the benefit of any class of creditors but for all alike. Under the state laws it is hardly possible to conceive of how the condition here sought to be established could arise. These deeds must have, as to Hurst and Tearney, been upheld as valid; they could only have been set aside as to the debts of creditors assailing them; if the rents, issues, and profits were shown to be sufficient in five years to pay off these assailing debts, they alone would have been subject to their payment, and the estate in fee would have reverted to and remained in Tearney; on the other hand, if these rents were not sufficient to pay these debts, and the corpus had to be sold, out of the proceeds of such sale would have been paid the assailing debts and any residue would have been decreed to Tearney. Not so under the bankruptcy act. It absolutely makes void any conveyance, lien, or preference made within four months of the filing of the bankrupt petition, and in addition vests full power in the trustee to sue, in either federal or state courts, to set aside fraudulent transfers made by the bankrupt prior to these four months. In bringing such suits the trustee is not required to do so "for the benefit of the existing creditors at the time of the recordation of the alleged fraudulent transfer." Nor can he bring it for and on behalf of any one particular creditor, whereby that creditor secures a prior lien over others, nor can he institute such suit at the cost and expense of any particular creditor or creditors. His suit must be for the benefit of all creditors alike and at the cost of the common fund held by him for the benefit of all. And in administering such suit instituted by the bankrupt trustee the state as well as the federal courts must be governed by the requirements of the bankrupt act as being the superior law of the land.

For this reason I think the Supreme Court of Appeals of the state very rightly and properly held these conveyances of Hurst to Tearney void and set them aside "as to the rights of the plaintiff trustees" (representing all creditors equally), and not as to any particular creditor or class of creditors of the bankrupt, thus leaving to the bankruptcy court the administration of the funds arising from the sale of the properties according to the requirements of the bankruptcy act and not those of the state laws. A clear distinction in this regard is to be drawn between an absolute conveyance held to be fraudulent and a mortgage or deed of trust only giving security or lien for debt. If the

bankruptcy court had been confronted with a situation whereby, after the payment of all debts and costs of administration, a surplus remained by reason of the proceeds of sale arising from the fraudulently conveyed properties, it would doubtless have recognized Tearney's right to such surplus as against Hurst; but certainly it would cut out none of the creditors, precedent or subsequent, represented by the trustees, to create such surplus in Tearney's favor.

Thus it will be seen that Tearney in this case may have lost rights in this property which under state laws he might otherwise have had, for possibly few if any of Hurst's creditors would have undertaken to assail his deeds. The whole fund arising from the sale of the properties came into the control of the bankrupt court. How is it to be administered? Will Tearney be allowed to prove and secure pro rata payment of the \$14,000 which he paid for the properties? I think not, for this debt, if it be considered such, arose from fraudulent intent and designs, and courts will leave parties guilty of fraud without remedy. But will a court of bankruptcy go farther, and punish the fraudulent grantee by refusing him the right to participate, with an honest and undisputed debt, in the funds collected by the trustees for the equal benefit of all honest debts of the bankrupt, properly proven? I think not. To do so in effect would be to establish a class preference in favor of Hurst's other creditors as against an honest debt due Tearney. It might be carried further and become a discrimination against an assignee for value of Tearney, in case he had assigned the debt in his lifetime to another. Being now dead, it certainly would be a discrimination against his creditors and legatees. Such preferences and discriminations are just what bankrupt acts are created to prevent and destroy, for "the primary object of the bankrupt law is to secure the equal distribution of the property of the bankrupt of every kind among his creditors." *Trimble v. Woodhead*, 102 U. S. 647, 650, 26 L. Ed. 290.

It therefore follows that the ruling of the referee must be reversed, and the petition filed by the trustees, praying for a return of the dividends paid to the executors of Tearney, must be dismissed.

NOTE.—The very valuable system, adopted by the publishers of the Federal Reporter, of annotating the syllabi of our decisions, has, upon presentation of the proof sheets of the foregoing opinion to me for correction, called my attention to a number of cases digested under the title Bankruptcy in Century Digest, §§ 497-500, and Decennial Digest, § 311. A careful examination of the cases so digested has led me to the conclusion that the principles enunciated by the Supreme Court in *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, are fully in accord with the conclusion reached by me in this case.

## HARRIS v. GALE.

(Circuit Court, E. D. Oklahoma. June 29, 1911.)

No. 1,459.

## INDIANS (§ 15\*)—ALIENATION OF LAND—STATUTES—EFFECT.

Act Cong. May 27, 1908, c. 199, § 9, 35 Stat. 315, providing that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of his land, provided that no conveyance of the interest of any full-blood Indian heir therein shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee, applies to conveyances of interest of heirs of deceased allottees whether such death occurred before or after May 27, 1908.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.\*]

In Equity. Bill by John Harris, guardian, against G. W. Gale. Demurrer sustained, and bill dismissed.

J. F. Bledsoe, J. C. Little, and E. D. Slough, for complainant.  
H. A. Ledbetter and S. T. Bledsoe, for defendant.

CAMPBELL, District Judge. The question for consideration arises upon defendant's demurrer to complainant's bill. By the bill it is sought to have canceled, as a cloud upon the title to certain lands of the complainant's minor ward, a deed made by complainant as guardian of such ward, because it was not approved by the Secretary of the Interior. The ward is a full-blood Choctaw Indian. The land was the allotment of her ancestor, also a full-blood Choctaw Indian, who died in March, 1905, whereupon the ward inherited the land. Subsequent to the passage of the act of Congress approved May 27, 1908 (chapter 199, 35 Stat. 312), on petition of the guardian the county court of Pittsburgh county ordered the interest of the ward in said land sold; whereupon the sale was duly made, pursuant to said order, for a fair consideration, and duly confirmed by the said court, and deed executed accordingly. The only question to be considered is whether or not, in a case where a full-blood allottee of any of the Five Civilized Tribes has died prior to May 27, 1908, his full-blood Indian heirs, may, after said date, sell their interest in the allotted lands inherited from the deceased without the approval of the Secretary of the Interior.

By section 9 of the act of Congress approved May 27, 1908, *supra*, it is provided:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of such deceased allottee."

It is contended by complainant that the above provision applies solely to the sale of such inherited land by full-blood Indian heirs, where the death of the ancestor occurs subsequent to the date of the passage of said act, and that, in all cases where the ancestor had died

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prior to its passage, a sale by a full-blood Indian heir, even though made subsequent to its passage, must be approved by the Secretary of the Interior as provided in section 22 of the act of April 26, 1906, (chapter 1876, 34 Stat. 145), reading as follows:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and, if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

It appears that for about a year following the passage of the said act of May 27, 1908, the Department of the Interior, charged with the administration of governmental affairs relating to the Indians and the execution of the various acts of Congress pertaining thereto, construed said act as contended for by the defendant, and held that all sales by full-blood Indian heirs of lands inherited from deceased allottees should be approved by the court having jurisdiction of the settlement of the estates of the said deceased allottees, regardless of whether they died before or after May 27, 1908, and that the approval of such conveyances by the Secretary of the Interior was not necessary. But on August 17, 1909, the Attorney General, having been asked his advice thereon, rendered an opinion in which he held:

"That the provisions of section 9 of the act of 1908 could not be held to operate retroactively and to remove absolutely all restrictions upon the alienation of the lands of an allottee who died prior to the passage of the act, and that conveyances made since May 27, 1908, by full-blood Indian heirs of land inherited prior to that date, are not valid unless approved by the Secretary of the Interior, even though they shall be approved by a probate court of the state of Oklahoma."

He further held that the date of the death of the allottee governs the question whether or not the act of 1908 applies. Since the rendition of this opinion, the Department of the Interior has been proceeding in conformity therewith. It is conceded by the Attorney General in his opinion that:

"There would seem to be no good reason in making a difference in the alienability of lands inherited by full bloods prior to the passage of the act and that of land so inherited after its passage."

But he finds:

"The intention of Congress to make such difference is so clear that it may not be disregarded."

To my mind it is not clear that such was the intention. The act provides that the *death* of any allottee *shall operate* to remove all restrictions, etc. That is, the fact of the death of an allottee shall from and after the passage of the act have such effect. But while the operation or effect which the act attaches to the fact of the allottee's

death arises with the act and must, therefore, be of future application and prospective rather than retroactive and retrospective, still it by no means follows that the death of the allottee contemplated by the act is of necessity a death occurring subsequent to its passage. It is the *death* of any allottee which the act provides shall thereafter *operate* to remove restrictions. Is it not the operation or effect of the death rather than the death itself which shall exist or arise after the passage of the act? What more authority is there for reading the act as if it said "the death *hereafter* of any allottee," than for reading it as if it said "the death *heretofore* or *hereafter* of any allottee?" In any event, it would still proceed in the language of the statute "shall operate," etc.

Nor does the use of the word "shall" necessarily confine this act to cases where the ancestor's death occurs after its passage, as is seen from a consideration of a number of cases which the diligence of counsel interested in this case has brought to the court's attention. In the case of *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140, 90 N. W. 378, the following statute was involved:

"When any person shall die intestate, seised of an estate of inheritance in any lands, \* \* \* where administration shall not have been granted for five years from the death of the decedent, \* \* \* any heir or grantee of an heir may institute proceedings to obtain a decree of heirship of distribution."

It was held that this statute was applicable to cases where death occurred before the date of its passage. After giving what it considered the reasons for this legislation, the court says:

"We can imagine no other sensible ground upon which the Legislature could have made the distinction in the relief it intended to give or that could have justified the lawmakers in saying this is a wholesome remedy only where its benefits are to accrue to those whose ancestors die five years after the law takes effect, but it is to be withheld from very many otherwise within the benefits we bestow. The reasons are against, rather than in favor of, such an unjust discrimination. \* \* \* Be this as it may, the word 'shall' is often used in remedial statutes in a general sense, including both the past and the future, and should be so considered where a more restricted interpretation is not required. We therefore hold that chapter 157, supra, being intended to give a remedy for existing rights, must be liberally construed, in order to accomplish the beneficial purpose for which it was enacted, and should be applied to rights and obligations that accrued before its enactment, as well as those to accrue thereafter."

In *Maysville & L. R. Co. v. Herrick*, 13 Bush (Ky.) 122, a Kentucky statute was involved which provided that any "married woman who shall come to the commonwealth without her husband, he residing elsewhere, may acquire property, contract and bring and defend actions as an unmarried woman." It was held that this statute applied to married women who came to the state before the statute took effect, as well as to one who came afterwards. The court said:

"Mrs. Herrick is within the description of persons intended to be benefited by this statute, unless she is excluded because she came to Kentucky prior to the adoption of the general statutes. To exclude her only because the statute speaks only of married women 'who shall come,' etc., would be to adhere to the letter of the law, and disregard its spirit. It was intended for



an enabling act for the benefit of a class of persons laboring under legal disabilities and not enjoying the protection incident to the state of marriage, because of the absence, from the commonwealth, of their husbands; persons clearly within this class will not be denied the benefit of a remedial statute by grammatical construction, at the expense of the manifest legislative intent."

In *Plum v. City of Fond du Lac*, 51 Wis. 393, 8 N. W. 283, there was involved a statute of Wisconsin which provided that:

"If any damage shall happen \* \* \* no action shall be maintained thereon, unless, within 90 days after the happening of the event causing such damage, notice in writing \* \* \* shall be given to the mayor," etc.

The court said:

"The learned counsel of the respondent insists that the language in some parts of the section makes this particular provision apply only to cases of future injury. The section begins, 'if any damages shall happen,' and, further on, 'if such damage *shall* happen,' and, in the clause requiring such notice to be given, 'such damage.' This form of the future tense of the verb is very common in statutes which clearly relate to the past as well as the future, and has no particular significance in determining their effect as future or retroactive. By the statute rule of construction the words 'shall have been' include past and future cases (section 4972, Rev. St.), and in *Klaus v. City of Green Bay*, 34 Wis. 628, it was argued by counsel that the words 'who shall have done work' plainly referred to the future and not to the past, and the present Chief Justice said, in his opinion: 'But there is nothing in the language when considered with reference to the object of the law, which requires that they should have this restricted operation. This and similar language is frequently used in statutes which have been held to operate retrospectively, and we have no doubt the Legislature intended that the remedy should apply to a case like this before us.' This language is entirely appropriate in this case."

In *Kelly v. Owen*, 7 Wall. 496, 19 L. Ed. 283, the Supreme Court was considering a statute which provided:

"That any woman who might lawfully be naturalized under existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."

The court said:

"As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married,' or 'who shall be married,' do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her. The construction which would restrict the act to women whose husbands, at the time of marriage, are citizens, would exclude far the greater number, for whose benefit, as we think, the act was intended. Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any application for naturalization on her part; and, if this was the object, there is no reason for the restriction suggested."

This question was before the Supreme Court of this state in *Ma-Harry v. Eatman*, 116 Pac. 935, recently decided and not yet officially

reported, and that court decided that the approval of the Secretary of the Interior was not necessary, saying:

"The only object to be accomplished by requiring the approval of deeds of full-blood heirs by the secretary or the county court was the protection of the living and not the dead. The law in force at the time of the execution of the deed ought to govern, and not that in force at the time of the death of the allottee. This is the construction, as we are advised, placed upon this act by the Department of the Interior for the first year following its passage. What caused a change in the policy or construction of the act by the department, we are not advised; but we know that there was no change in the statute, nor was there any subsequent enactment by Congress authorizing it. We are constrained to hold that after the passage of the act of May 27, 1908, the approval of the Secretary of the Interior was not necessary to the deed of any full-blood heir other than the specific instances in the statutes enumerated, and as the heirs of Davis Lowman, deceased, executing the deed to the plaintiff in error were not in the excepted class, the approval of the county court of McCurtain county of plaintiff's deed in the instant case was sufficient, and said deed so approved conveyed all the title of the heirs of the deceased allottee in said land."

There being no conceivable reason why Congress should have intended to distinguish between conveyances by full-blood heirs of inherited lands, made subsequent to the act of May 27, 1908, where the ancestor died prior to that date, and where the ancestor died subsequent to that date, and the language of the act itself not so clearly evincing such an intention as to preclude the contrary construction, it is decided that by the said act any full-blood Indian heir of any deceased allottee of the Five Civilized Tribes is authorized to convey any interest in the lands inherited by him, from such deceased allottee, upon approval thereof by the court having jurisdiction of the settlement of the estate of such deceased allottee, whether such death occurred before or after May 27, 1908, and the approval of such conveyance by the Secretary of the Interior is not required. Of course, in cases where such heir is a minor, the procedure to secure the necessary order and approval of the court must be as in cases of other minors.

The demurrer must therefore be sustained, and the bill dismissed. It is so ordered.

## THE SATELLITE.

(District Court, D. Massachusetts. April 20, 1910.)

No. 248.

**1. MARITIME LIENS (§ 25\*)—MASSACHUSETTS STATUTE—SUPPLIES—"OTHER ARTICLES."**

In Rev. Laws Mass. c. 198, § 14, which gives a lien on a vessel for money due for "provisions, stores, or other articles furnished for or on account of such vessel" by virtue of a contract, express or implied, with the owner, the words "other articles" include only such articles in the nature of provisions and stores as might be necessities for the vessel in the sense of the maritime law.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20-36; Dec. Dig. § 25.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5070-5102; vol. 8, pp. 7741-7743.

Maritime liens created by state laws, see note to The Electron, 21 C. C. A. 21.]

**2. MARITIME LIENS (§ 25\*)—MASSACHUSETTS STATUTE—NECESSARY SUPPLIES—LIQUORS—"OTHER ARTICLES."**

Liquors supplied to a vessel engaged in making daily fishing excursions from Boston to sea, of about 8 hours' duration, during the summer months, to be dispensed by the owners to passengers ordering the same, are in aid of the business in which the vessel is employed, and may fairly be deemed necessities and within Rev. Laws Mass. c. 198, § 14, giving a lien for provisions, stores, and other articles supplied to a vessel under contract with the owner.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20-36; Dec. Dig. § 25.\*]

**3. MARITIME LIENS (§ 32\*)—MASSACHUSETTS STATUTE—TIME FOR FILING STATEMENT—"DEPART FROM PORT."**

Under Rev. Laws Mass. c. 198, § 15, which provides that the lien on a vessel for supplies, etc., given by the preceding section, shall be dissolved unless a statement of the demand is filed for record within 30 days after the vessel "departs from the port at which she was when the debt was contracted," a vessel which made daily fishing trips from the port of Boston to sea, beyond the limits of the port and the state, on each of such trips "departed from the port" within the meaning of the statute, although she did not touch at any other port, and the lien for any item of debt contracted for supplies was dissolved in 30 days after the next trip made, notwithstanding the fact that a running account was kept for such supplies which was not closed until after she had made her last trip for the season.

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. § 32.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1988, 1989.]

In Admiralty. Suit by Francis M. Doyle against the steamer Satellite. Decree for respondent.

George L. Dillaway, for libellant.

Russell, Moore & Russell, for claimant.

DODGE, District Judge. This libel was filed December 6, 1909. The libellant, who is a liquor dealer in Boston, claims \$1,262.49 as the balance of an account for ale, beer, whisky, and bottled drinks called tonics, furnished by him to the steamer at Boston, on various dates

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in April, May, June, July, August, September, and October, 1909. The earliest date of any of the deliveries is April 17th, and the latest date is October 30, 1909.

The evidence shows that the Satellite was employed by her owner, during the season of 1909, in making daily fishing excursions out of the port of Boston. On these trips she was accustomed to leave Boston at 10 a. m., go out to various fishing grounds some miles from land, and get back to her wharf in Boston at about 6 p. m. On none of these trips did the steamer put into any other place than Boston, nor was there at any time any intention that she should do so. The fishing grounds visited were off Marblehead or off Scituate. They were in every case more than one marine league from the shore of Massachusetts and were outside the territorial limits of the commonwealth as defined by Revised Laws Mass. c. 1, § 3. Tickets for the trip were sold to the persons carried, which also entitled the holders to the use of fishing tackle and bait and to a chowder, all provided by the steamer. An extra charge was made for drinks ordered, which were supplied by the steamer as ordered by the persons carried. The evidence showed that the steamer had carried on the same business during the corresponding months in years previous to 1909; that its supplies of ale, beer, and other liquors had been ordered during those seasons from the libellant; and that there had been a running account with him continuing through each previous season, as in 1909, the credit items being partly cash on account and partly empty bottles or cases returned, and the final balance of the account being settled, in former years, after the boat stopped running at about the end of October. The items of the account now sued on are not disputed, and there is no dispute that the articles were delivered to the vessel by the libellant, or that the balance claimed is due as between the libellant and the owner of the vessel, who knew and approved of what was done.

The Satellite belonged to a citizen of Massachusetts, was registered at Boston, and Boston was her home port. The alleged lien is claimed under Revised Laws Mass. c. 198, § 14. This section provides as follows:

"If by virtue of a contract, express or implied, with the owner of a vessel \* \* \* money is due for \* \* \* provisions, stores, or other articles furnished for or on account of such vessel in this commonwealth, the person to whom such money is due shall have a lien on the vessel, her tackle, apparel and furniture to secure the payment of such debt, and such lien shall be preferred to all others, except that for mariners' wages; and shall continue until the debt is satisfied."

The claimant contends that these provisions give no lien for liquors furnished to a vessel under circumstances as above.

[1] The libellant could acquire no lien according to the general maritime law for supplies of any kind furnished, as these were, at the vessel's home port, and by authority of the owner there residing. His claim must rest wholly upon the state statute. If his contract with the owner of the vessel was maritime in its nature, "the case in admiralty becomes complete if only the conditions of the statute are all complied with, and whether or not these conditions conform in all

details to the general rules of the maritime law." *The Iris*, 100 Fed. 104, 113, 40 C. C. A. 301, 310.

A contract is not necessarily maritime in its nature because it has relation to a vessel, nor because it is a contract for articles to be used on board a vessel. Regard must be had to the character of the articles contracted for. If they were such as can be called necessities for the vessel, the contract is maritime. Looking only at the language of the state statute here in question, a contract for supplies does not meet all its conditions unless the supplies contracted for are within the description "provisions, stores, or other articles." "Other articles" here means articles of the same kind with provisions and stores, and the words quoted are intended, in my opinion, to include only such articles in the nature of provisions and stores as might be necessities for the vessel in the sense of the maritime law. The question is whether the articles furnished by this libellant can be said to fall within that description.

[2] It has been said that necessities include whatever would have been ordered by a prudent owner if present; but, under the circumstances of this case, the application of such a test is not of much assistance. On the question whether liquors to be dispensed to passengers on a vessel may be regarded as necessities, there are conflicting decisions. In *The Long Branch*, 9 Ben. 89, Fed. Cas. No. 8,484, supplies furnished for a restaurant maintained on board a steamboat running from New York to Sandy Hook included liquors to be dispensed from a bar which formed part of the restaurant. It was held that the restaurant and bar were no more than a convenient method of supplying the ordinary wants of the class of passengers transported, and the court declined to make any distinction between the liquors and the other supplies furnished. In *The Mayflower* (D. C.) 39 Fed. 41, a lien was maintained, under provisions of a Pennsylvania statute substantially like those here in question, for liquors furnished to be dispensed to passengers on an excursion boat, plying in the vicinity of Pittsburgh.

On the other hand, in *The Shrewsbury* (D. C.) 69 Fed. 1017, it was held that there was no lien, under similar provisions of an Ohio statute, for liquors furnished to be dispensed at a lunch counter and bar maintained on board a steamer carrying passengers on Lake Erie. It is true that the lunch counter and bar in that case appeared to have been managed, not by the owners themselves, but by other persons under a contract with the owners; but the decision seems to have been that such supplies were not of the kind contemplated by the Ohio Legislature as entitled to the protection of a lien on the boat. And in *The Robert Dollar* (D. C.) 115 Fed. 218, where the question was whether a lien existed under the general maritime law, it was held that there was no lien for liquors furnished for a bar maintained by the owners on a vessel making voyages to Alaska. The court said:

"It is always optional with the owner of a vessel whether to conduct a bar or not, and as it is not essential to the navigation of the vessel, or to the safety and comfort of the passengers, I cannot regard bar supplies as necessities in the sense in which that word is used in the twelfth admiralty rule."

There is no doubt that in determining what supplies are necessities regard must be had to the character of the voyages or the employment in which the vessel is being used, nor that a more inclusive construction of the term has had to be adopted, as the uses to which vessels are put and the purposes for which they are employed have come to be more various in character. If she is employed in carrying passengers, part of the profits from her employment is, of course, obtained by supplying passengers' wants during the voyage. The longer the voyage and the more passengers carried, the greater will be the variety in kind of the articles which must be furnished to her for this purpose. The decision in *The Plymouth Rock*, 13 Blatchf. 505, Fed. Cas. No. 11,237, that supplies for use in the restaurant on board a passenger steamer were necessities, has never been, nor do I see how it could be, questioned. At least in cases like *The Long Branch*, above cited, where the voyages made were only of a few hours duration, it might be possible to say that it is optional with the owner whether to maintain a restaurant on board or not; but the probability that, if he did not, he would get fewer passengers to carry, seems to me to meet this objection. If passengers are carried, whatever may be reasonably supposed to meet the ordinary wants of the class of passengers expected must, I think, be necessities, whether strictly essential to their safety and comfort or not. Judged by this test, I think the liquors furnished by the libelant may fairly be called necessities. *The J. S. Warden* (D. C.) 175 Fed. 314, a recent decision by Judge Hand in the New York Southern district, tends to confirm this conclusion. It was there held that the services of a bartender rendered on board a passenger-carrying vessel are maritime and secured by a lien on the vessel, because they are in aid of the purposes of the voyage, notwithstanding the earlier decisions that the only services on board which confer a lien are such as aid in the navigation or preservation of the ship. I hold, therefore, that the libelant acquired a lien under the state statute.

[3] Such a lien is dissolved under the provisions of the statute unless a statement of the demand is filed for record within 30 days after the vessel departs from the port at which she was when the debt was contracted. Rev. Laws Mass. c. 198, § 15. The last of the daily trips made before the libel was filed was on October 31, 1909, and the last supplies furnished to her by the libelant were furnished October 30, 1909, as has been stated. No statement of the demand was filed for record until December 7, 1909. Between November 1st and December 7th the vessel had not departed from Boston. The respondent contends that she had departed from the port of Boston on each of her daily trips, and that, if the libelant ever had a lien for what he furnished, he has now lost it because no statement was filed within the required time. The libelant's contention is that there was no departure from the port of Boston on the daily trips, and that, even if there had been, the fact that there was a running account with the vessel made it unnecessary to file the required statement until 30 days had elapsed after the departure of the vessel from the port next following the close of the account. The account was closed, according

to him, on November 1st, on which date there were items credited. In view of *The Helen Brown* (D. C.) 28 Fed. 111, and *The William E. Cleary* (D. C.) 114 Fed. 756, both of them decisions in this court, I am obliged to hold that each of the daily trips made by this vessel was a departure from the port of Boston. It is true that the vessel went into no other port while absent from Boston; but there can be no question that her trips took her in each instance beyond the limits of the port of Boston and upon what are called the high seas. The decisions referred to are each put upon the ground that the vessel had been outside the limits of the port, not upon the ground that she had been into some other port. When beyond the outward geographical limits of Boston Harbor and in Massachusetts Bay, as was said by Judge Nelson in *The Helen Brown*, the vessel "was then upon the high seas; she had left her port and had gone to sea. Whether her departure was for a longer or shorter voyage, or with the intention of returning sooner or later, can make no difference."

The fact that there was a running account might be important if the statutory limitation of the time, within which the statement must be filed for record, referred to the time when the cause of action accrued. It refers, however, to the time when the debt was contracted, and I do not see how it can be said that the debt was not contracted until the account was closed. It seems to me that a separate debt was contracted upon each occasion when articles were furnished to the vessel. *Elmore v. The Alida*, Fed. Cas. No. 4,419; *Spencer v. The Alida*, Fed. Cas. No. 13,231; *The Goldenrod*, 153 Fed. 171, 82 C. C. A. 345. If so, the lien for them was dissolved 30 days after the daily trip next following, in the absence of a statement filed for record within that time.

I am obliged to hold that the libellant's lien for what he furnished had been dissolved before his libel was filed, and the libel is therefore to be dismissed.

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#### THE TEASER.

#### THE HARRISBURG.

(District Court, D. Massachusetts. January 27, 1910.)

No. 230.

#### 1. COLLISION (§ 118\*)—SUIT FOR DAMAGES—ANSWER.

In a suit for collision against a tug and her tow, the two are to be regarded for many purposes as one vessel under steam for the navigation of which the tug is responsible, and, where both are charged with fault, an answer by the claimant of the tug is insufficient unless it answers the charges against the tow.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 252; Dec. Dig. § 118.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COLLISION (§ 118\*)—SUIT FOR DAMAGES—ANSWER.

In a suit for collision, an allegation in the libel that libelant's vessel was without fault should be answered either by denial, admission, or an averment of want of knowledge.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 252; Dec. Dig. § 118.\*]

3. ADMIRALTY (§ 65\*)—PLEADING—ANSWER.

Where allegations in an answer in admiralty are unnecessary and not required by the rules of pleading, they are not subject to exception for insufficiency.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 515-518; Dec. Dig. § 65.\*]

4. ADMIRALTY (§ 64\*)—PLEADING—INTERROGATORIES IN LIBEL.

Exceptions to interrogatories propounded in a libel for collision considered.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 511-514; Dec. Dig. § 64.\*]

5. ADMIRALTY (§ 64\*)—PLEADING—INTERROGATORIES IN LIBEL.

That an interrogatory propounded in a libel for collision has been answered in the answer to the libel is not ground for exception to the interrogatory.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 511-514; Dec. Dig. § 64.\*]

6. ADMIRALTY (§ 64\*)—ANSWERS TO INTERROGATORIES.

Answers to interrogatories propounded in a libel held subject to exception for ambiguity and insufficiency.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 511-514; Dec. Dig. § 64.\*]

In Admiralty. Suit by John L. McDonald and others against the steam tug Teaser (Harry W. Law, claimant), and the barge Harrisburg (George Fredericksen, claimant). On exceptions to answers of both claimants. Sustained in part. Also on exceptions by claimant Law to interrogatories propounded in the libel. Overruled. Also on exceptions to answers by claimants to interrogatories. Sustained in part.

Benjamin Thompson, for libelants.

Carver, Wardner & Goodwin, for claimant of Teaser.

Blodgett, Jones & Burnham, for claimant of Harrisburg.

On Exceptions to Answers of Claimants.

DODGE, District Judge. The libel against this tug and barge is in a cause of collision. The collision is alleged to have occurred October 13, 1907.

The libelants allege that their schooner Demozelle was run into and sunk by the barge while in tow of the tug.

They also allege that the tug passed their schooner, going in an opposite direction, but passed too near for safety, yet that the barge, which followed immediately after, would also have passed their schooner without collision had she not failed to follow the tug's course, and, instead of doing so, sheered across the schooner's course.

[1] 1. Article fourth of the libel alleges that the collision and resulting damage were wholly caused by negligence on the part of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



tug and of the barge. It goes on to make eight specifications of the negligence thus charged to have caused the collision. The first is that neither the tug nor barge had a competent lookout, wheelsman, or officer of the deck. The next three specifications are of faults ascribed to the tug. The remaining four specifications are of faults ascribed to the barge.

Law, claimant of the tug, answers the above allegations in the fourth article of his answer by denying the collision to have been caused by any negligence on the tug's part, but without saying anything in answer to the charges of fault on the barge's part. This the libelants except to as insufficient.

A tug and tow are for many important purposes, in cases of this kind, to be regarded as one vessel under steam. And since, under ordinary circumstances, according to our law, the tug is responsible for the combined navigation, the navigation of both is to be regarded as under the orders and direction of the tug until the contrary appears. These well-recognized principles seem to me to require the claimant of the tug to answer the charges of fault made against the barge. I find nothing in the libel indicating that the barge was not under the orders and directions of the tug, nor does anything of the kind appear to be claimed in the answer. It cannot be said, therefore, that for the faults ascribed to the barge the tug can in no event be held. Absence of a proper lookout, etc., on board her, failure on her part to follow the tug, or to avoid sheering toward the schooner or across her course, or failure to slip or cut the hawser, if necessary, cannot now be said to be matters as to which the tug had no control or responsibility, and therefore matters as to which she was not called upon to know, by observation at the time, what the facts were. I consider this exception well taken, and it is sustained.

[2] 2. The last allegation made in the fourth article of the libel is a denial that the collision was caused by any negligence on the schooner's part.

To this the only answer made by the claimant of the tug in the fourth article of his answer is a denial of any fault on the tug's part. The libelants except to this as insufficient.

This exception also I must sustain. I think the libelants are entitled to know whether or not the claimant of the tug admits or denies their allegation that the schooner was without fault. Whether the schooner was in fault or not seems to me a matter presumably within the observation and knowledge of those in charge of the tug at the time of the collision. If so within their knowledge, I think the allegation referred to has not been answered as rule 27 requires. Otherwise, I think a statement that the claimant can neither admit nor deny, for want of knowledge, is called for.

[3] 3. The seventh article of the answer is one which does not purport either to admit or deny specific allegations of the libel. Those articles of the libel, containing allegations which rule 27 requires the claimant to meet by direct admission or denial if he can, are all covered by the first five articles of the answer; or will be so covered if the fourth article of the libel be answered as above directed. In the

sixth article of the answer is set forth the claimant's own account of the collision, after which the seventh makes a general denial that the collision was due to fault of the tug and a general averment that everything possible to be done on board her to avoid it was done. The libelants object that this seventh article is insufficient in not setting forth specifically what was thus done on board the tug.

It does not seem to me that the averments of the article were necessary for the purpose of complying with rule 27 or any other of the admiralty rules. If not required, I do not see how they can be called insufficient. Taken in the connection in which they occur, it may be doubted whether they add anything substantial to the allegations of fact made in the sixth article. But, however this may be, if, as I think, the averment that the tug took every possible precaution was not a required averment, I am unable to sustain the objection that it is not specific enough.

4. The same considerations oblige me to overrule the objection that the seventh article does not, besides denying that fault on the tug's part caused the collision, aver what or whose fault did cause it.

5. Of the exceptions to the answer filed by Fredericksen, claimant of the barge, the only one which I am called upon to consider is the second exception. This objects that the last three lines of the eighth article of the answer are insufficient.

In the lines referred to it is alleged that everything was done on the barge to avoid collision that could have been done, and that the collision was due to the fault of the schooner or of the tug, or of both. The objection made is like that made to the seventh article of the tug's answer, i. e., that it does not specify what was done on the barge, nor in what respect schooner or tug, or both, were to blame.

The eighth article of this answer occupies a position corresponding to that occupied by the seventh article of the tug's answer, in that it follows after articles (first to sixth, inclusive) in which each article of the libel is taken up in order and the allegations thereof admitted or denied—and after an article (seventh) wherein the claimant's account of the facts is set forth affirmatively. I am obliged to regard it, as I regarded the corresponding article of the tug's answer, as containing allegations which are not inserted because required by any express rule or requirement of admiralty pleading; and which, moreover, are entitled to no greater weight than statements of inferences from facts previously pleaded. I do not see how what has thus been inserted can give the libellant the right to demand that it be amplified. This exception is therefore overruled.

#### On Exception of Claimant Law to Interrogatories.

1. The objections made to interrogatories 9, 10, 21, 22, and 24 are, in substance:

That they do not seek information regarding anything alleged in the libel.

That they do not seek information in support of the libelants' case.

That they are irrelevant and immaterial.

Admiralty rule 23 gives the libelants the right to interrogate "touching all and singular the allegations in the libel."

Their libel alleges fault on the part both of the tug and of the barge, causing the collision between their schooner and the barge—which they describe.

They have specified as fault on the part of both, among other things, that neither had any competent lookout, wheelsman, or officer of the deck (article fourth).

[4] I do not see how it can be doubted that interrogatories 9 and 10, which call for the name of the persons on board the tug and the barge, or on watch at the time, the position and station of each person and how long he had occupied it, are interrogatories touching the allegations of the libel.

Nor do I see how it can be doubted that interrogatories 21, 22, and 24, which ask what the first knowledge any such person on the tug had of the collision, how the knowledge was acquired and when, and what orders were thereupon given to the tug's man at the wheel and engineer, are in like manner interrogatories touching the allegations of the libel, in which the tug is further charged with fault in not slowing, stopping, or reversing when danger of collision became imminent.

The exceptions to the five interrogatories above mentioned are therefore overruled, and the claimant Law is required to answer them.

[5] 2. The objection made to interrogatory 25, that it has been partly answered in the answer to the libel, if true, does not seem to me sufficient to excuse the claimant from answering it again as required by the interrogatory. Of course, libelants cannot know, when they annex interrogatories to their libel, what answer will be made to the libel itself.

The remaining objections to this interrogatory are similar to those dealt with above. If the tug, having a barge in tow, passed the schooner starboard to starboard, shortly before a collision between that schooner and the barge, the inquiries how far she was from the schooner in passing, and to what extent the schooner was kept under observation and by whom after passing, are, in my opinion, inquiries touching those allegations in the libel which charge the tug with failure to tow the barge clear of the schooner and with failure to slow, stop, or reverse when danger of collision between those vessels became imminent. This exception is overruled.

3. The objection made to interrogatories 26, 27, and 28 is that they inquire about matters not within the claimant's reach or knowledge, and over which those in charge of the steam tug had no control. The inquiries made in all these interrogatories relate, it is true, to what happened on the barge, which by this claimant's answer to interrogatory 15 appears to have been a considerable distance astern of the tug. I cannot, however, assume it to be impossible that the claimant has any knowledge which will enable him to answer any of the inquiries. The tug appears to have been in charge of and responsible for the barge to such an extent as to forbid me to sustain the exceptions on the grounds stated. If the claimant is without such means of knowledge as enable him to answer, he can so state in his answers. The exceptions to these three interrogatories are overruled.

On Exceptions to Answers of Claimants to Interrogatories.

[6] The exceptions to the answers filed by Law to interrogatories 17, 18, and 23 are sustained. In each answer the language used leaves some doubt whether it is or not a full, distinct, and explicit answer as it stands. All ambiguity can, as it seems to me, be easily removed, and should be removed.

If, in answer to interrogatory 17, the persons named were the only persons in the pilot house during the time inquired about, it should be distinctly so stated. If not, the answer is, of course, incomplete.

In answer to interrogatory 18, there should be a specific mention or description of each light, such as will leave no room for dispute whether they were "regulation towing and side lights" or not.

In answer to interrogatory 23, the Teaser's course and speed "prior to the collision" may or may not have been her course and speed at the time about which inquiry is made. The answer, as it stands, is irresponsive.

As to the exceptions to answers filed by Fredericksen on behalf of the barge, I sustain those to answers 7, 8, 11, 12, 13, 26, and 27, and overrule that to 28.

In answer to interrogatory 7, the claimant should have stated on what voyage the Teaser was bound, if he knew.

In answer to interrogatory 8, having stated, in answer to the previous interrogatory 4, that another barge was concerned in the towage operation, he should have stated whether she was light or loaded, if he knew.

(Both these interrogatories having been answered by the claimant of the Teaser, though this claimant ought to answer them also, it would seem that his answers can hardly be of great importance.)

If there were objections to answering interrogatories 11, 12, and 13, those objections ought to have been raised by exceptions, stating the ground of objection. An objection in place of an answer seems, strictly speaking, to be a refusal to answer. Treating these objections as exceptions, however, I rule that these interrogatories ought to be answered.

This claimant's answer to interrogatory 26 seems to me, though not complete, yet more nearly so than the libelants allow it to be. If the schooner was seen nearly ahead and between the tug and barge, this may well have been the circumstance that caused apprehension. If she was about halfway between tug and barge, the length of the hawser, stated in answer to interrogatory 15, gives her distance from the barge approximately. Who it was that first saw the schooner in a position to cause apprehension, to whom and how he reported the fact, if to any one, and the speed of the Harrisburg at the time, are all matters called for by the interrogatory, and the claimant should answer upon these points.

His answer to interrogatory 27 is obviously insufficient. The inquiry is as to orders given on board the Harrisburg as well as given from the tug.

His answer to interrogatory 28 seems to me sufficient. The interrogatory does not call for the reasons why he has no information enabling him to answer.

## THE MURRELL.

(District Court, D. Massachusetts. March 18, 1910.)

No. 241.

## 1. SHIPPING (§ 209\*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—PLEADING—INTERROGATORIES.

Admiralty rule 23, permitting a libellant to attach to his libel interrogatories to be answered by a respondent, is applicable to proceedings for limitation of liability brought by a vessel owner, and the petitioner in such a proceeding is to be regarded as a libellant within such rule and may attach to his petition interrogatories to be answered by a damage claimant who has brought suit on his claim or by leave of court may be allowed to do so by amending his petition after it has been filed.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-661; Dec. Dig. § 209.\*]

## 2. SHIPPING (§ 209\*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—INTERROGATORIES.

Objections to interrogatories propounded by a libellant under admiralty rule 23, in a proceeding for limitation of liability, considered.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 209.\*]

## 3. SHIPPING (§ 209\*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—PLEADING.

In a proceeding for limitation of liability by the owner of a vessel, he has the burden of proving the necessary allegation of his petition that whatever damage may have resulted from any act or negligence of those in charge of his vessel was without his privity or knowledge, and a denial of such allegation is not necessary; but, if a damage claimant denies it in his answer with the intention of raising an issue of fact and offering evidence thereon, he should specify the acts relied on to establish petitioner's privity or knowledge.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-661; Dec. Dig. § 209.\*]

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

Petition by the Baltimore & Boston Barge Company, as owner of the steam tug *Murrell*, for limitation of liability. On exceptions of Eastern Coal Company, damage claimant, to interrogatories propounded by petitioner. Sustained in part. Also on exceptions to answer of Eastern Coal Company and Austin Gove & Son. Sustained.

Frederic Cunningham, for petitioners.

Blodgett, Jones & Burnham, for Eastern Coal Co. and Austin Gove & Son.

On Exceptions of Eastern Coal Company to Interrogatories Propounded by Petitioner.

DODGE, District Judge. By its petition filed October 27, 1909, the owner of the tug seeks limitation of its liability for the loss of a barge while being towed by the tug. A monition was issued October 28, 1909, returnable February 4, 1910. On January 18, 1910, before the return day, and before any damage claimant had appeared in obedience to the monition, the petitioner filed an amendment to the petition asking to amend it by adding interrogatories to be an-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

swered by the Eastern Coal Company, owner of the barge and named in the petition as a probable damage claimant, in case it should appear in these proceedings as such and answer the petition. The Eastern Coal Company did appear and filed an answer claiming damage for the loss of the barge, on January 26, 1910, and it has since excepted to the interrogatories propounded in the petitioner's amendment of January 18, 1910. [1] The Coal Company contends that a petitioner to limit liability has not the right under his petition to propound interrogatories and require a damage claimant to answer them. It also contends that, if he has such a right, the interrogatories must be annexed to the petition when filed and cannot be added afterward by amendment.

It is true that admiralty rule 23, which permits the libelant to require the defendant to answer on oath interrogatories at the close of the libel, was made before proceedings for limited liability had been authorized by statute or regulated by rules 54-58, inclusive. Rule 23, when made, undoubtedly contemplated only such libels as were then familiar in cases of admiralty jurisdiction; but now that section 4284, Rev. St. (U. S. Comp. St. 1901, p. 2943), has provided that the owner of a vessel is permitted to take appropriate proceedings for the purpose of apportioning the amount limited according to section 4283 among the parties entitled thereto, and rule 54 has since provided that he may take such proceedings by filing a "libel or petition" in the proper District Court, and since there is no doubt that such a libel or petition is to all intents and purposes a libel in admiralty, I see no sufficient reason for holding that rule 23 has no application whatever, and that the petitioner is without the right to interrogate the parties against whom relief is sought.

It is alleged in this petition that the Eastern Coal Company has filed in this court a libel against the petitioner, claiming damages for the loss of the barge and of her cargo. The petitioner might have answered that libel in the ordinary manner, setting up in its answer, if it chose, statutory limitation of liability. At the close of its answer it might have required the Eastern Coal Company to answer interrogatories touching the allegations of the libel or its own defensive allegations by virtue of admiralty rule 32. In the limited liability proceedings commenced by its petition, the same controversy as might thus have been raised is to be heard and determined, with the difference only that the petitioner becomes nominally the libelant and the Coal Company nominally the defendant. The provisions of the admiralty rules regarding interrogatories were intended to assist the court and parties by securing, in advance of the trial, full and explicit statements of their respective claims, and thus presenting more clearly the precise issues to be determined. So far as the petitioner's allegations regarding the sinking of the barge are concerned, its interrogatories will perform the same function if permitted here, and in the same controversy, notwithstanding the change in the nominal position of the parties. My decision must be that the petitioner has the right to interrogate this damage claimant and to be regarded for that purpose as a libelant under admiralty rule 23.

If I am right in this view of the matter, while the petitioner cannot put interrogatories as of course after his libel has been filed, he may nevertheless be allowed to do so by amending his libel. The Edwin Baxter (D. C.) 32 Fed. 296.

[2] The Coal Company, without waiving the objection that it cannot be required to answer the interrogatories at all, objects to certain of them that they are not "touching all and singular the allegations" in the petition, as rule 23 provides, and are immaterial or call for opinions instead of facts, or pry unduly into its defense. These are interrogatories 1-11, 20-26, 27, 28, and 31.

Interrogatories 1-4 ask where the barge was built, whether built for the Coal Company; if so, what she cost; and when and what the company paid for her.

These questions bear so remotely, if at all, upon any of the allegations in the libel, that I do not think they come within the rule.

Interrogatories 5-11 ask if the barge did not leak so that she had to put in during the voyage for repair at Delaware Breakwater; if so, how much she leaked per hour; whether her pumps could keep her clear; how many and what kind of pumps she had; what their condition was at the Breakwater; how long it took to repair them; and the nature and location of the repairs.

I think these questions bear sufficiently on the petitioner's allegations that the barge leaked so that she could not be kept afloat after grounding long enough to get to a place of safety, to bring them within the rule. I think the Coal Company should answer them. It does not object to answering interrogatory 12, which bears upon the same allegations.

Interrogatories 20-26 ask if the barge's master knew beforehand that the tow was going through Pollock Rip Slue (in the channel of which she is alleged to have grounded), whether he knew any reason why she could not go through safely, whether he suggested a different course to the tug, whether he knew that since he was last there a new shoal had formed in the slue and a new buoy had been put there and that the new buoy had disappeared, and how often and when he had been there with a vessel drawing so much water as the barge is alleged to have been drawing when she grounded.

These questions seem to me to bear sufficiently upon the allegations that the grounding of the barge was because she was improperly steered by an incompetent helmsman and failed to follow the barge ahead of her or the tug, or the allegations that she grounded upon an unknown and newly formed obstruction in the channel, to make them proper under the rule, and I think the Coal Company should answer them.

Interrogatories 27 and 28 ask whether the barge grounded within or without the channel as known and used before the accident, and whether the channel referred to had not long been the usual route for vessels of the barge's size and draft.

These questions I think should be answered, for the same reasons.

Interrogatory 31 asks for a statement of all that was done on the barge, to keep her afloat after she had been pulled off from where she grounded

This question seems to me proper for the reasons stated with regard to interrogatories 5-11. I do not see that it requires any improper disclosure of the defense.

The result is that the Coal Company need not answer interrogatories 1-4, inclusive, but is required to answer all the other interrogatories excepted to.

On Exceptions to Answer and Claim of Damages Filed by Eastern Coal Company and Austin Gove & Son.

[3] The petition in this case was filed October 27, 1909. The liability sought to be limited is that to which the petitioner may be found subject by reason of the stranding and sinking of the barge West Virginia on September 29, 1909, while being towed by the Murrell. The Eastern Coal Company, as owner of the barge, and Austin Gove & Son, as owner of the cargo of coal on board her, have filed on January 26, 1910, an answer containing a claim by each for damages for the loss of its property caused, as it alleges, by the tug's negligence. This answer denies generally the following allegations of the petition:

"Eighth. That if any loss, damage or injury from said (collision) was sustained or occasioned by reason of any act, matter, or thing, or negligence by those in charge of said tug, the same was occasioned or incurred without the privity or knowledge of your petitioner or any of its officers."

The petitioner excepts because, having denied this eighth article of the petition, the answer "fails and omits to allege and specify in detail what acts, matter, or thing, or negligence by those in charge of said tug, were occasioned or incurred without the privity or knowledge of your petitioner." With its exceptions it has filed a motion that the damage claimants be ordered "to specify in detail the acts, matter, or thing, or negligence by those in charge of said tug, whereby any loss, damage, or injury from the grounding of the barge was occasioned or incurred with the privity or knowledge of your petitioner or any of its officers."

The answer elsewhere charges the tug with negligence causing the barge to sink, and this charge is made in considerable detail. The acts or omissions specified as constituting such negligence are all of them, however, acts or omissions by persons in charge of the tug who are not alleged to be officers of the petitioner company, nor is it alleged that any such officer was on board the tug. Nor is it alleged that the petitioner put incompetent persons in charge of the tug or otherwise failed in its duty regarding her before the voyage was undertaken.

The petitioner contends that, if the damage claimants mean nothing more by their denial of the eighth article of its petition than that they intend to rely on any insufficiency in its proof of the absence of its own privity or knowledge in connection with any negligence of its employes that may be shown, they ought to have alleged their own ignorance whether there was such privity or knowledge or not, and required it to prove the absence thereof. The denial, it contends, implies an intent to offer affirmative proof of facts tending to establish



its privity or knowledge and gives it the right to know before the trial what the facts intended to be shown are.

The nature of the question as to the absence of privity or knowledge on the petitioner's part is such that I am by no means clear that the damage claimants' denial can be taken to mean anything more than that they dispute generally on information and belief the petitioner's right to limitation, whatever may be the evidence in support of it. The petitioner has the burden of proving the absence of its privity or knowledge, as one of the "facts and circumstances on which limitation of liability is claimed" (Adm. Rule 54), and therefore as a jurisdictional fact without sufficient proof of which, whether denied by an answer or not, the authority of the court to make the decree sought is not established. *Benedict, Admiralty* (3d Ed.) § 580. Whether it has made sufficient proof of the absence of its privity or knowledge may be a question both of law and of fact. But if the damage claimants should offer evidence upon it of facts not specifically pleaded, and it should appear that the petitioner was taken by surprise and had not had a fair opportunity to meet the evidence offered, delay might prove necessary in order to afford it such an opportunity, and delay after the trial had once begun would be undesirable from every point of view. If the damage claimants do not intend to rely upon such affirmative proof of facts not pleaded, they will lose no advantage to which they are entitled if they are required to say so before the trial. I think their position upon the question should be disclosed in the pleadings. If such proof is to be offered, the facts to be proved should be specified. Such seems to have been the character of the pleadings in this respect, in more than one of the reported cases wherein the absence of privity or knowledge has been in dispute. *The Colima* (D. C.) 82 Fed. 665; *In re La Bour-gogne* (D. C.) 117 Fed. 261; *In re Starin* (D. C.) 173 Fed. 721.

Without ruling that the damage claimants' answer is exceptionable under admiralty rule 28, I shall grant the petitioner's motion for specifications of negligence claimed to have been with its privity or knowledge.

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ROSS v. H. S. GEER CO.

(Circuit Court, N. D. New York. July 3, 1911.)

**1. COURTS (§ 292\*) — FEDERAL COURTS — JURISDICTION — TRADE-MARKS AND TRADE-NAMES.**

If acts constituting infringement of a trade-mark and other acts constituting unfair competition in trade are independent, though relating to the same article, each set of acts is a separate cause of action, of the former of which a federal Circuit Court has jurisdiction, but not of the latter, both parties being residents of the same state; but, where the wrongful acts are not distinct, unfair competition as well as infringement of the trade-mark may be enjoined in the same suit.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 834; Dec. Dig. § 292.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 292\*) — FEDERAL COURTS — JURISDICTION — TRADE-MARKS AND TRADE-NAMES.

A federal Circuit Court, in a suit to enjoin infringement of a trade-mark, cannot enjoin future acts amounting to unfair competition only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 292.\*

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Suit by William Ross against the H. S. Geer Company. On motion to modify a preliminary injunction. Motion granted.

Frank C. Curtis, for complainant.

John W. Roberts (John T. Norton, of counsel), for defendant.

RAY, District Judge. The parties are both residents and citizens of the state of New York. The complainant has a valid registered trade-mark, "Trojan," duly registered after 10 years' appropriation and exclusive use. He applied it to an ice cream disher or spoon, dipper or ladle, for accurately measuring the amount of ice cream taken up thereby and so constructed as to remove the contents into another receptacle without adhering to the disher or spoon. It was also so constructed as to be easily and thoroughly cleansed. This spoon or ladle is of simple construction and has a distinctive and an attractive appearance. It was called and known as the "Gem." It was well known in the trade and known as of the complainant's make independent of the trade-mark, "Trojan," used or placed thereon, but especially when that name was found thereon. The complainant used this name "Trojan" on other goods of the same class made and sold by him.

Prior to the commencement of this action, the defendant, or the company who manufactures, the defendant being a dealer only, it is said, commenced manufacturing and selling an ice cream dipper, spoon, disher, or ladle, used for the same purpose, and which, as to the bowl and some of its parts, resembled the spoon of the complainant. This had: "Clipper Disher, Pat. Feb. 7, 05. Geer Mfg. Co., Troy, N. Y."—on the handle. A later one, more nearly resembling complainant's spoon or disher, had on the handle: "New Clip Disher, Pat. Pend. H. S. Geer Co., Troy, N. Y." Later, and before the commencement of this suit, the defendant put out another dipper or ladle approaching very much nearer to the general form, construction, and appearance of the complainant's spoon or disher, and on the handle of this defendant put the words, "Trojan Disher," and on the reverse side, "H. S. Geer Co., Troy, N. Y." Later defendant put on the market an almost exact duplicate of the complainant's spoon or disher with the same marks, and later one that merely omitted the complainant's trade-mark on the dipper or ladle itself, but which when offered for sale and sold had on the box containing it the words: "Trojan Ice Cream Disher. Cup Shape. H. S. Geer Co., Troy, N. Y." And also, "Directions for cleaning Trojan Spoons."

The defendant was clearly infringing the complainant's trade-mark

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Trojan" and was clearly making and selling a substantial duplicate of the complainant's dipper or ladle and taking a substantial part of his trade and injuring him in his business. The defendant's spoon or ladle as finally made and put on the market was such a close imitation or duplication of complainant's spoon or ladle that, regardless of the trade-mark, it would be easily taken and purchased for the spoon or ladle of complainant's make, and confusion did occur. In short, defendant by so making its spoon or ladle in the form and style of complainant's and putting on same the word "Trojan" was clearly passing off its spoon or ladle as that of complainant's make and intending so to do, and in so doing was not only guilty of infringement of the trade-mark, but of unfair competition in trade. The defendant's spoons or ladles were made by one process, and the infringement of the trade-mark and the construction were parts of one act and related to this one article. The single purpose of these acts was to get complainant's trade. The complainant brought suit alleging the facts and characterizing them as both infringement of the trade-mark and unfair competition in trade and applied for a preliminary injunction restraining or enjoining such acts which resulted in a single wrong and damages, viz., the impairment of complainant's trade by passing off on the public the spoon or disher of defendant's make as those of complainant's make. The injunction order was granted and has not, at this time, been appealed from. Thereupon, on the commencement of this action, the defendant wholly ceased to use the complainant's trade-mark, "Trojan," in any place or way. It did not longer place it on the spoon or ladle or on the package containing it or in its advertisements. In short, defendant ceased to infringe the trade-mark, but desires to make or to sell the dippers, spoons, or ladles made in such close imitation of complainant's dippers, spoons, or ladles as above described.

The injunction order contains a clause which enjoins the defendant from making or selling or offering for sale any dipper, spoon, or ladle made in such close imitation of the complainant's dipper, spoon, or ladle as to deceive the public or cause the one to be taken or purchased as the other, etc.; in short, it enjoins the defendant from committing acts in the future in reference to this article which amount to unfair competition in trade with respect thereto, but which acts will not infringe the complainant's trade-mark inasmuch as what defendant proposes to do and desires to do will not use the word "Trojan" in any way. The dipper or spoon defendant desires to make is called "New Troy Cup Disher," instead of "Trojan."

Is the injunction broader and more comprehensive than the facts justify, the power and jurisdiction of this court in the premises considered? As the parties are all citizens of the state of New York, this court has no jurisdiction of an action for unfair competition in trade pure and simple. It does have jurisdiction of an action between these parties for infringement of the trade-mark.

[1] If acts constituting infringement of a trade-mark and other acts constituting unfair competition in trade are separate and independent acts, even though they all relate to the same article of manu-

facture, each set of acts constitutes a separate and a distinct cause of action, of one of which this court has jurisdiction and of the other of which it has no jurisdiction. In such a case this court could not take jurisdiction of the acts amounting to unfair competition only for the reason it has jurisdiction of the other separate and distinct acts amounting to infringement of a trade-mark. But when the wrongful acts are not separate and distinct, but are all done together as one whole, or one act, as was the case here, then the facts may be alleged and proved and the wrongful acts enjoined. The complainant should not be compelled to separate the one act into parts and allege and prove in the Circuit Court of the United States those parts of the act which constitute infringement of the trade-mark and allege and prove in the state court those parts of the same act which amount to unfair competition in trade, thus resorting to two tribunals to right one wrong, the impairment of his business by the diversion of a part thereof by another. The Circuit Court of the United States, having jurisdiction of the parties and of the subject-matter for the purpose of enjoining the infringement of the trade-mark, may also enjoin all wrongful acts done in connection with the infringement which augment and aggregate the wrong. *Globe-Wernicke Co. v. Fred Macey Co.*, 119 Fed. 696, 703, 56 C. C. A. 304; *Siler et al. v. Louisville, etc., R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

In the *Globe-Wernicke Case*, supra, the court, Lurton, Day, and Severens, said:

"The bill was not founded on two separate matters or transactions. The conduct of the appellee complained of consisted of the same acts. The legal qualities of those acts were in some respects different, and the result was that the facts presented a double aspect. It is upon this consideration that such a bill can be sustained against an objection that it is multifarious."

[2] But can the court enjoin the doing of acts in the future not done in connection with and as a part of the infringement of the trade-mark or of an infringement thereof for the reason the same acts substantially have been done heretofore in connection with infringement of the trade-mark? If, having jurisdiction for one purpose, the court may retain and exercise jurisdiction for every purpose, still that purpose or those purposes must be to enjoin or restrain some act or acts done in connection with the acts creating the cause of action which gave the court jurisdiction. But may the court extend its jurisdiction to and over future acts which have no connection with an infringement of the trade-mark? In short, I doubt that in this action the court can enjoin the doing of acts by the defendant in the future which, if done, will amount to unfair competition in trade only. *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 37, 41, 21 Sup. Ct. 7, 45 L. Ed. 60, is a case where the trade-mark was infringed and the shape of bottles and color of labels copied and the whole wrong was righted. In *Saxlehner v. Eisner*, 147 Fed. 189, 77 C. C. A. 417, the last headnote reads:

"That a corporation, and, through it, its officers, agents, and servants, had been enjoined from further infringing complainant's trade-marks, and from conducting a business campaign of unfair competition, did not preclude com-

plainant from obtaining an injunction restraining certain of the officers in their individual capacity from performing such unwarranted acts."

As a condition of modifying the injunction, the defendant offers to give a bond to pay all damages, etc., awarded against it in the action and to keep an account of its sales. There will be an order modifying the injunction so as to permit the defendant to make and sell its ice cream dippers, ladles, or spoons which do not bear the word "Gem" or "Trojan" in any form or combination on the article itself or on the package or packages containing it and which are not advertised as the Trojan spoon, dipper, or ladle, provided it executes and files a bond to complainant in the sum of \$5,000, conditioned to pay all costs and damages awarded against it in case the court finally holds that it has power in this action to enjoin the future making and sale of dippers or spoons of the character mentioned entirely disconnected from any infringement of the trade-mark "Trojan," and also keeps an account of its sales to be rendered to this complainant if directed so to do.

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In re YORK SILK MFG. CO.

(District Court, M. D. Pennsylvania. July 8, 1911.)

No. 1,719.

1. **BANKRUPTCY (§ 353\*)—DISTRIBUTION—ALLOWANCE OF CLAIMS—STATUTES.**  
Distribution of the bankrupt's estate is controlled by the provisions of the act of Congress, and its interpretation is ultimately a matter for federal determination.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541-544; Dec. Dig. § 353.\*]

2. **BANKRUPTCY (§ 346\*)—CLAIMS AGAINST ESTATE—TAXES—BONUS.**

A bonus exacted by a state from a corporation for the privilege of increasing its capital stock is not a tax entitled as such to priority under Bankr. Act July 1, 1898, c. 541, § 64 (a), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), but a debt based on a contractual relationship, provable and entitled to a pro rata distribution with general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.\*]

3. **BANKRUPTCY (§ 346\*)—ALLOWANCE OF CLAIMS—PRIORITIES—CLAIMS OF COMMONWEALTH—TAX ON VALUE OF CORPORATE LOANS.**

The obligation of a Pennsylvania corporation, through its treasurer, to collect from the Pennsylvania holders of its obligations a tax of four mills by deducting it from the interest due them, is not a tax on the corporation, and an account settled therefore by the state officers is not entitled to a priority in the distribution under the bankrupt law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.\*]

4. **BANKRUPTCY (§ 346\*)—CLAIMS—PRIORITIES—DEBTS OWING THE COMMONWEALTH—"PENALTY"—"TAX."**

Penalties imposed on a corporation for failure to return increase of capital stock, file reports, etc., are not taxes within the meaning of any law, and are not entitled to priority under the bankruptcy act, and under Bankr. Act July 1, 1898, c. 541, § 57 (j), 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), cannot be allowed except for the amount of the pecuniary loss

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sustained by the act or transaction out of which the penalty arose. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority, and the penalties so imposed on the corporation are different from penalties for nonpayment of taxes, the latter being exacted in lieu of interest, while those on the corporation are by way of punishment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5272-5276; vol. 8, pp. 7750, 6867-6886, 7813.]

#### 5. BANKRUPTCY (§ 191\*)—CLAIMS BY COMMONWEALTH—LIENS.

Claims of the commonwealth founded on settlements by state officials of Pennsylvania, made under Act March 30, 1811 (5 Smith's Laws, p. 228), and April 16, 1827 (Laws 1826-27, p. 471), against a bankrupt corporation after the adjudication in bankruptcy, were too late to acquire liens on the bankrupt property; the statutes of the state relating to such settlements providing that they shall be a lien from the date of the settlement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286-295; Dec. Dig. § 191.\*]

In the matter of the York Silk Manufacturing Company, bankrupt. Heard on exceptions to report of referee disallowing claims of the Commonwealth. Order affirmed.

The following is the referee's report:

#### Claims of Commonwealth.

On October 20, 1910, the Auditor General filed a claim for \$18,806.67. The proof is made up as follows:

- |   |             |
|---|-------------|
| (1) Bonus on increase of capital stock, August 1st, 1903, ⅓ of 1 per cent. on \$3,200.00.....   | \$10,666.67 |
| Settled and entered by Auditor General and approved by State Treasurer October 19, 1910. Interest claimed from June 25, 1904, at rate of 6 per cent. per annum.   |             |
| (2) Penalty for neglect to file a sworn return of actual increase of capital stock from \$1,800,000 to \$5,000,000....  | 5,000.00    |
| Settled and entered by Auditor General and approved by State Treasurer, October 18, 1910. Interest claimed from November 18, 1910, at rate of 6 per cent. per annum.  |             |
| (3) Tax of 4 mills as estimated and appraised value of corporate loans.....   | 2,400.00    |
| Penalty for failure to make report, 10 per cent.....  | 240.00      |
| Settled and entered by Auditor General and approved by State Treasurer October 18, 1910. Interest claimed at rate of 12% per annum from December 18, 1910.  |             |
| (4) Penalty for failure to file capital stock reports for the years 1903, 1904, 1905, 1906, 1907, 1908, and 1909.....   | 500.00      |
| Settled and entered by Auditor General and approved by Treasurer October 19, 1910. Interest claimed from November 19, 1910, at rate of 6 per cent. per annum. Attorney's commissions of 5 per cent. are claimed. Certificates of settlements covering the above were filed as liens in York, Berks, and Cumberland counties, Pa. and writs of scire facias issued thereon on or about October 20th, 1910. |             |

#### Statement of Facts.

(1) On September 6, 1910, the York Silk Manufacturing Company was adjudged a bankrupt by the District Court of the United States for the Middle District of Pennsylvania.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(2) The bankrupt corporation was incorporated in Pennsylvania August 24, 1900, with authorized capital of \$200,000, for the purpose of manufacturing silk and textile fabrics. The authorized capital was increased February 2, 1902, to \$1,800,000, which was actually issued and the bonus paid.

(3) On August 23, 1903, a further increase was authorized to \$5,000,000. No return of the actual increase of \$3,200,000 was made, nor was the bonus on it paid. The actual increase appears to have been made May 31, 1904; the corporation engaged in the business for which it was incorporated having mills in York, Berks, and Cumberland counties, in the state of Pennsylvania, and Middlesex county, in the state of Connecticut.

(4) On September 23, 1910, George E. Neff, Esq., was elected trustee in bankruptcy, and thereafter entered upon the discharge of his duties as such.

(5) On October 7, 1910, the trustee filed a petition asking for an order to sell at private sale to A. D. Walker, Richard L. Austin, James Crosby Brown, the real estate of the bankrupt and certain personal property.

(6) On October 21, 1910, the referee granted an order authorizing the trustee to sell at private sale all the real estate of the bankrupt to the parties named for the sum of \$276,000 freed and discharged from all mortgages, judgment liens, or incumbrances whatsoever, and certain personal property of the bankrupt for the sum of \$15,000, freed and discharged from all liens and incumbrances whatsoever. This order was afterwards ratified and affirmed by the order of Hon. R. W. Archbald, district judge of said court.

(7) On September 1, 1908, a mortgage for \$750,000 to secure a bond issue for like amount was entered of record against all the real estate of the bankrupt. Under this mortgage bonds to the amount of \$682,500 were issued.

(8) The trustee, in addition to the said items of \$276,000 and \$15,000, received the following sums of money: Cash in bank, \$7,752.65; cash, \$54.57; rent, \$2,694.13; rent, \$208.33; rent, \$1,250. The account of the trustee showed receipts for \$303,059.68, and the balance on his account is \$288,144.10.

(9) The trustee paid the borough, county, school, and building taxes on the Fleetwood Mill, situate in Berks county, the high school, tuition, and school taxes on the Middletown mill, water rents at Middletown mill, and other real estate taxes due.

(10) The bondholders will receive about 35 or 40 per cent. on their bonds in the distribution.

#### Conclusions of Law.

(1) The commonwealth claims priority out of the real estate and personal estate of the bankrupt for all the items embraced in the claim. The state's contention to priority appears to be based upon three grounds: (1) That the said bonus, corporate loans, and penalties are taxes within the purview of the bankruptcy act; (2) that the fiscal officers of the commonwealth having proceeded in accordance with the provisions of the Pennsylvania acts of March 30, 1811 (5 Smith's Laws, p. 228) and April 16, 1827 (Laws 1826-27, p. 471), liens were acquired prior to the sale of the property of the bankrupt; and (3) that according to sections 31 and 32 of the Pennsylvania act of June 1, 1889 (P. L. 420), relating to taxes, it is entitled to a preference in this distribution.

Section 64 (a) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) provides as follows: "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors and upon filing the receipts of the proper public officers of such payment, he shall be credited with the amount thereof, and in case any question as to the amount or legality of any such tax, the same shall be heard and determined by the court."

The first and most important question is whether the bonus claimed here is a tax within the meaning of the federal or state statutes.

The bankrupt act of 1867 (Act March 2, 1867, c. 176, § 28, 14 Stat. 531), *inter alia*, gave priority to "all debts due to the state, in which the proceedings in bankruptcy are pending and all taxes and assessments made under the laws of such state."

The present act of 1898 is quite different. Section 64 relating to priority claims omits "all debts due the state," as well as "assessments." It is nar-

rowed down so far as the state is concerned to "all taxes legally due and owing by the bankrupt."

It is urged that the case of *State of New Jersey v. Anderson*, 17 Am. Bankr. Rep. 63, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, is directly applicable to the facts of this case. There the tax in question was an annual license fee or franchise tax required by the statute of New Jersey to be paid by corporations upon their outstanding capital stock for the privilege of the existence and continued right to exercise their franchise. This is the same as our capital stock tax which has invariably been allowed priority in this court. The bankrupt, however, is excepted from the payment of this tax by the Pennsylvania statute, because it is a manufacturing corporation.

[1] This distribution is controlled by the provisions of the acts of Congress relating to bankruptcy, and the interpretation of a federal statute is ultimately a matter for federal determination.

In the case of the *State of New Jersey v. Anderson*, 17 Am. Bankr. Rep. 63, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, defines a tax as follows: "Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government. We think this exaction is of that character. It is required to be paid by the corporation after organization in invitum. The amount is fixed by the statute, to be paid on the outstanding capital stock of the corporation each year and capable of being enforced by action against the will of the taxpayer."

The bonus here is not a tax on capital stock as in the above case. It is a sum exacted by the state for the privilege of increasing its capital stock. It is not a tax, but a debt based upon a contractual relationship. Elements of a tax are that it be levied annually and required to be paid in invitum. A bonus imports a consideration.

In *Commonwealth v. Erie & Western Transportation Co.*, 107 Pa. 112, the Supreme Court of this state held that a bonus was not a tax. Also see *Commonwealth v. Bessemer*, 207 Pa. 302, 56 Atl. 871; *Commonwealth v. Hoop Co.*, 226 Pa. 6, 74 Atl. 617. The superior court in *Commonwealth v. Bailey, Banks & Biddle Co.*, 20 Pa. Super. Ct. 210, also held that a bonus is not a tax.

[2] The same decision is reached in *Balto. & Ohio R. R. v. Maryland*, 21 Wall. 456, 22 L. Ed. 678. It will thus be seen that it is authoritatively held that a bonus is not a tax. I therefore am obliged to conclude that the claim of the commonwealth for bonus is not entitled to priority in this distribution, but is a provable debt against the bankrupt, entitled to a pro rata distribution with other general creditors.

The next question is whether the corporate loans are a tax within the meaning of the bankruptcy act or a state statute.

[3] The obligation of a Pennsylvania corporation through its treasurer to collect from the Pennsylvania holders of its obligations a tax of four mills by deducting it from the interest due them is not a tax on the corporation, and an account settled therefore by the state officers is not entitled to a priority in the distribution under the bankrupt law. In *re Wyoming Valley Ice Co.* (D. C.) 16 Am. Bankr. Rep. 594, 145 Fed. 267.

The Supreme Court of Pennsylvania in *Commonwealth v. Railroad Co.*, 186 Pa. 246, 40 Atl. 492, has said, in regard to this obligation: "The tax is not in any sense or in any degree a tax on a corporation or its property, but on the individual citizen of the state who holds the bonds. The corporation is chargeable with it only as collector, and by reason of the default of the duty to collect." In *Darlington v. Marshall Kennedy Milling Co.*, 56 Pittsb. Leg. J. 201, the court ordered payment of the taxes on corporate loans to be paid in advance of a mortgage under sections 31 and 32 of the act of June 1, 1889. The point, however, was not raised in that case, and the distribution was under an execution, and the provisions of the bankruptcy law were not involved. If we could conclude that the taxes due on the corporate loans were taxes within the meaning of the act of June 1, 1889, we reach a point of conflict between the state statute and the federal law in which the latter provides that the taxes to have priority must be "legally due and owing by the bankrupt," and it necessarily follows that the provisions of the federal statute must prevail over the state law.

The case of *In re Wyoming Valley Ice Company* (D. C.) 16 Am. Bankr. Rep. 594, 145 Fed. 267, is a ruling of Judge Archbald of this court, and is conclu-



sive upon the referee. It therefore follows that this tax on corporate loans is not entitled to priority in this distribution, but is allowable as a general claim in this state.

[4] Coming next is the question of penalties. It is perfectly manifest that they are not taxes within the meaning of any law. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority. These penalties are quite different from penalties imposed for nonpayment of taxes. The latter are exacted in lieu of interest. The penalties under consideration are punishments for failure to perform certain acts, and the penalties were not imposed until after the adjudication in bankruptcy.

Section 57 (j) of the bankruptcy act provides as follows: "Debts owing to the United States, a state, a county, a district or a municipality as a penalty or forfeiture shall not be allowed except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." It will thus be seen that under these circumstances penalties are not even provable in bankruptcy, and can only be allowed for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose with reasonable and actual cost occasioned thereby, and such interest as may have accrued thereon according to law. The penalties are in no sense a fixed liability absolutely owing at the time of the filing the petition in bankruptcy, which is a necessary requisite to a provable claim as provided by section 63 of the bankruptcy act. Also see *In re Southern Steel Co.* (D. C.) 25 Am. Bankr. Rep. 358, 183 Fed. 498. These penalties must therefore be disallowed entirely, but without prejudice to the state to make a claim as provided for in the above section.

[5] The State Treasurer and Auditor General proceeded under the acts of 1811 and 1827, and made settlements against the bankrupt October 18 and 19, 1910, which was after the adjudication in bankruptcy, and on the 20th of October, 1910, entered liens in York, Adams, and Berks counties, Pa., whereon scire facias were issued. This was too late to acquire liens on the bankrupt property. The date of cleavage is the date of adjudication.

It should be observed that an adjudication in bankruptcy acts is personam and in rem. The property of the bankrupt at once vests in the trustee subsequently to be appointed. The rights of all parties are fixed by the adjudication. An adjudication is in effect a caveat, attachment, and injunction. When in any settlement made agreeable to the Act of 1811 a balance is found to be due to the commonwealth, this balance, together with interest from the expiration of the three months after the date of the settlement, "shall be deemed and adjudged to be a lien from the date of settlement of such account upon all the real estate of the person or persons indebted and on his or their securities throughout this commonwealth." The date of the lien here mentioned is the date of settlement. It is manifest that a settlement made after an adjudication in bankruptcy creates no valid lien. In fact, under section 67 of the bankrupt act, liens obtained against a person who is insolvent at any time within four months of filing of the petition in bankruptcy are void. Even if the settlement had been made prior to the adjudication in bankruptcy, they would not be conclusive in this court under the case of the State of New Jersey v. Anderson, 17 Am. Bankr. Rep. 63, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284. Under the act of 1827, the transmission by the Auditor General to the prothonotaries of the respective counties of the certified copies of the balance due the commonwealth, and the entry of record of such copies in the office of the prothonotary, are necessary in order to maintain a lien of such balances as against other lien creditors of the debtor. *William Wilson & Son v. Silversmith Co.'s Estate*, 150 Pa. 285, 24 Atl. 636. From this it will be seen that the mortgage in this case would have priority over the settlements. In the case just cited the Supreme Court says: "Being still in force, therefore, we are obliged to hold that their provisions must be complied with in order to enforce the collection of the claims of the commonwealth, and when they are in hostility to the claims of lien creditors in the county where the delinquent debtor resides. We do not see how we could

hold otherwise, unless we are prepared to hold that the lien given to the commonwealth is a specific lien upon each item of personal property in question, so as to follow it in whatever hands it may be found." We could not possibly hold such a doctrine as it would affect all the business carried on by corporation and limited partnerships with such an extremely oppressive and onerous liability as to destroy it altogether. We have never held such a liability by way of lien as this, and it would be entirely hostile to the spirit of our laws and the free interchange of commodities among our citizens. In this case the executions had been issued and levies made on personal property.

In *Gladden v. Chapman*, 188 Pa. 586, 41 Atl. 735, it is again held that if the commonwealth does not file certified copies of the settlements in the prothonotary's office, as required by the act of 1827, it is postponed to other lien creditors. The acts of June 7, 1879 (P. L. 112), and June 1, 1889 (P. L. 420), are considered in this case.

In *re Clark Coal & Coke Co.* (D. C.) 22 Am. Bankr. Rep. 843, 173 Fed. 658, which was a distribution in bankruptcy proceedings, the claim of the state for capital stock tax was postponed to other liens. The referee there held that "the lien of the state for the taxes claimed is to be paid as of the dates of the entry in the prothonotary's office."

I therefore hold that the claim of the state cannot participate in the distribution of the real estate fund, and the same is accordingly awarded to the bondholders under the mortgage.

This leaves for consideration only the personal fund which is much less than the amount of the claims of the state. The act of April 14, 1905 (P. L. 166), under which the \$500 penalty is claimed, provides that the penalty imposed shall be a lien from the date of settlement by the Auditor General and State Treasurer. The penalty of \$5,000 is claimed under act Feb. 9, 1901 (P. L. 3) § 3. This "shall be collected on account settled by the Auditor General and State Treasurer." It will be seen that there can be no lien under these acts, except from the date of settlement, and, as settlement was made after the adjudication in bankruptcy, it was then too late to originate any lien against the assets of the bankrupt corporation. And as already stated penalties are not provable. Bankr. Act, § 57 (j).

Sections 31 and 32 of the Pennsylvania act of June 4, 1889 (P. L. 420), provided as follows: "That all taxes imposed by this act shall be a lien upon the franchise and property both real and personal. \* \* \* Whenever the franchise and property of a corporation, company, association, joint-stock association or limited partnership shall be sold at judicial sale all taxes due the commonwealth shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage, or other claims which shall be entered of record or become a lien after the passage of this act. \* \* \* Nor shall any judicial sale be valid or a distribution of the proceeds thereof be made until all taxes due the commonwealth have been fully paid into the State Treasury, and the certificate of the Auditor General, State Treasurer, and Attorney General to this effect, filed in the proper court with the proceedings \* \* \* for sale." Section 31 refers to "all taxes imposed by this act." The act has no application to a bonus. In fact, section 33 expressly says "that nothing in this act contained shall be taken or construed to alter or repeal existing laws imposing taxes upon collateral inheritances or imposing any bonus," etc. Nor is a bonus a tax, as already stated. Referring to corporate loans, it is not a tax "legally due and owing by the bankrupt." Section 64 (a) of the bankruptcy act. In *re Wyoming Valley Ice Co.* (D. C.) 16 Am. Bankr. Rep. 594, 145 Fed. 267. It is not a tax on the corporation or its property, but on the individual citizen of the state who holds the bonds. Section 32 is not pertinent to proceedings under the bankruptcy act. In the last analysis in order that the state may obtain priority its claims must be for taxes legally due and owing by the bankrupt within the meaning of the bankruptcy act. The bonus and taxes on corporate loans are not taxes legally due and owing by the bankrupt.

The penalties claimed of \$500 and \$5,000 cannot be considered as taxes, under the act of 1889 or of the federal statute. The penalties are not even provable in bankruptcy.

It is therefore ordered as follows:

- (1) All the claims of the commonwealth filed are denied participation in the distribution of the real estate fund.
- (2) All the claims of the state are disallowed as priority claim against the personal estate.
- (3) The claims for bonus, interest, and amount due on corporate loans, and interest, attorney's commissions, etc., are allowed as general claims against the bankrupt estate.
- (4) The items relating to penalties of \$500 and \$5,000 are disallowed, but without prejudice to the state to present a claim under the provisions of section 57 (j) of the bankruptcy act.

Niles & Neff, for the bankrupt.

A. V. Bower, John F. Kell, and C. P. Miller, for the Commonwealth of Pennsylvania.

WITMER, District Judge. After hearing the argument of counsel, reading and considering the opinion filed by J. Edward Vander-sloot, Esq., referee, the exceptions thereto and the record in this case, it is, upon consideration, adjudged and decreed that the findings of the referee in favor of the trustee and general creditors disallowing the claim of the commonwealth, as preferred, and in rejecting the claim for penalties, are in accordance with the law, and the referee's conclusions and order are affirmed.

The well-considered opinion of the learned referee is adopted as the opinion, conclusions, and order of the court.

#### UNITED STATES v. TUCKER.

(District Court, S. D. Ohio, E. D. April 8, 1911.)

##### 1. COMMERCE (§ 40\*)—SUBJECTS OF REGULATION—SALES.

The sale and shipment from Ohio to Washington, D. C., of a bottle of medicine containing cocaine without a label indicating its presence, the seller knowing when he solicited the order that the transaction, if completed, would necessitate interstate transportation, was interstate commerce, whether the sale was made before or after shipment, and is within Pure Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.\*]

##### 2. COMMERCE (§ 14½,\* New, vol. 12, Key No. Series)—SUBJECTS OF REGULATION—FORM OF NEGOTIATIONS.

Commerce being intercourse, it is unimportant, in determining whether a transaction was interstate commerce, whether the negotiations were conducted by mail, by traveling salesmen, by telegraph, or by telephone.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1287-1298; vol. 8, pp. 7606, 7607.]

##### 3. COMMERCE (§ 14½,\* New, vol. 12, Key No. Series)—"INTERSTATE COMMERCE."

Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes importation from one such division to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

another, whether it be of goods, persons, or information, is a transaction of interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

Nathan Tucker was convicted of violating the pure food and drugs act, and moves for a new trial. Overruled.

Sherman T. McPherson, U. S. Dist. Atty.

Vorys, Sater, Seymour & Pease, for defendant.

SATER, District Judge. The defendant delivered at Mt. Gilead, Ohio, and shipped from that place to one Henson (whose real name is Morgan), residing at Washington, D. C., a bottle of medicine containing cocaine. The bottle bore no label or brand indicating the presence of that drug in the medicine. The jury having found him guilty of violating the pure food and drugs act of June 30, 1906, 34 Stat. 768, c. 3915 (U. S. Comp. St. Supp. 1909, p. 1187), he moves to set aside the verdict on the ground that he was engaged in intrastate, and not in interstate, commerce.

In answer to an inquiry from Henson, the defendant mailed him an examination or symptom blank and what is manifestly a previously prepared stock letter, stating that under a separate cover were forwarded to him circulars fully explaining the defendant's system of relief and cure for asthma, hay fever, and nasal catarrh, and naming the cost of treatment. Henson was requested to fill out the blank and return it with full payment in advance, on receipt of which a treatment would be sent by express without delay. Henson filled out the symptom blank and returned it with a postal order for the sum named. Thereupon the defendant deposited in the mail at Mt. Gilead a bottle containing two ounces of the medicine, addressed to Henson, and also shipped to him by express an atomizer, both of which were received by Henson at Washington. Later a second bottle of medicine was sent in the same manner as the first. Henson made no suggestion and gave no direction as to the mode of transporting any of the medicine.

[1] Was the transaction in which the defendant engaged interstate commerce? His contention is that the sale and delivery were completed in Ohio, when the medicine was deposited in the mail, and that the title thereto then and there passed to the purchaser, free from any interest of the defendant therein, that the delivery to the postal department for transmission to Henson was a delivery to him, and that consequently the transaction was wholly intrastate and governed by the Ohio law of sales (99 Ohio Laws, pp. 413-425; sections 8381-8455, Ohio General Code). He claims that the fact that the sale was made with the intent that the medicine should be transported from Ohio to the District of Columbia after the sale and delivery were fully completed did not impart an interstate character to the transaction, because the agent by whom the transportation was effected—the United States mail—was the agent of the purchaser and not of himself. To sustain his contention he relies on *State v. Mullin*, 78 Ohio

St. 358, 85 N. E. 556, 18 L. R. A. (N. S.) 609, 125 Am. St. Rep. 710. In that case a resident of Harrison county gave an order by mail to a resident of Jefferson county for a case of beer to be forwarded to the purchaser by express, marked "C. O. D." The beer was sent, received, and paid for. It was held that the express company was the agent of the purchaser to receive the goods from the seller and the agent of the seller to receive their price from the purchaser, and that upon delivery to the carrier the title to the goods passed to the purchaser, although he was not entitled to their actual possession until he paid or tendered the purchase price. It was further held that the place of both the sale and delivery was the place of the seller's residence, and that the sale was completed when the seller delivered the goods to the carrier. The transaction was wholly intrastate, and the goods were shipped under instructions given by the purchaser. The facts of that case and the law applicable thereto readily distinguish it from the case at bar.

The second section of the pure food and drugs act is limited in its application to interstate and foreign commerce. The prohibition therein contained runs against the introduction of misbranded drugs into any state, or territory, or the District of Columbia, from any other part of the United States, or from any foreign country. The offense with which the defendant is charged in the indictment is the delivery of such a drug at Mt. Gilead, Ohio, for shipment, and its actual shipment from that place, to a point outside the state, an offense which, if established, is punishable under the provisions of the act.

[2] That the negotiations were conducted by mail is unimportant. Commerce is intercourse (*Gibbons v. Ogden*, 9 Wheat. 189, 193, 6 L. Ed. 23), and for the purposes of commercial intercourse parties may avail themselves of the mails as well as of traveling salesmen (*Robbins v. Shelby Taxing District*, 120 U. S. 489, 495, 7 Sup. Ct. 592, 30 L. Ed. 694), or of the telegraph (*Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708), or the telephone (*Central Union Telephone Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Judson on Interstate Commerce*, § 6).

Neither a sale nor the place of sale and delivery is alone the test of interstate commerce, nor does transportation, although an adjunct essential to commerce, constitute a transaction interstate commerce. A sale, the parties to which are from different states, when such sale necessarily involves the transportation of goods, is a transaction of interstate commerce, whether the contract of sale be made in the one state or the other, or made before or after shipment.

[3] Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state, or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. *U. S. v. Swift & Co.* (C. C.) 122 Fed. 529, 531; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 17, 84 C. C. A. 167; *Hopkins v. U. S.*, 171 U. S. 578, 597, 19 Sup. Ct. 40, 43 L. Ed. 290;

*Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694; *Caldwell v. North Carolina*, 187 U. S. 622, 629, 23 Sup. Ct. 229, 47 L. Ed. 336; 7 Cyc. 416; *Globe Elevator Co. v. Andrew (C. C.)* 144 Fed. 871, 882; *In re Charge to Grand Jury (D. C.)* 151 Fed. 834, 839. When the state courts have been called upon to express themselves, their utterances have been in harmony with the foregoing. *Cook v. Rome Brick Co.*, 98 Ala. 413, 12 South. 918; *Culberson v. American Trust & Banking Co.*, 107 Ala. 464, 19 South. 34; *Loverin & Browne Co. v. Travis*, 135 Wis. 322, 331, 115 N. W. 829, 832. In the last-named case it is said that:

"It cannot now be doubted that 'commerce,' in the federal Constitution, comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities. Nor can it be doubted that the solicitation of the purchaser by the seller, the contract of purchase and sale, and the actual physical delivery to the purchaser, by whatever means may be selected, are all inherent parts of the intercourse pertaining to trade or traffic in merchandise."

The transaction in which the defendant engaged was interstate commerce. The evidence justified the verdict returned by the jury, and the motion is therefore overruled.

#### In re SCHEIER et al.

(District Court, E. D. Washington, E. D. June 2, 1911.)

No. 1,021.

#### 1. COURTS (§ 96\*)—TERRITORIAL COURTS—DECISIONS—CONCLUSIVENESS—RULE OF PROPERTY.

Decisions of a Supreme Court of a territory construing a territorial statute should be given the same force and effect as a decision of a supreme court of a state, especially where the decision establishes or relates to a rule of property.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 96.\*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 468.]

#### 2. COURTS (§ 366\*)—CONSTRUCTION—EFFECT.

Construction placed on a statute by the highest court within the jurisdiction of the lawmaking body becomes a part of the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957; Dec. Dig. § 366.\*]

#### 3. BANKRUPTCY (§ 397\*)—PARTNERSHIP—EXEMPTIONS.

Individual partners cannot claim exemptions from the partnership property as against partnership debts in bankruptcy, though the other partner or partners may have consented thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 397.\*]

#### 4. EXEMPTIONS (§ 52\*)—STATUTES—PROPERTY IN LIEU OF PROVISIONS, ETC.

Under Rem. & Bal. Code Wash. § 563, subd. 4, providing that a debtor shall have exempt certain domestic animals and the feed therefor for six

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

months, and also provisions and fuel for his family, a debtor who has not the animals referred to cannot select other property in lieu thereof and hold the same exempt from his creditors.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 40; Dec. Dig. § 52.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Julius Scheier and Louis Scheier, copartners as Scheier Brothers, and as individuals. On certified questions by the referee. Referee's decision denying exemptions affirmed.

Edelstein & Weinstein, for bankrupts.

Campbell & Goodwin, for trustee.

RUDKIN, District Judge. The following questions have been certified to the court by the referee in bankruptcy at the instance of one of the above-named bankrupts:

1. "Is a bankrupt, a member of a bankrupt partnership, who is a householder as defined by the laws of the state of Washington, and, at the time of filing his petition in bankruptcy, possessed none of the animals enumerated in subdivision 4 of section 563 of Remington & Ballinger's Codes and Statutes of Washington, entitled to retain from the assets of his firm, as exempt under said subdivision 4 of said section 563, other property to the value of \$250 in lieu of such animals; he having no individual assets from which to claim such exemption, no member of the partnership having assets not claimed by and set off to him as exempt, the firm assets being insufficient to pay firm creditors in full, and his only copartner consenting to the allowance of the exemption claimed by him from the firm assets?"

2. "If the bankrupt, Julius Scheier, is entitled to the allowance of exemptions from the partnership assets under the facts stated in question No. 1, should he be allowed, by virtue of said subdivision 4 of said section 563, to retain from the partnership assets any property in lieu of sufficient provisions and fuel for the comfortable maintenance of himself and family for six months; he having had no appreciable supply of provisions and fuel on hand at the time of filing his petition in bankruptcy?"

Section 563, subd. 4, Rem. & Bal. Code, referred to in the foregoing certificate, provides as follows:

"The following property shall be exempt from execution and attachment, except as hereinafter specially provided: \* \* \* (4) To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section."

The right to the exemptions claimed is fixed by the laws of the state where the bankrupt resides, and the decisions of the highest court of the state construing these laws are controlling upon the federal courts.

In *Charleston v. McGraw*, 3 Wash. T. 344, 17 Pac. 883, the Supreme Court of the territory held that a partner could not claim ex-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

emptions from partnership property under similar facts; but no decision has been made by the Supreme Court of the state upon this question.

[1] How far the decision of the Supreme Court of the territory is binding on this court may admit of question; but it would seem that the decision of the highest court of the territory construing a territorial statute should have the same force and effect as a decision of the Supreme Court of the state. This is especially true where the decision establishes or relates to a rule of property.

[2] The construction placed upon a statute by the highest court within the jurisdiction of the lawmaking body becomes a part of the statute, and, if the Legislature cannot add to exemptions without impairing the obligation of existing contracts, certainly no court should accomplish the same result by a mere change in its decisions.

[3] However, if I should disregard the decisions of the Supreme Court of the territory entirely, the overwhelming weight of judicial authority would lead me to the same conclusion.

"By the great weight of authority individual partners cannot claim exemptions in the partnership property as against a partnership debt. This is held on various different grounds: (1) On the well-known ground that partnership property is subject to the payment of partnership debts before all other claims; (2) the impracticability or even inequity of allowing an exemption out of the property; (3) that, under the theory of the civil law that a partnership is an entity—a theory not generally recognized by the common law and one which is inconsistent with its principles—and that the partnership property does not belong to the individual partners, but to the firm, that is, to the legal entity; (4) that the different exemption statutes contemplate only individuals and have no reference to partnerships." 18 Cyc. 1383.

A different rule obtains in Georgia, Michigan, North Carolina, New York, Wisconsin, and perhaps one or two other states; but the federal courts sitting in bankruptcy have never adopted or followed the minority rule outside of the particular states in which that rule prevails. *In re Beauchamp et al.*, 101 Fed. 106.

The fact that the other partner has consented to the allowance of the exemption does not change the rule. *McCrimmon v. Linton*, 4 Colo. App. 420, 36 Pac. 300, and cases there cited.

The first question certified must therefore be answered in the negative.

[4] The second question certified must be answered in the negative for the same reason, and for the additional reason that the statute does not permit the debtor to select other property in lieu of provisions and fuel for his family and feed for the animals therein named. *Carter v. Davis*, 6 Wash. 327, 33 Pac. 833.

The decision of the referee denying the exemptions claimed is approved and affirmed, and an order will be entered accordingly.



## UNITED STATES v. ERICKSON.

(District Court, W. D. Michigan, S. D. September 28, 1910.)

## 1. EVIDENCE (§ 83\*)—PRESUMPTION—PERFORMANCE OF OFFICIAL ACTS.

In the absence of a contrary showing, names of witnesses for an applicant for naturalization are presumed to have been posted for the time required by law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

## 2. ALIENS (§ 71½\*)—NATURALIZATION—DEFECTS—EFFECT.

A naturalization certificate should not be vacated as having been obtained illegally or through fraud, because, on ineligibility of one of two witnesses appearing, his name was erased from the witnesses' affidavit, and another name substituted, and the date of the affidavit changed to that when the new witness verified, though no duplicate of the affidavit as so changed was forwarded to the Department of Commerce and Labor.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71½.\*]

## 3. ALIENS (§ 71½\*)—NATURALIZATION PROCEEDINGS—REVIEW.

Naturalization proceedings, like ordinary judicial proceedings, are properly sustained if defects asserted are merely technical and formal, though the defects cause annoyance to the supervising administrative department.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 71½.\*]

## 4. ALIENS (§ 68\*)—NATURALIZATION—FILING OF PAPERS.

Absence of a filing indorsement, or a calendar entry by a clerk concerning a naturalization petition actually filed, is immaterial if the fact of filing sufficiently appears.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-146; Dec. Dig. § 68.\*]

## 5. ALIENS (§ 68\*)—NATURALIZATION—VALIDITY—OMISSION BY CLERK.

An applicant for naturalization is not affected by any failure of the clerk to report to the Department of Commerce and Labor any details which he ought to report.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-146; Dec. Dig. § 68.\*]

Petition by the United States to vacate Ole Erickson's naturalization certificate. Petition dismissed.

Geo. G. Covell, U. S. Atty.

DENISON, District Judge. This is a petition to vacate a naturalization certificate issued by the circuit court of Benzie county, September 21, 1908. It appears that Erickson filed his petition February 29, 1908, with William A. Anderson and F. Erickson as witnesses; that F. Erickson was not eligible as a witness, for lack of citizenship; that on April 25, 1908, the name of Erickson was erased from the witnesses' affidavit, and the name of Peter Anderson was substituted, and the date of the affidavit changed from February 29, 1908, to April 25, 1908. These are the allegations of the petition, taken as confessed by default, and I interpret them as meaning that there appears of record upon the petition an affidavit purporting to be signed and sworn to on April 25, 1908, by William Anderson and Peter Ander-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

son, as witnesses; and that it was so subscribed and sworn to, by them on that day, is the proper inference to be drawn from this record. If, however, the fact was that only Peter Anderson appeared and signed upon the second stated day, this would not present an essentially different situation, because that would amount to an affidavit by one witness on February 29th and by the other on April 25th, making the paper then complete.

[1] It was the duty of the clerk to post both of these names for more than 90 days before September 21st, the day of hearing, and there is no allegation that he did not do so. It must, therefore, be presumed. that they were so posted.

[2] The present petition to vacate is based upon this substitution of a witness, and upon the attending irregularities. It seems to me quite clear that the alleged defects are not vital, nor, indeed, serious, and that they do not justify depriving respondent of his citizenship.

[3] I know of no reason why the proceedings for naturalization in a court of record should not be governed by the same general principles as ordinary judicial proceedings, and vacated if the defects are vital and essential things, but sustained if the defects are merely technical and formal. The fact that defects of the latter class cause annoyance and trouble to the supervising, administrative department, cannot make void any proceedings upon which substantial rights are based.

It may well be conceded, as held in *United States v. Martorana*, 171 Fed. 397, 96 C. C. A. 353, that a petition, verified by only one competent witness, is invalid, and it may even be called void in the sense in which that word is often used, although it would seem rather to be a sort of ineffective paper, ready to become effective at any time upon attaching the other affidavit. However this may be, the worst that can be said of such a petition is that it is not lawfully on file with the clerk, but is an unofficial paper remaining in his hands either with an imperfect affidavit, or with no affidavit, according to the view which may be taken. When, 30 days later or 60 days later, two competent witnesses come into the clerk's office and sign and swear to this paper, it then becomes a valid and unimpeachable petition, and an entirely sufficient basis for the posting of the witnesses' names and the subsequent judicial examination and pronouncement.

[4] It would be more orderly for the clerk then to file the paper over again and give it a new consecutive number upon the official record; but it is a familiar rule that the absence of a filing indorsement or a calendar entry by the clerk with reference to a paper which is actually filed, and upon which the clerk has acted, is quite immaterial, if the fact of the filing sufficiently appears.

[5] So, too, the failure of the clerk to report to the Department of Commerce and Labor any details which he ought to report cannot affect the right of the applicant for citizenship.

The only obstacle, as I think, to treating the petition, when finally properly verified, as sufficient, upon the theory that it is a petition then first efficiently initiated, is that by clause 2 of section 4 (Act June 29, 1906, c. 3592, 34 Stat. 597 [U. S. Comp. St. Supp. 1909, p.

479]) the petition is required to be filed in duplicate; and, as one of the duplicates first filed in this case had been forwarded to the Department of Commerce and Labor, a complete affidavit was attached only to one duplicate. The requirement of a duplicate petition as distinguished from a mere copy cannot be for any purpose excepting for the convenience and permanence of record, and I do not think the absence of one duplicate, under the conditions here stated, is vital. The department desires to be advised of all the particulars specified in the petition, so that it can make the necessary inquiry and opposition, if there is reason therefor. This substantial purpose was fully satisfied by what was done in this case. When the petition was eventually filed, the duplicate, perfect in every respect, excepting in one, was on file in Washington; and there was, in this case, no substantial prejudice to the department, or to the public, or the law, from the failure of the department to have 90 days' notice of the name of the new witness.

I hesitate extremely to reach a conclusion which may seem to be in conflict with that of the Court of Appeals of the Second Circuit, but the matter, unless as to the single question of the duplicate affidavit, seems to me very clear; and since the theory that the petition, when properly verified, may be treated as a new petition, was not mentioned by the court in that case, it may be assumed that the facts of that case did not justify such a theory.

I feel compelled to hold that Erickson's naturalization should not be cancelled on the ground of fraud nor on the ground "that such certificate of citizenship was illegally procured"; and, as no other grounds are provided for in section 15 of the act in question, the petition must be dismissed.

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SLADE v. ROSE.

(Circuit Court, D. Rhode Island. June 24, 1911.)

No. 2,934.

**1. TAXATION (§ 805\*)—REDEMPTION FROM TAX SALE—TIME TO REDEEM.**

Gen. Laws R. I. 1909, c. 60, § 18, providing that the person who owned real estate sold for taxes, at the time of the assessment, or any interest therein, may redeem upon repaying to the purchaser the amount paid therefor with 20 per cent. in addition, within one year after the sale, or within six months after final judgment has been rendered in any suit in which the validity of the sale is in question, provided the suit be commenced within one year after the sale, does not affect the right to question the validity of the tax sale, and imposes no limitation on that right, but affects only the right of redemption.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.\*]

**2. TAXATION (§ 696\*)—REDEMPTION FROM TAX SALE—STATUTORY PROVISIONS—CONSTRUCTION.**

Statutes affording a right to redeem from tax sale are given a liberal construction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1393; Dec. Dig. § 696.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. TAXATION (§ 699\*)—REDEMPTION FROM TAX SALE—TIME TO REDEEM.**

Under Gen. Laws R. I. 1909, c. 60, § 18, giving the right to redeem from tax sale within one year after the sale or within six months after final judgment in any suit in which the validity of the sale is in question, provided the suit be commenced within one year after the sale, the right of redemption exists throughout the pendency of a suit begun within a year as well as during the six months after final judgment, and is not suspended from the end of the year until the date of the final judgment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1402-1405; Dec. Dig. § 699.\*]

**4. TAXATION (§ 699\*)—REDEMPTION FROM TAX SALE—TIME TO REDEEM.**

Under Gen. Laws R. I. 1909, c. 60, § 18, giving the right to redeem from a tax sale within one year after the sale or within six months after the final judgment in a suit in which the validity of the sale is in question, provided the suit be commenced within one year after the sale, the right to redeem within six months after final judgment is not upon condition that in the pending suit the owner shall establish some right.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 699.\*]

**5. TAXATION (§ 699\*)—REDEMPTION FROM TAX SALE—TIME TO REDEEM—"FINAL JUDGMENT."**

In Gen. Laws R. I. 1909, c. 60, § 18, giving the right to redeem from a tax sale within one year after the sale or within six months after "final judgment" in any suit in which the validity of the sale is in question, provided the suit be commenced within one year after the sale, the term "final judgment" means a final disposition of the suit to test the validity of the sale, and is not to receive such strict interpretation as when used in statutes concerning appeals or writs of error, but covers all judgments, whether before or after hearing on the merits, which put an end to the suit whose pendency defers the vesting of an indefeasible title in the purchaser.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 699.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

**6. TAXATION (§ 806\*)—TAX TITLE—SUIT TO TEST VALIDITY—INTERVENTION.**

In an action of ejectment by the owner of land against the purchaser at a tax sale, a mortgagee claiming the right to redeem is not entitled to intervene.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1598; Dec. Dig. § 806.\*]

At Law. Action by Mary G. Slade against Almanza J. Rose. Heard on petition of Elbert A. Bennett and another to be allowed to intervene and be made parties plaintiff. Petition denied.

Charles A. Wilson, for plaintiff.

Christopher E. Champlin, for defendant.

Gardiner, Pirce & Thornley, for interveners.

BROWN, District Judge. This is a petition to intervene as plaintiffs in an action of ejectment begun by writ dated January 10, 1910, by the plaintiff as owner in fee of lands in New Shoreham, against the purchaser at a tax sale. Elbert A. Bennett is the mortgagee of record of the land in question, and the American Exchange National Bank is the actual owner of the mortgage; said Bennett merely holding it for the bank.

Chapter 60, § 18, General Laws of Rhode Island of 1909, is as follows:

"Sec. 18. The person who owned any real estate sold for taxes, at the time of the assessment, or any interest therein, his heirs, assigns or devisees, may redeem the same upon repaying to the purchaser the amount paid therefor, with twenty per centum in addition, within one year after the sale, or within six months after final judgment has been rendered in any suit in which the validity of the sale is in question: Provided, said suit be commenced within one year after such sale."

This action was brought by the plaintiff, Mary G. Slade, within one year after the tax sale.

[1] The statute does not affect the right to question the validity of the tax sale, and imposes no limitation on that right, but affects only the right of redemption. *Struthers v. Potter*, 30 R. I. 444, 75 Atl. 867.

The petitioners desire to avail themselves of the right of redemption, which exists after the expiration of one year, by reason of the fact that a suit was brought by the plaintiff, Mary G. Slade, within the year.

[2, 3] Statutes affording a right to redeem from a tax sale are given a liberal construction. *Dubois v. Hepburn*, 10 Pet. 1, 23, 9 L. Ed. 325. Upon a literal interpretation, as well as upon a fair interpretation of the statute, a suit brought by any owner within the year preserves the right of redemption for the benefit of that owner and his assigns, as well as of other owners. A reasonable interpretation of the statute requires us to hold that the right of redemption exists throughout the period of the pendency of a suit begun within the year, as well as during the period of six months from and after final judgment.

To hold that the right of redemption exists for a year and then is suspended until the date of final judgment in a suit brought within the year, and then is revived for a period of six months, is to give the statute an unreasonable construction, and to attribute to the Legislature an eccentric intention.

The purpose of the statute is to give an opportunity to test the validity of a tax sale. If the sale is invalid then there is no need of redemption. The six-month extension of the period of redemption is for the benefit of those who cannot invalidate the sale and are forced to redeem or lose their property.

[4, 5] The right to redeem within six months after final judgment is not upon condition that in the pending suit the owner shall establish some right; on the contrary, the provision is valuable only in case of his failure. The character of the provision for the benefit of those whose lands have been sold, by a valid sale, should be kept in mind when we consider what is meant by the term "final judgment" as used in section 18. Obviously it means a final disposition of the suit to test the validity of the sale. The earlier the termination of the suit, the earlier the termination of the attack upon the validity of the sale, the better for the purchaser. The purchaser has no interest in having the case delayed for a trial on the merits in case the plaintiff prefers to enter a judgment of dismissal or discontinuance.

After the expiration of a year, the date of final disposition of a suit brought within the year fixes definitely the expiration of the statutory right of redemption, at a day six months thereafter. It follows that the words "final judgment" are not to receive such strict interpretation as when used in statutes concerning appeals and writs of error, but cover all judgments, whether before or after hearing on the merits, which put an end to the suit whose pendency defers the vesting of an indefeasible title in the purchaser.

[6] The reasons given in support of the petition to intervene are therefore, in my opinion, insufficient.

The petitioner, as mortgagee, is entitled, under the statute, to redeem at any time during the pendency of the present suit, and for the period of six months after its termination by a judgment, rendered before or after hearing, which is final in the sense that it ends the suit and fixes a date for the beginning of the final period of six months. Whether, after the expiration of a year, the petitioners could gain any additional rights by being made parties plaintiff to a suit brought within the year, is doubtful.

Ordinarily an amendment introducing new rights of action must be considered as of the date of its allowance. If these petitioners had independent rights to institute a suit within a year to test the validity of the sale, and have not done so, there is a very serious doubt whether, if added as plaintiffs, the suit as to them could be considered as a suit brought within the year. Unless the suit as it stands inures to their benefit by extending the period of redemption, I doubt if the right to redeem exists or can be secured.

I find it unnecessary to determine whether, under chapter 283, § 23, of the General Laws of Rhode Island, petition of this character may be granted. The dispute between the present plaintiff and the petitioners as to their respective rights at law, would doubtless tend to confuse, if not to change, the issues in the case. Such a departure from the ordinary procedure, if permissible in any case at law, is not justified by the reasons assigned in support of this petition.

Petition for leave to intervene is denied.

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### JOHNSON v. HANLEY, HOYE CO.

(District Court, D. Rhode Island. July 3, 1911.)

#### 1. BANKRUPTCY (§ 167\*)—PREFERENCES—ACTS CONSTITUTING.

Where a partner of a bankrupt firm directed a mortgagee of firm property, foreclosing the mortgage and obtaining a surplus after satisfaction of the mortgage debt, to pay the surplus to a firm creditor, the transaction was in effect a direct payment by the firm to the creditor, and constituted a preferential payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 282; Dec. Dig. § 167.\*]

#### 2. BANKRUPTCY (§ 302\*)—PREFERENTIAL PAYMENT—SUIT TO SET ASIDE.

Though equity has cognizance of constructive and actual fraud, whether a bill in equity lies by a trustee in bankruptcy to set aside a prefer-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ential payment to a creditor of a bankrupt will not be determined on demurrer to the bill, but the demurrer will be overruled, reserving the right to raise the question of jurisdiction at final hearing.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.\*]

In Equity. Suit by Edwin A. Johnson against the Hanley, Hoyer Company. Demurrer to bill of complaint. Overruled.

Gardner, Pirce & Thornley, for complainant.

Gorman, Egan & Gorman, for respondent.

BROWN, District Judge. This is a demurrer to a bill in equity by a trustee in bankruptcy, to set aside a preferential payment of money to a firm creditor.

[1] Upon the foreclosure of a mortgage upon firm property, there remained after satisfaction of the mortgage debt a considerable surplus belonging to the bankrupt firm. One of the copartners directed the mortgagee to pay from the surplus in his hands a debt due the defendant, a creditor, thereby creating a preference.

In legal effect this transaction was the same as a direct payment by the firm to prefer a firm creditor.

The defendant contends that a bill in equity will not lie because the complainant has a full and complete remedy at law. Neither brief upon demurrer considers how far Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), is designed to limit the jurisdiction of equity as to subject-matters whereof the jurisdiction at law and equity is concurrent. It has been said, as in *Whitehead v. Shattuck*, 138 U. S. 146-150, 11 Sup. Ct. 276, 34 L. Ed. 873, that section 723 is merely declaratory. In *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, is cited with approval the opinion in *re Maher* (D. C.) 144 Fed. 503, wherein it was said:

"In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid."

[2] Equity has cognizance of constructive fraud as well as actual fraud. *Eyre v. Potter*, 15 How. 42, 14 L. Ed. 592.

It must be admitted, however, that the question presented by the demurrer is not free from doubt, and that there is a serious conflict of authority upon the question of the right of a court of equity to entertain jurisdiction of a suit of this character. An action at law has been held adequate in many cases, and upon principle I fail to see why the trustee cannot have a complete remedy at law in the present case upon the facts alleged in the bill. Whether there is also relief in equity is the subject of conflict of decision. The complainant cites the following cases: *Pond v. New York Nat. Ex. Bank* (D. C.) 124 Fed. 992, to the effect that this suit "is analogous to a judgment creditor's suit to set aside a fraudulent conveyance"; also *In re Plant* (D. C.) 148 Fed. 37; *Mason v. National Bank* (D. C.) 163 Fed. 920; *Norcross v. Nathan* (D. C.) 99 Fed. 414; *Wall v. Cox*, 101 Fed. 403, 41 C. C. A. 408; *Off v. Hakes*, 142 Fed. 364, 73 C. C. A. 464; *Parker v. Black*, 151 Fed. 18, 80 C. C. A. 484.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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The decision of the Circuit Court of Appeals in the Sixth circuit, however, in *Warmath v. O'Daniel et al.*, 159 Fed. 87, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414, directly supports the defendant's demurrer. Whether a distinction between the transfer of money and of other property affects the question is doubtful in view of *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438-443, 21 Sup. Ct. 906, 45 L. Ed. 1171. In *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332, it was pointed out that though the defendant was obliged to surrender a preference he was yet entitled to a dividend, and that circuity of proceeding might be avoided by permitting the defendant to prove his claim so that the court might settle the amount of the dividend, and that the final decree might direct a deduction of the amount of the dividend from the amount of the preference.

A bill of this character has been characterized as of the nature of a creditor's bill, as a bill based upon constructive fraud; and it has been suggested that circuity of action may be avoided by a bill in equity, though the weight of this suggestion is doubtful.

The conflict between the Circuit Courts of Appeals upon this question is not determined by any decision of the Supreme Court which has been brought to my attention. The Supreme Court case which in its facts most closely resembles the case at bar is perhaps *Hicks v. Knost*, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183, which was a bill in equity to recover money paid by the bankrupts with intent to prefer. Upon a question certified by the Circuit Court of Appeals for the Sixth circuit, and which must have been answered in view of the particular facts, it was held that the District Court, by the consent of the proposed defendant, had jurisdiction. This case was decided before the enlargement of jurisdiction of the District Court.

It seems hardly possible that if the entire want of jurisdiction on the ground that the remedy was at law, because only a money judgment was sought, or because there was a full remedy at law, was apparent upon the statement of facts, that this could have been overlooked by the Circuit Court of Appeals which certified the question, or by the Supreme Court which answered it. Nevertheless, it is quite true that the question decided was of different character from that before us, and related rather to the right of a defendant to litigate in the state court than to a question of equitable jurisdiction.

Upon the whole, the question of equitable jurisdiction is doubtful and requires a careful consideration of the decisions of the Supreme Court. In view of the doubt the proper course in the present case is to overrule the demurrer, reserving to the defendant the liberty to raise the same question at final hearing.

Demurrer overruled.



## In re FOGELMAN.

(District Court, E. D. New York. July 17, 1911.)

**1. BANKRUPTCY (§ 288\*)—COURTS—JURISDICTION—PROPERTY IN HANDS OF THIRD PERSON.**

Where property of a bankrupt was alleged to be in the possession of a third person, who, though not admitting possession, claimed no title to any of the property, he could not object to the bankruptcy court's jurisdiction to order him to surrender the property to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 210.\*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 1288.\*

**2. BANKRUPTCY (§ 136\*)—CONCEALED PROPERTY—PROCEEDINGS AGAINST BANKRUPT.**

Proceedings to compel a bankrupt to turn over property which was concealed for or by him could be based on an examination of the bankrupt's agent as to what disposition he had made of the bankrupt's property; but until the property or its proceeds had been traced through the hands of the bankrupt to the agent, or until he had avoided responsibility by showing that his control over it had terminated, because it reached the possession of his agent and had been converted or stolen, the bankrupt should be dealt with first, and the trustee could not demand that the agent be compelled to account for the property, unless the property or its proceeds was specifically shown to be in his hands.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.\*]

In the matter of bankruptcy proceedings against Boris Fogelman. On application to confirm a special commissioner's report. Granted.

Amy Wren, trustee, in pro. per.  
Law & Holtzmann, for bankrupt.

CHATFIELD, District Judge. This is an application to confirm a special commissioner's report, in which he has directed that the bankrupt turn over to the trustee the value of certain property, which the special commissioner has estimated as at least \$1,639.27, and which represents merchandise traced into the hands of the bankrupt or his agents and not accounted for, under such circumstances that its fraudulent concealment or disposition is proven. The trustee in bankruptcy has filed certain exceptions to the special commissioner's report, based principally on his failure to add certain items to the amounts found by him, and on his conclusion that no jurisdiction exists over a third party, who actually handled or disposed of some of the goods. The bankrupt has also pointed out one or two credits to which he is entitled, if the figures found by the special commissioner be taken as the maximum value of the property concealed.

It appears that the bankrupt sold out a business in Manhattan, and with the greater part of the proceeds therefrom purchased a business in Brooklyn, which was put into the hands of his prospective son-in-law for actual management. The store was conducted by this man, who has since married the bankrupt's daughter. The clerks in the store were also relatives, and a large quantity of goods was purchased upon credit, which was bolstered up by false statements of the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

son-in-law, the bankrupt, and the clerks. After large quantities of goods had been purchased, and after a peculiar method of running the business had been followed, an involuntary petition in bankruptcy was filed by three relatives, two of whom are brothers of the son-in-law. The charge is boldly set forth in their petition that assets have been concealed by the bankrupt, who was doing nothing except through his agent, the brother of these petitioning creditors. The claims of these petitioning creditors and of other creditors who are relatives are not substantiated, as the circumstances under which these creditors are said to have made loans and received payments are unbelievable, and there is an abundance of testimony to justify the conclusion of the special commissioner that a large amount of assets was concealed, even much more than the amount reported.

[1] The original proceeding to turn over property was directed against the bankrupt and his son-in-law; but, upon the hearings before the special commissioner, certain attorneys, who appeared at first for the son-in-law, objected to any proceeding to compel the son-in-law to turn over property, on the ground that the court had no jurisdiction to dispose of a claim of title against objection by a third party or one claiming title. This ground of objection was plainly invalid. The son-in-law did not admit the possession, and made no claim of title to any of the property which the bankrupt had in his business; and unless this son-in-law laid claim of title to some specific articles or funds, he could not object to the jurisdiction of the court, if the proceeding were an attempt to trace into his hands property of the bankrupt, not in any sense his own. But during the course of the reference, and in the commissioner's report, it would appear that this objection and ruling was treated as the foundation for a determination by the commissioner, which was entirely correct so far as it went. No property was traced into the hands of the son-in-law, Svigals, except as agent for the bankrupt.

[2] Any proceedings to compel the bankrupt to turn over property which was concealed for him or by him could be based upon an examination of the bankrupt's agent as to what disposition he made of the bankrupt's property. But until the property or its proceeds had been traced through the hands of the bankrupt, and until he avoids responsibility by showing that his control over it had terminated, because it had reached the possession of his agent and been converted or stolen, and was hence out of his own control, the trustee is not in a position to demand that the agent be compelled to make good or account for the bankrupt's property, unless the property or the proceeds be specifically shown to be in his hands. Therefore the commissioner's report that the bankrupt should be ordered to return the property or to account for its proceeds, and that the agent on the present evidence should not be treated as a principal, but merely examined as a witness, is correct.

There being sufficient testimony to establish the conclusions of the commissioner as to the secretion of property by the bankrupt, or his agents for him, the only question remaining is as to amount. The commissioner has allowed the bankrupt credit for twice the amount ob-

tained by the sale of the property at auction. While this is arbitrary, it is an increase over any estimated amount indicated by the testimony, and it is difficult to see how the bankrupt can properly object to the commissioner's allowing more than the witnesses for the trustee fix as the value of the property accounted for. In other respects the commissioner's computation seems to be correct, with the exception of such items as necessary deductions for checks paid after the striking of the bank account balance and the item of \$180 for the Leavitt note. These matters can be adjusted upon the settlement of the order.

The motion to confirm the report will be granted, and the exceptions to the report overruled for the present. If the bankrupt disavows responsibility, and accuses his son-in-law of conversion or larceny, by attempting to show that possession was last in the son-in-law, then the report will be sent back for further hearing, on the charge that the son-in-law has or has concealed property belonging, not to himself, but to the bankrupt estate.

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In re WIESEBROCK.

(District Court, E. D. New York. July 10, 1911.)

**1. BANKRUPTCY (§ 241\*)—EXAMINATION OF BANKRUPT—FALSE TESTIMONY—PUNISHMENT—CONTEMPT.**

Where a bankrupt, on his examination, was guilty of contumacious conduct and false swearing, the scope of the bankruptcy court's jurisdiction to punish him depended on interference with the exercise of the court's jurisdiction, and not on the injury to the public welfare and morals, which is the basis of punishment for perjury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 405; Dec. Dig. § 241.\*]

**2. BANKRUPTCY (§ 241\*)—CONTEMPT—FALSE SWEARING—PUNISHMENT.**

Where a bankrupt was guilty of contumacious conduct and false swearing in his examination before creditors, but had purged himself of the greater part of the contumacious acts, which related to the concealment of assets and imaginary incurring of debt, and his creditors did not seek to prosecute him criminally or to recover any assets, his punishment for contempt would only extend to an adequate punishment for his disregard of his duties as a bankrupt and his failure to properly comply with the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.\*]

In the matter of bankruptcy proceedings against Robert Wiesebroch. On application to punish the bankrupt for contempt and giving false testimony. Granted.

Willett & Frost, for bankrupt.

Francis M. Eppley, for objecting creditor.

CHATFIELD, District Judge. The bankrupt has been denied his discharge on the merits, because of false testimony before the referee in an attempt to conceal assets properly belonging to his estate. While the discharge proceedings were pending, an application was made to punish him for contempt for interfering with the bankruptcy pro-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceedings by the giving of this false testimony, and by his failure to give correct information regarding the actual assets of his estate. The referee has certified to that effect, and the matter was referred to the district attorney for this district in the following memorandum:

"The bankrupt so acted and testified as to justify the report of the referee, as certified, that he was in flagrant contempt; but this contemptuous conduct was as to matters which should have been made the basis of a criminal charge, as well as used in opposing the discharge. If false testimony is a means of concealing assets, then an order to turn over property may be made the basis of a contempt proceeding as an alternative in case of disobedience; but this court does not wish to act in place of a petit jury, upon a pure question of perjury, disguised as a failure to respect the court (the crime being a failure to respect the oath). The matter will be referred to the district attorney; but, as the statute of limitations may have run as to some or all of the matters, a determination upon this motion will be left until the district attorney has finished his investigation."

The United States attorney has informed the court that no action was deemed advisable, but has not stated whether this was because of the apparent running of the statute of limitations, or whether his action was based upon other reasons.

[1] Assuming that no criminal action can be taken, the creditors have renewed the motion to have the bankrupt punished for contempt. His way of testifying and his actions before the referee were sufficient, as shown by the testimony, to justify an order declaring his conduct contumacious; but the scope of this court's jurisdiction to punish him therefor depended upon the interference with the exercise of that jurisdiction, and not with the injury to the public welfare and morals which is understood to be the basis for the crime of perjury, upon a trial for which the defendant is entitled to have the people proceed (rather than individual creditors) by way of indictment and trial by jury.

The certificate of the referee and the testimony show that, before the reference was completed, much of the careless or false testimony was admitted or corrected by the bankrupt. At that time any proper proceeding for the criminal act of perjury could and should have been brought to the attention of the prosecuting authorities of the district. Any interference with the activities of the creditors or of the referee in locating assets of the estate could have been treated as a contempt (including the giving of false testimony with regard thereto), for the purpose of vindicating the court's authority and discovering assets. But even then the bankrupt would have been allowed to purge himself of contempt, in so far as he could by giving correct testimony or information as to the property, and the creditors would then have been compelled to proceed by attempting to secure this property directly. This attempt might have taken the form of a direction by the court that the bankrupt purge himself of contempt by disclosing the whereabouts of his property; but such a proceeding would not have been countenanced to the extent of forcing a civil settlement of his debts under the threat of contempt proceedings.

[2] As the matter stands at present, the creditors did not seek to prosecute criminally, they did not seek to recover any assets, and the bankrupt has purged himself of the greater part of the contemptuous

acts which had to do with the concealment of assets and imaginary incurring of debt. He is still liable to punishment for his disregard of his duties as a bankrupt and the way in which he failed to comply with what the bankruptcy statute requires him to do.

To that extent the report of the referee should be confirmed, and he may be ordered to appear before the court for a disposition of the matter.

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UNITED STATES v. HARSHA et al.

(Circuit Court, E. D. Michigan, S. D. April 27, 1911.)

ACCOUNT (§ 12\*)—DUTY TO ACCOUNT—REMEDY—EQUITABLE PROCEEDINGS.

An action at law was instituted by the United States against a former clerk of the Circuit Court for an accounting, and to review the conduct of the clerk's office for 27 years, and the clerk's taxation of his own costs in about 2,200 cases. The bill of particulars, after stating a few items, set out a summary of the fees and costs account, followed by a list of 2,181 cases of law and equity, with the amount of the alleged overcharge in each case; the items varying from \$250 to 10 cents. Each of these items constituted a balance the constituent items of which were not shown; it having required a skilled examiner, with from two to five assistants, more than six months to make up and state the account which was the basis of the action. It appeared that the trial of the case, if proceeded upon at law, would consume at least four months. *Held*, that the court was justified in refusing a trial to a jury and suspending proceedings until action should be taken in equity.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 12.\*]

At Law. Action by the United States against Walter S. Harsha and the Fidelity & Deposit Company of Maryland on the bond of the defendant Harsha as former clerk of the Circuit Court. Trial refused.

F. H. Watson, U. S. Atty., and J. E. Bland, Asst. U. S. Atty.

Harrison Geer, for Harsha.

Brennan, Donnelly & Van De Mark, for Surety Co.

DENISON, District Judge (sitting by designation). At the last term of this court, when I found this case upon the calendar, I thought it unsuitable for trial at length before a jury, and I urged upon counsel the advisability, if not the necessity, of some arrangement that should put the issues in shape where they could be tried and disposed of intelligently. To this end, I suggested either a general reference by a consent or the appointment of an auditor under the state statute. As the case stood for jury trial, the latter course also could be taken only by consent.

After several months, the case now comes up for trial and is regularly reached. Counsel and parties have accomplished nothing along the suggested line, so that the situation is controlled by the record as it stands, and without any opportunity to rely upon the voluntary co-operation of all parties in removing difficulties.

The suit is for an account and on an account. It covers and involves reviewing the conduct of the clerk's office for 27 years, and the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

clerk's taxation of his own costs in about 2,200 cases. The bill of particulars, after stating a few items which present no unusual difficulty, gives what it calls a "summary of the fees and costs account," followed by a list of 2,181 cases at law and in equity, with the amount of alleged overcharge in each case. These items vary in amount from \$250 down to 10 cents. This is not all. Each of these items is only a balance item and depends upon the correctness of each of its constituent items. The records of the court show (by estimate) an average of 20 items to a case. This makes more than 40,000 items. It is familiar knowledge about the clerk's office that a skilled examiner, with from two to five assistants, worked industriously for more than six months to make up and state the account which is the basis of the action.

Counsel all agree that the trial will occupy as much as four weeks. With the indicated tendency to contest every item, it is more likely to take four months; and this would allow only fifteen minutes to each balance item, that is, to each independent issue.

Under these circumstances, should I impanel a jury and proceed with the trial? I think not. The case is the typical, the ideal, one for a master in chancery, and it is so unsuitable, indeed, so unfit, to be tried by jury, that such a trial, unless the issues were simplified, would be a mere farce. I think all the proceedings herein should be stayed pending a resort to equity by some one or more of the parties. If no one of them should do so, that would raise another question; but the propriety of a proceeding in equity seems to me so obvious that I anticipate no such reluctance.

Whether the jurisdiction in equity depends on (1) the right to bring a formal "action of account," or (2) the existence of mutual debits and credits, or (3) the practical inadequacy of the legal remedy, in either case, it is clear.

1. The case seems in all respects suitable for the common-law action of "account render," "where a man is charged as bailiff whereby the certainty of his receipt appears not till account" (Bouvier); defendant would plead "plene computavit," and the plaintiff, if successful, would get a judgment "quod computet."

2. Under the law, defendant has rendered formal accounts at stated periods. Accounting, then and now, is the essence of the whole situation. Defendant is entitled to credit in each case for his lawful fees, and then to credit on the final balance for certain errors and excessive remittances, if any; in other words, each of the balance items, and then the final balance, depends upon mutual debits and credits.

3. It is impossible to believe that a trial by jury is adequate to determine the issues accurately and truly. It is true a suit at law and a judgment at law are adequate remedies to recover any specific sum which the defendant, as former clerk, owes; but to apply the phrase "adequate remedy" to such proceedings, under the circumstances of this case, seems to me an abuse of words. There have been various decisions bearing upon the question, but none of them which are adverse to the right of equitable procedure are, so far as I have observed, under circumstances nearly as extreme as those of this case.

These conclusions will be embodied in a formal order refusing to proceed with the trial, and, if I am mistaken in entering such order, the question can be quickly raised and disposed of by mandamus proceedings.

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In re VARLEY & BAUMAN CLOTHING CO.

(District Court, N. D. Alabama, S. D. June 10, 1911.)

No. 11,000.

1. LIENS (§ 14\*)—TRANSFER TO PROCEEDS OF SALE.

Ordinarily a lien on personalty can be transferred to the proceeds of its sale only by order of court directing sale free from lien.

[Ed. Note.—For other cases, see Liens, Dec. Dig. § 14.\*]

2. BANKRUPTCY (§ 264\*)—RENT—RIGHT OF LANDLORD.

A bankrupt merchant's landlord being equitably entitled only to security for future rent to accrue under the lease, an order approving a sale of the lease sufficiently protected the landlord's rights, by ordering the purchaser to execute good bond to the trustee securing payment of such rent, especially since the rental value of the premises exceeded the rent provided in the lease, and the landlord had additional recourse against the new tenant, by proceeding against the latter's stock of goods or to dispossess.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 264.\*]

In the matter of the Varley & Bauman Clothing Company, bankrupt. On petition of John C. Gallagher to pay a rent lien out of a particular fund. Petition denied.

H. U. Sims, for petitioner.

London & Fitts, for trustee.

GRUBB, District Judge. In this cause a receiver was appointed by the court and authorized to conduct the business of the bankrupt. The bankrupt, at the time of the filing of the petition, had a sale on, which the receiver continued, and sold practically all of the goods before the appointment of the trustee. The trustee, when appointed, elected to assume the lease, and sold it, as part of the assets of the estate, for \$500 and the covenant of the purchaser to pay all future accruing rents. The referee approved the sale, requiring the purchaser to execute a bond with sufficient sureties to the trustee to secure the covenant. The landlord now asks that the trustee be directed to hold sufficient of the proceeds of the sale of personal property in his hands, about \$9,100 in amount, to secure the payment of rent during the unexpired term of 30 months, or to pay that sum to him presently and without discounting it, or to set aside the sale of the lease and restore the rented premises to him.

The landlord had a lien on the personal property which was sold at retail, under the law of Alabama, for all future accruing rent under the lease. *Martin v. Orgain*, 174 Fed. 772, 98 C. C. A. 246. No appearance or objection to the retail sale was made by the landlord during its progress, nor was any notice given him of the sale. After the

personal property was converted into cash, the landlord first filed his petition, asking that his lien upon the stock of goods be transferred to the proceeds of the retail sale in the hands of the trustee. No action was had upon this petition until after the election of the trustee and his assumption of the lease.

[1, 2] Ordinarily a lien on personal property can only be transferred to the proceeds of its sale by an order of court directing its sale free from lien, after notice to the lienholder. *Collier on Bankruptcy* (8th Ed.) p. 839. Without such provision in the decree of sale, the property is presumed to be sold subject to the lien. *Collier* (8th Ed.) pp. 838, 839. Goods sold at retail in the ordinary course or conduct of a mercantile business are not sold subject to the lien, since in such case it is not practicable for the lien to follow the goods. Ordinarily the lease of a retail storehouse contemplates a sale in the ordinary course of business, and is an authority for the tenant to dispose of such goods as are so sold, free from any lien in favor of the landlord. The lien, in that event, is waived both as to the goods and the proceeds of the sale. In this case the goods were sold under an order of court, authorizing the receiver to continue the conduct of the business of the bankrupt. It would seem that, ordinarily, a sale of this kind might, within the contemplation of the parties to the lease, be made free from the landlord's lien. However, in this case, the receiver sold all the goods, on which the landlord's lien rested. Under such circumstances, it is but equitable that the lien of the landlord be transferred by decree of the court to the proceeds of the sale, and this even though the decree of sale made no such provision.

However, it does not seem to me that, when done, the lien so created is of the same character as the lien given by law to the landlord on the property itself, which is a contractual lien, and, therefore, not subject to displacement by decree of court. So far as the proceeds of the sale in this particular case are concerned, the lien or priority of the landlord is created by the order of court, and it is competent for the court to mold its order so as to do equity as between the landlord and the trustee. The landlord is equitably entitled only to security for his future accruing rent. If the referee, in his order, has provided such ample security, the landlord is without grievance. Whether the landlord's motive in asking present payment without discount out of the fund in the hands of the trustee, or that it be held in the hands of the trustee to await the unexpired term, is to coerce the surrender of the lease back to him or not, it will embarrass the administration of the estate to do either, and without corresponding benefit to the landlord, if he has adequate security for his rent under the order of the referee. He has, under that order, for his security a tenant, with the right to dispossess, in the event of default, a stock of goods in the rented premises, belonging to the new tenant, and the benefit of a good bond in the sum of \$5,000. In addition, the evidence shows that the present rental value of the premises is in excess of the stipulated rental in the lease. This furnishes adequate security to the landlord; and the order of the referee will therefore be confirmed, and the petition to review be denied, at the cost of the petitioner.



In re FITZGERALD.

(District Court, D. Connecticut. July 28, 1911.)

No. 2,564.

**BANKRUPTCY (§ 140\*)—TITLE OF TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE.**

Where claimant, the bankrupt's mother-in-law, loaned him \$200 to buy fixtures for a grocery business, and after he bought them he gave her a written conveyance of them, and she took possession on the same day and immediately gave him a conditional bill of sale, duly recorded, the transaction was merely colorable, and the property passed to the trustee, notwithstanding the good faith of the parties.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.\*]

In the matter of Robert E. Fitzgerald, bankrupt. On decision of referee as to the claim of Mrs. Margaret Welch. Decision affirmed.

The following is the decision of Referee Newton:

In the matter of the claim of Margaret Welch to certain personal property which was in the possession of the bankrupt at the time of his adjudication in bankruptcy, May 27, 1911. Margaret Welch is the mother-in-law of the bankrupt. The facts as agreed to are as follows: She loaned him \$200 to buy the fixtures for the grocery business. He bought the fixtures, and on September 20, 1910, gave her a written conveyance of them; and it is claimed that she at once took possession, and thereupon, on said September 20, 1910, she gave to him a conditional bill of sale, correct as to form, which was duly and immediately recorded. This transaction took place before the store was opened.

The question is: Is she entitled, under these circumstances, to hold the property against the trustee? The money was actually advanced by said Margaret Welch, and the whole transaction was in good faith, and she and said Fitzgerald both believed that the conditional bill of sale would protect said Welch against an attachment and against bankruptcy proceedings. The two bills of sale are made a part of this memorandum. Nothing has been paid by Fitzgerald on the conditional bill of sale. With regret I feel obliged to hold that the property passes to the trustee, and that the conditional bill of sale is void.

By agreement of all parties, it is ordered that the trustee sell the property and hold the money until the decision of the judge, and, as the parties desire a review, as the quickest and simplest way of obtaining the opinion of the judge, I have allowed them to waive filing a petition, and send this memorandum to the judge, with the understanding on all hands that he shall pass upon the matter and render his decision without any hearing or argument.

PLATT, District Judge. Would the proceedings set forth in the memorandum have protected Fitzgerald against a bona fide creditor under our state law? is the only question in the case.

Mrs. Welch might have bought the property herself, and have given him a conditional bill of sale, in which case she would have been protected; but unfortunately she did not take that course. She loaned him the money to buy the fixtures. After he bought them, they were his fixtures, and he still owed her the money which she loaned him to buy them with. His transfer of them to her by the written assignment of September 20th, and attempt to place her in possession, is a mere fiction, and does not do what the parties sought to, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

their good faith and honest intention does not help them out in the least.

Sections 4864 and 4865 of the Connecticut Statutes of 1902 have not changed the law in regard to retention of possession by the vendor. This has been twice decided by our highest court. Property sold by the bankrupt, but retained in his possession, is subject to be taken by bona fide creditors as his property, and the good faith of the parties makes no difference.

The decision of the referee, which is explained in his memorandum, is affirmed.

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In re VOGT.

(District Court, E. D. New York. June 22, 1911.)

1. BANKRUPTCY (§ 336\*)—FRAUDULENT CLAIM OF LIEN—AMENDMENT.

Where a claim of lien under a mortgage had been declared fraudulent, the claimants were not entitled to amend, so as to prove such claim as a general claim against the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 523, 524; Dec. Dig. § 336.\*]

2. BANKRUPTCY (§ 314\*)—CLAIMS—LIENS—AMENDMENT.

Where certain claimants against a bankrupt were shown by the schedules to have been creditors in the sum of \$3,250 for goods sold, for which notes had been given and later an alleged usurious mortgage delivered, they were entitled, if they had not estopped themselves, or limitations had not run against them, to prove such amount as a general claim against the estate, though their liens were defeated.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.\*]

In Bankruptcy. In the matter of bankruptcy proceedings against Jacob Vogt.

See, also, 163 Fed. 551.

Francis B. Mullin, for trustee.

Roger Foster, for the Franks.

CHATFIELD, District Judge. At the present time the referee is ready to proceed with the case. The trustee has at last applied to the court to administer the estate, and the mortgagees, who have variously attempted to enforce their claims, but whose latest mortgage was declared invalid, have appeared in court and expressed a desire to assert their lien, if they can substantiate any to the fund, or, if their claim be not a lien, that it be allowed as a general debt against the bankrupt estate. Under these circumstances, the situation is different from that which was decided upon the previous motions, when the trustee asked this court to have the funds paid over to him, and the claims of all mortgagees declared null and void, upon his motion and against the objection of those mortgagees.

[1] The receiver's estate may be ordered to turn the property over to the trustee, subject to the further order of the court, and the trustee may apply to the referee for the declaration of a dividend. The

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Franks may appear before the referee, and, if they are so advised, file a verified petition, setting forth any claim of lien which they may now make (bearing in mind the decision of the Supreme Court of the United States, in *Frank v. Vollkommer*, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. Ed. 911) to any part of the bankrupt estate. Inasmuch as the claim of the Franks, under the third mortgage, was held to be fraudulent, they obtained nothing thereby, and cannot amend that claim, so as to prove a general claim.

[2] But they were shown by the schedules to have been creditors in the sum of \$3,250 for goods, that notes had been given for this amount, and later the alleged usurious mortgage delivered. Their claim has always been a part of the record, and they would seem to be entitled, if their claimed liens are all defeated, to be treated as general creditors, if they have not estopped themselves, or put themselves in a position in which the statute providing for a year within which to prove claims has cut them off.

It is not necessary to dispose of this question at the present time. If they attempt to claim a lien, the matter will be referred to the referee as special commissioner, to hear and determine upon the validity of the lien, and at the same time he can consider whether or not they are estopped from being treated as general creditors if the lien be disallowed.

The motion to pay over the money to the trustee, with the other provisions indicated, will be granted.

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PHELPS v. CONNECTICUT CO.

(Circuit Court, N. D. New York. June 22, 1911.)

1. REMOVAL OF CAUSES (§ 111\*)—JURISDICTION ACQUIRED BY REMOVAL—SERVICE OF PROCESS.

Defendant, a Connecticut railway company, had neither office, property, nor place of business in New York, did no business in that state, and had no agents or servants there. Suit was brought against it in the state court of New York by service on its secretary while within the state on business not connected with or relating to the corporation. *Held*, that such service, though sufficient to confer jurisdiction on the state courts, was not valid to confer jurisdiction on a federal Circuit Court, sitting in New York, on removal of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 237; Dec. Dig. § 111.\*]

2. REMOVAL OF CAUSES (§ 108\*)—DISMISSAL—MOTION—LACHES.

Suit was brought by service of process on defendant's secretary in the state of New York March 16, 1911. On April 3d following, the case was removed to the federal Circuit Court, and on April 21st affidavits of defendant's officers, supporting a motion to dismiss, were made in Connecticut and forwarded to defendant's attorney in New York. Such attorney appeared specially on April 26th and moved to set aside the service; the papers being served on the 28th. *Held*, that the motion was not barred by laches.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 217; Dec. Dig. § 108.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by Louise Phelps against the Connecticut Company. On motion to set aside service of summons and complaint after removal of the cause to the Circuit Court. Granted.

Charles M. Sheafe, Jr., for the motion.  
Hancock & Spriggs, opposed.

RAY, District Judge. [1] The plaintiff is a citizen and a resident of the state of New York. The defendant is a corporation, a street car company, operating a surface line wholly in the state of Connecticut, organized and doing business under the laws of that state. Neither now does it have, nor at the time of the service of the summons and complaint in this action did it have, any property, office, or place of business in the state of New York, nor was it doing any business in the state of New York. It had and has no agents or servants in said state of New York.

The plaintiff alleges a cause of action against the defendant for personal injuries sustained on or about October 3, 1908, by reason of defendant's negligence while riding on one of defendant's cars between Hartford and Waterbury, state of Connecticut. Damages are laid at \$10,000.

March 16, 1911, while A. E. Clark, the secretary of the defendant company, was temporarily in the city of New York on business in no way connected with or relating to that of the defendant company, he was served with the summons and complaint herein; such action being commenced and the summons issued out of the Supreme Court of the state of New York. April 3, 1911, the defendant duly moved the case into the Circuit Court of the United States, in which district the plaintiff resides.

The defendant, by its attorney, appeared specially for the purpose of such removal, and on the 26th day of April prepared motion papers to set aside the service of the summons and complaint which were served April 28, 1911. These are the only proceedings in the case up to the hearing of this motion. This service of the summons and complaint on the defendant under the decisions of our Court of Appeals was good in the state court. *Pope v. Terre Haute Car & Mfg. Co.*, 87 N. Y. 137; *Atl. & Pac. Tel. Co. v. Balt. & Ohio R. R. Co.*, 87 N. Y. 355.

However, the holdings in the federal courts are the very opposite. *Gokey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. See *Grant v. Cananea Con. Copper Co.*, 189 N. Y. 241, 249, 82 N. E. 191, where comment is made on the different holdings of the two courts. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; *Wabash Western Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. In *Conley v. Mathieson Alkali Works*, supra, the action was commenced in the Supreme Court of the state of New York and then removed to the Circuit Court of the United States, and service was set aside after removal. There has been no general appearance by defendant voluntary or otherwise.

[2] The plaintiff contends that this motion should be denied for laches; that the defendant should have moved earlier. But the removal was had April 3, 1911, and April 21st C. S. Mellen verified his affidavit at New Haven, Conn., and Mr. Clark verified his at the same place the same day. The defendant's attorney resides in New York City, and allowing a reasonable time to examine the law, ascertain the facts, and prepare the papers and secure their verification, I do not see that there was any unreasonable or undue delay in making this motion.

The facts as stated are not controverted, and plaintiff's counsel says he is unable to dispute the allegation of the moving papers.

Under the decisions I am compelled to grant the motion. It is not a matter of discretion.

Motion granted.

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In re CUMMINGS.

(District Court, E. D. Pennsylvania. June 23, 1911.)

1,938.

**BANKRUPTCY (§ 393\*)—IMPRISONMENT—ORDER TO PAY MONEY—FAILURE TO COMPLY—DISCHARGE.**

Where a bankrupt on failing to comply with an order requiring him to pay a large sum of money to his trustee was imprisoned, and, after being confined from May 5, 1911, to June 9th following, applied for his release on the ground of poverty and inability to comply with the order, and on a hearing had June 21st it appeared that he had no money or property either in possession or under his control, or that any property was held for his benefit, he would be released.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 619-622; Dec. Dig. § 393.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of John E. Cummings. On petition to discharge the bankrupt from custody. Granted.

Clarence H. Goldsmith, for bankrupt.

M. Hampton Todd, for trustee.

J. B. McPHERSON, District Judge. The petitioner has been in confinement since May 5, 1911, for failing to comply with an order made April 11th, requiring him to pay a large sum of money to his trustee. *Cummings v. Synnott* (C. C. A.) 184 Fed. 718, and *In re Cummings* (D. C.) 186 Fed. 1020. On June 9th he filed the pending petition asserting his poverty and inability to comply with the order, either in whole or in part. Upon this petition a hearing has been had (June 21st) at which numerous witnesses were examined. It is not necessary to say that imprisonment for debt no longer exists. It is true that in some instances a man may still be put into jail for failing to obey the decree of a court that orders him to pay money, but this power continues to exist because in these instances a contempt of court is committed if the order is not obeyed where obedience is possible; and be-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause the defendant may not yet have satisfied the court that the presumption of his ability to pay is opposed to the fact. This subject was considered in *Re Marks* (D. C.) 176 Fed. 1018. Imprisonment is one means—and I have known it to be an effective means—of finding out whether an assertion of financial inability is really true; but after a court has been clearly satisfied that a debtor is unable to pay, imprisonment cannot lawfully be continued. It would then become punishment pure and simple, and this can no longer be inflicted. In *Trust Co. v. Wallis*, 126 Fed. 464, 61 C. C. A. 342, the Court of Appeals for this circuit has discussed the general subject.

"The powers vested in courts of bankruptcy, to accomplish the general purpose of the bankrupt law, to wit, to segregate the estate of the bankrupt and provide for its equitable distribution amongst the creditors, are plenary and far-reaching. The court may, by summary order, direct the delivery and turning over to the trustee by the bankrupt, or by any third person holding the same under his order and control, any property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. For disobedience of such order, the court in bankruptcy undoubtedly has the power, by attachment for contempt, to enforce compliance with such order, and punish refusal to comply. This power, however, is far-reaching and drastic, and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property, or, if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, the proceedings for contempt, by fine or imprisonment, would result in nothing, certainly not in compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty."

The evidence just heard leaves no doubt in my mind about the financial situation of the bankrupt. He has no money or property, either in possession or under his control, and none is held for his benefit. He cannot pay any part of the money that he has been ordered to pay, and, so far as appears, he is never likely to have such ability. To confine him longer would be not only useless, but unlawful. If he has offended against the criminal law, the criminal law must punish him.

It is therefore ordered that he be discharged from custody.

## C. J. HUEBEL CO. v. LEAPER.

(Circuit Court of Appeals, Sixth Circuit. July 11, 1911.)

No. 2,119.

## 1. SALES (§ 89\*)—WRITTEN CONTRACT—SUBSEQUENT MODIFICATION.

Subsequent correspondence between the parties extending the time for performance of a written contract for the sale and delivery of posts and poles, the extensions being favorable to both parties, was admissible under the rule that parties having power to make a contract have equal power to agree on subsequent modifications thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252; Dec. Dig. § 89.\*]

## 2. SALES (§ 388\*)—CONTRACTS—BREACH—INSTRUCTIONS—DAMAGES.

In an action for breach of a contract for the sale of posts and poles, evidence and admissions held to justify an instruction that plaintiff was entitled to recover the difference between what he was able to obtain for the balance of the poles and posts which defendant refused to accept and the contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1108; Dec. Dig. § 388.\*]

## 3. SALES (§ 372\*)—PERFORMANCE—EXTENSION OF TIME—DELAY—DAMAGES.

Time of performance of a contract for the sale of posts and poles having been extended by agreement, defendant could not recoup damages for delay in plaintiff's performance against plaintiff's claim to recover damages for defendant's breach of contract.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 372.\*]

## 4. SALES (§ 384\*)—CONTRACT—BREACH—DAMAGES—ADDITIONAL WORK—TAXES—INTEREST.

In an action for the buyer's breach of a contract for the sale of posts and poles, plaintiff having "cut back" 681 poles at defendant's request, and having sold the balance of the contract quantity after defendant had refused to receive any more, was properly permitted to recover the reasonable value of the cutting back, taxes paid on the poles after they were ready for delivery, and interest on the balance due after the date of the sale of the remainder of the contract quantity which defendant refused.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.\*]

## 5. SALES (§ 384\*)—BREACH OF CONTRACT—DAMAGES.

Where plaintiff contracted to sell defendant certain posts and poles, and, after taking part of the contract quantity, defendant refused to accept any more, he was not entitled to recover the cost of clearing additional land which he held under a lease for the purpose of clearing and removing the timber therefrom, on the theory that it was necessary to provide space to store the posts and poles waiting defendant's directions to ship.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.\*]

## 6. SALES (§ 384\*)—CONTRACT—BREACH—DAMAGES.

Where delays on both sides in the performance of a contract for the sale of posts and poles up to June 25, 1909, were agreed to on grounds satisfactory to both parties, and on June 30, 1909, plaintiff sold the balance of the material, on notice to defendant, because of defendant's breach of contract, plaintiff could not recover interest by way of damages prior to that date.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 384.\*]

**7. APPEAL AND ERROR (§ 1140\*)—REVERSAL—DAMAGES—REMITTITUR.**

Where a judgment is erroneous only in the amounts of damages allowed, and the items for which plaintiff was not entitled to recover were clearly ascertainable, the Court of Appeals was authorized to affirm the judgment in case plaintiff would agree to remit an amount sufficient to cover the items for which he was not entitled to recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.\*]

Knappen, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Western District of Michigan.

Action by Henry E. Leaper against C. J. Huebel Company. Judgment for plaintiff, and defendant brings error. Reversed in part.

M. J. Doyle, for plaintiff in error.

W. S. Hill (W. P. Belden, of counsel), for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and EVANS, District Judge.

EVANS, District Judge. The defendant in error, Henry E. Leaper, whom we shall, for convenience, call the plaintiff, sued the C. J. Huebel Company (a corporation), which we shall call the defendant, for damages resulting from the alleged breach of a contract which was in writing, and the material parts of which are as follows:

"This agreement, made and entered into this twelfth day of January, 1907, by and between H. E. Leaper of Green Bay, county of Brown, state of Wisconsin, party of the first part, and C. J. Huebel Co., of Menominee, Michigan, party of the second part, witnesseth:

"That for and in consideration of the moneys to be paid, and the conditions to be performed by the party of the second part, hereinafter set forth, party of the first part hereby agrees to sell and deliver to said party of second part all the cedar poles and posts that he may have during the winter 1906 and 1907 estimated at about seven thousand poles and twenty thousand posts.

\* \* \*

"Party of the first part hereby agrees to deliver said material on cars of the Soo Line as may be directed by parties of the second part from time to time, parties of the second part agree to move all the said poles and posts by July 20, 1907, and party of the second part agrees to inspect the same from time to time when so delivered, in quantities of not less than \_\_\_\_\_ per cent. of the whole amount, said inspection to be final, and upon such inspection and marking of said material by said party of the second part, the same shall become the property of the said party of the second part, and they shall pay therefor in the manner hereinafter provided. Party of the first part agrees to pay for any labor necessary in handling said material for inspection.

"In consideration of the sale and delivery by said first party to said second party, of the material specified in this agreement, the said second party hereby agrees to pay therefor when delivered according to contract, the parties for themselves, their heirs and assigns agree as follows, to wit: \* \* \*

"Terms of payment: Two thousand dollars on the signing of this contract, two thousand April 15th, two thousand June 1st, four thousand July 1st and balance July 20, 1907, and any moneys advanced to said first party shall become a lien on all material intended under this contract, and the same to be deducted from the proceeds of first materials delivered."

Omitting certain averments of the declaration, which were not pressed at the trial, the plaintiff, in stating his cause of action, averred:

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



"That during the winter of 1906 and 1907, as contemplated as aforesaid, he did cut and manufacture and had ready for delivery to the said defendant, at the time and times and places contemplated by said contract, the full amount of, to wit, 7,000 cedar poles and 20,000 cedar posts, all of which conformed in every respect to the specifications thereof, as set forth in said contract.

"And the plaintiff alleges that, at the time of the execution of the contract aforesaid, it was contemplated, understood, and agreed between the parties thereto that the poles and posts so to be gotten out and delivered to the said defendant should be delivered upon cars at the millyard of said plaintiff in said county of Alger in said district, upon a railroad track to be built connecting the Minneapolis, St. Paul & Sault Ste. Marie Railway with said millyards, and to be completed on or about the 1st day of June thereafter; that, by an understanding and agreement between the parties to said contract, the time for the completion of said railroad track was extended to, and said railroad track was completed on, to wit, July 1st thereafter; that it was the duty of the said defendant to direct from time to time the delivery of said poles and posts upon cars at the said millyard of the plaintiff on or before the 20th day of July, A. D. 1907, or within a reasonable time, to wit, one month, thereafter. Yet the said defendant, notwithstanding his duty as aforesaid, did not so order and direct the delivery of said poles and posts as aforesaid within the time as aforesaid, and afterwards did only order and direct the delivery of a portion of said poles and posts as aforesaid, to wit, 3,000 of said poles and 10,000 of said posts, and on, to wit, the 1st day of July, A. D. 1909, refused and still does refuse to direct and order the delivery of the balance thereof.

"And the said plaintiff alleges that on, to wit, the 1st day of July, A. D. 1909, the said defendant still refusing and neglecting to direct and order the delivery of said balance of cedar poles and posts as aforesaid, the said plaintiff did elect to hold the said contract forfeited and did offer the said poles and posts for sale of all of which the said defendant was notified and informed, and did sell said balance of said poles and posts at the highest market price obtainable therefor, and did receive for said posts and poles a large sum of money, to wit, \$2,000. And the said plaintiff alleges that there was then due him and unpaid under the said contract from said defendant the full and complete sum of \$4,400; and that by reason of the premises the said plaintiff has lost and been deprived of a large sum of money, to wit, \$2,400, which said sum the said defendant did undertake and agree to pay to him, the said plaintiff, upon request. Yet the said defendant, although often requested so to do, has not paid the said sum, or any part thereof, to the damage of the plaintiff of \$4,000."

The plaintiff also gave notice of the particulars of his claims, the details of which appear in the record but need not be stated here.

After demanding a trial of the matters set forth in the declaration, the defendant filed notice of its defenses, which, in substance, were: First, that the plaintiff had been paid in full; and, second, that it had upon its part performed all the stipulations of the agreement, but that the plaintiff had not done so, and that by his failure to do so the defendant had been damaged in the sum of \$10,000.

Upon the issues thus made the case went to trial before a jury and resulted in a verdict for the plaintiff for \$2,613.70. Exceptions were taken to certain rulings of the court in respect to the admission of testimony and also in respect to certain phases of the charge to the jury. Many errors are assigned upon the rulings referred to, but we shall only notice such as seem to be material.

[1] 1. The testimony for the plaintiff tended to show that by the mutual agreement of the parties the time for performing certain stipulations of the contract was extended. The defendant objected that there was no averment in the declaration to authorize admission of

testimony to establish the fact of an extension of time; but, while that pleading is not entirely specific, the court is of opinion that it is sufficient to authorize the admission of the testimony objected to. That testimony consisted mainly of a written correspondence between the parties, which occurred after the execution of the contract. While what takes place before its execution may be merged in a written contract, we know of no principle of law which would prevent the parties to an agreement from afterwards modifying or changing its terms. They have the same right to change their agreement that they had to make it originally. Citation of authority is not needed upon the proposition, but we may refer to *Teal v. Bilby*, 123 U. S. 578, 8 Sup. Ct. 239, 31 L. Ed. 263.

If the correspondence which was had after the contract was made tended to show that its terms had been changed to better suit both of the parties, it was competent and admissible as evidence. The importance of this testimony may be indicated by stating the respects in which the written contract was changed by the parties and their reasons for it, though their reasons may not be very material, if in fact the changes were made. The plaintiff had agreed to deliver the poles and posts on cars of the railroad known as the Soo Line, but the mill of the plaintiff was located several miles distant from it. The poles and posts were gotten out in winter and accumulated at the mill, and could only be delivered on cars of the railroad during the warm months. In order to get them on the cars of the Soo Line, a branch track had to be laid from the railroad to plaintiff's mill, and it was supposed when the contract was made that this branch line could be completed before midsummer and in time for delivery and removal of the lumber within the time stipulated in the contract; but the completion of the track was delayed, and the cars could not be gotten to the mill, nor was it practical to wagon the poles and posts to the railroad. It was in reference to this situation that the correspondence took place, and we think it was not error to permit it to be read as evidence. It might also be observed that it may not have been very prejudicial to the defendant to have the correspondence read, as possibly the modifications thereby made in the contract were quite beneficial to it as well as to the plaintiff. And it may be added that in view of the nature of the correspondence it is scarcely possible that defendant could have been prejudiced by an amendment of the declaration and a proceeding with the trial thereunder. There was no suggestion that all the correspondence or other evidence on the subject was not immediately available. The Michigan practice is liberal in permitting amendments when prejudice will not result, and such amendment would clearly have been within the discretion of the trial judge. There was surely no greater prejudice in admitting the testimony without amendment than if it had been admitted under amendment.

[2] 2. In writing, under date of June 25, 1909, the plaintiff gave notice to the defendant that unless the balance due him was paid he intended, on June 30th, to sell the poles remaining in his yards, and to hold the defendant liable in damages for the difference, if they did not bring enough to pay the balance due under the contract. The sale was accordingly made, and, after deducting the price obtained, a

balance was left of \$1,911.05. This sum was part of several amounts which made up the verdict of the jury for \$2,613.70.

It appears from the record that in the course of the trial the defendant's counsel, Mr. Doyle, made the following statement to the court and jury:

"The defendant concedes that on the 1st day of July, 1909, there was remaining in the plaintiff's millyard of the Huebel 1,907 stock poles and posts which at the prices named in the contract would amount to \$4,616.54, and that said stock was on that day sold by the plaintiff for the sum of \$2,705.49 and that said sum was the best price then obtainable therefor, and that, if the plaintiff is entitled to recover anything in this suit, he is entitled to recover the difference between those sums. The defendant further concedes that there were 681 poles cut back at the request of the defendant."

The same counsel in his brief here says:

"There is no controversy as to number, quality, or price. On June 30, 1909, Leaper declared the contract broken by Huebel and sold the poles then remaining in his yard for a sum \$1,911.05 less than the contract price. It is agreed by both parties that such was the best price obtainable at the date of sale."

[3] Upon the statement of counsel made at the trial, and upon the written correspondence admitted as testimony, we think the learned judge who tried the case was entirely right in charging the jury that the correspondence by its terms constituted an agreement to extend the time of performance of certain stipulations in the original contract, and that as there remained due on the contract price of the poles, after selling those sold under the notice of June 25th, a balance of \$1,911.05, the plaintiff was entitled to recover that much of his claim. It seems to the court that the facts admitted of no other conclusion. Besides, the time of performance having been extended by agreement, the right of recoupment for alleged damages during such delay falls to the ground.

[4] 3. Other items were embraced in the bill of particulars, two of which, namely, one for \$34.05, for "cutting back" 681 poles, and another for \$41.76 for certain taxes paid on the poles, do not seem to be disputed. Both of these items were also included in the verdict, and there can be no doubt of the propriety of this action.

4. Another item claimed by the plaintiff and included in the verdict was for \$130.61 which covered interest on the balance due plaintiff from July 1, 1909 (the day after the sale of the poles) to the date of the trial. We see no reason for supposing that this was not a proper element of damages if the jury chose to include it, and we think there was no error in the allowance of this item. Moreover, we find no assignment of error aimed at its allowance.

[5] 5. The plaintiff, in his bill of particulars, stated one item of the damages he claimed, in this language, "To expense of clearing land to store material, \$200," and \$150 of this sum was allowed by the jury and included in their verdict. The facts upon which this claim was based appear to be that the plaintiff having gotten the poles upon his yards at the mill, and the same not having been taken by the defendant, the plaintiff cut the timber off a part of the land contiguous to his millyard, so as to make room for the convenient care of the poles and possibly for the more convenient handling of his business gen-

erally. The land so cleared was part of that held by the plaintiff under a lease providing, among other things, for cutting and removing the timber therefrom. The court below submitted this item to the jury with the result stated. While a charge for storage might, under some circumstances, be a proper item of damage, we have reached the conclusion that the expense of "clearing the land" was not, as such, a proper element of any damage sustained by the plaintiff. There was nothing in the contract between the parties nor in the correspondence by which it was modified that seems to the court to authorize the conclusion that the expense of "clearing" additional land, even for enlarging plaintiff's facilities for taking care of the poles, was within the contemplation of the parties when they made their contract or when they modified it. Besides, the removal and sale of the timber from the land cleared was one of the plaintiff's objects in leasing it, and non constat that the increase of yard facilities was not permanently advantageous to the plaintiff and his business. This element of damage was, therefore, as we think, too remote, and in submitting it to the jury the court erred.

[6] 6. The court at the trial also submitted to the jury the question of allowing interest on the claim of plaintiff from January 1, 1908, to July 1, 1909, and to the extent of \$346.23 the jury allowed it and included it in their verdict. Up to June 25, 1909, when the notice of the sale was given, the delays upon the one side and the other in the performance of the stipulations of the contract were by mutual consent and for reasons which are stated in the correspondence—reasons which sometimes favored one side and sometimes the other, and the delays apparently resulted as much to the advantage of one party as to the other. At any rate, the delays were agreed to upon grounds which we may assume were satisfactory to the parties, and in these circumstances we cannot perceive that the plaintiff was entitled to damages by way of interest for any part of the time previous to June 30, 1909. In submitting this item to the jury we think there was error.

7. In short, the court is of opinion that in the verdict there were properly included the items of \$1,911.05, \$130.61, \$34.05, and \$41.76, which make up a total of \$2,117.47. To that extent the verdict and judgment were proper, but it was excessive and erroneous to the extent of \$496.23, made up, as we have indicated, of the items of \$150 and \$346.23.

[7] The judgment must be reversed, with costs, and with directions to the court below to grant the defendant a new trial of the action unless the plaintiff shall, within 30 days from the entry of this judgment, file in this court a consent to remit, from the judgment heretofore entered by it, the sum of \$496.23. That this practice is warranted by the authorities is shown by the following decisions: *Tefft v. Stern*, 73 Fed. 591, 21 C. C. A. 67; *Tefft v. Stern*, 74 Fed. 755, 21 C. C. A. 73; *American Nat. Bank v. Williams*, 101 Fed. 943, 42 C. C. A. 101; *Farrar v. Wheeler*, 145 Fed. 482, 75 C. C. A. 386.

If that reduction is thus made by the plaintiff and entered of record, new trial will be denied, and the judgment will be affirmed.

As the errors to its prejudice were substantial ones, the court is of opinion that the defendant, the C. J. Huebel Company, should recover its costs on this writ of error.

KNAPPEN, Circuit Judge. I concur in the foregoing opinion of Judge EVANS, except that I think the question of interest discussed in subdivision 6 of the opinion was properly submitted to the jury, and that the item of taxes rests upon the same basis as the interest allowance.

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JACKSON v. WHITE et al.

(Circuit Court of Appeals, Fourth Circuit. June 15, 1911.)

No. 953.

1. APPEAL AND ERROR (§ 1022\*)—REVIEW—FINDINGS OF FACT.

Where on questions of fact a special master and the trial judge concur, an appellate court will accept their findings, unless the record shows them to be clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\*]

2. CORPORATIONS (§ 187\*)—"DEBT"—CONSTRUCTION OF AGREEMENT BETWEEN STOCKHOLDERS.

Owners of a majority of the stock of a railroad company sold their holdings under an agreement to pay off all indebtedness of the company and deposited the proceeds of the stock to be paid out in discharge of such indebtedness on vouchers issued by the directors; the surplus remaining to be divided between them in proportion to their several holdings. *Held*, that the sum which a stockholder had paid for his stock was not a debt of the company, and the directors had no authority to allow and pay a claim therefor as against another stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 703; Dec. Dig. § 187.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

3. CORPORATIONS (§ 187\*)—ACTIONS BETWEEN STOCKHOLDERS—LIABILITY FOR MISREPRESENTATION.

Where stockholders of a corporation joined in a sale of their stock under an agreement to pay the debts of the corporation from the proceeds, statements made by certain of the stockholders to another to induce him to join in the sale, as to the amount which would be required to pay the debts, if made in good faith, did not create a liability on their part because the debts proved to be larger than their estimate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 703; Dec. Dig. § 187.\*]

4. CORPORATIONS (§ 327\*)—CONTRACT BY OFFICER—LIABILITY FOR BREACH.

A contract, by which a defendant, who owned a controlling interest in a corporation, agreed to deliver certain of its bonds to complainant's assignor, construed, and *held* to create an indebtedness from such defendant to complainant equal to the par value of such bonds, where they were never issued, but claims by others against the corporation on similar contracts were paid on that basis with defendant's consent as a director.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 327.\*]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by Ida G. Jackson against A. B. White, H. C. Jackson, V. B. Archer, H. B. Nye, Citizens' Trust & Guaranty Company of West Virginia, and Citizens' Trust & Guaranty Company of West Virginia, as trustee. Complainant appeals from the decree. Reversed.

James S. McCluer and Seth T. McCormick (McCluer & McCluer, on the brief), for appellant.

William Beard and William H. Wolfe, Jr. (B. M. Ambler and A. G. Patton, on the briefs), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. In the summer and early fall of 1901 the complainants and the defendants White, H. C. Jackson, Archer, and Nye held among them more than one-half of the capital stock of the Little Kanawha Railroad Company. They united in a sale for \$350,000 of all their holdings to J. T. Blair and E. D. Fulton. Out of this sum the sellers agreed to pay and discharge all existing liens and incumbrances and all valid claims and demands of any character whatever against the company. The buyers deposited \$350,000 with the defendant the Citizens' Trust & Guaranty Company. The last-named company was to pay this money out in the first place in discharge of the debts of the railroad company upon vouchers made up by its then board of directors. If a demand was made upon the railroad company which the directors did not believe to be valid, the sellers of the stock reserved the right to contest such claim. If they made such contest, they were required to leave in the hands of the trust company a sum of money sufficient to save harmless the buyers from any loss or damage that might arise in consequence of such claim. The surplus, if any, remaining after discharging the debts and liabilities of the company, was to be divided among the sellers in proportion to the number of shares of stock sold by each of them, respectively.

The complainant says that the \$350,000 was paid out under the direction of the defendants White, H. C. Jackson, and Archer. She asserts that she did not receive the sum due her, first, as creditor of the company; second, as stockholder therein; third, under a written contract with the defendant H. C. Jackson.

We will consider these contentions in the order above mentioned.

First, as creditor: Among the claims against the railroad company presented to its board of directors was that of W. W. Jackson for \$2,000 for services rendered and expenses incurred for the company. This claim the board of directors rejected. W. W. Jackson is the complainant's husband. She says that the claim should have been allowed and not rejected. The special master agreed with her and held that she was entitled to this sum. The court below held that the special master was in this respect in error. In so holding the court below was right. It was right whether the claim of W. W. Jackson was or was not a valid one in his hands as against the company. The record

does not show that this claim was ever assigned to the plaintiff. She has, therefore, in a legal sense, no interest in it.

Second, as stockholder: The number of shares of stock sold to Blair and Fulton was 2,971. At the time such sale was made, 282 shares stood in the name of the complainant. The special master found that  $23\frac{1}{4}$  of these belonged to defendant H. C. Jackson, and had been put in the name of the complainant by mistake, and that the complainant was legally and equitably entitled to  $258\frac{3}{4}$  shares and no more. The report of the special master was in this respect confirmed by the court below. Complainant does not here contest such conclusion.

As the holder of  $258\frac{3}{4}$  shares she is entitled to the same proportion of the surplus remaining after discharging the debts and liabilities of the company as  $258\frac{3}{4}$  bears to 2,971. This is not now denied. Until the filing of the bill in this cause it was ignored. That there is a surplus in which she is entitled to share is now admitted. What that surplus amounts to, or at least what it should amount to, is disputed. Defendants say that the determination by the board of directors of the company that a particular claim was a valid claim against the company is binding upon the complainant. This the complainant denies. She asserts that the defendants White, H. C. Jackson, and Archer caused to be paid claims which they knew were not debts of the company. She contends that the larger part of such sums so improperly expended were paid to some one or the other of the three defendants last named. She says that they are bound to account to her for her share of the sums which they so unlawfully paid out. To the extent that any of the defendants received out of this sum of \$350,000 money which he was clearly not entitled to claim under the terms of the agreement with Blair and Fulton, the complainant's contention under the peculiar circumstances disclosed by the record appears to us to be well founded.

To judge justly what was done and how it came to be done it is necessary, if possible, to understand something of the history of the railroad company and of the relation of the three principal defendants to it.

That there was a Little Kanawha Railroad appears to have been due in large part to the defendant H. C. Jackson. With him in the years immediately preceding 1901 were associated the defendants V. B. Archer and A. B. White and, apparently somewhat less intimately, H. B. Nye. Their resources were not adequate to enable them comfortably to finance the project. They at times found it very difficult to raise needed money for the road. The credit of the company had become so impaired that its name on commercial paper rendered the paper nonnegotiable. In other words, its note, even though indorsed by White or Archer or H. C. Jackson, would not be discounted at bank, although the individual notes of those gentlemen would have been. They were accordingly forced to give, in lieu of its paper indorsed by them, their individual notes.

They were hopeful that some day the enterprise would pay handsomely. They knew it had no money at the time. They, or some of

them, kept imperfect accounts of the expenditures and liabilities made or incurred by them for it. In order to raise money when it was sorely needed, sometimes the company and sometimes some of the defendants as individuals made bargains with other people by which such other persons were promised an interest in the securities to be issued by the road under varying terms and conditions classified in the several briefs. When the sale to Blair and Fulton was actually made, the sum received was not sufficient to realize any great expectations. The obligations entered into by the company and by the individual defendants varied in their terms. It was not easy—perhaps it was not possible—to make an exactly equitable distribution of the money received because the varying contracts and engagements could not be reduced to any common denominator. It was largely because of these conditions and difficulties that the present litigation has arisen and the record has expanded into nearly 1,300 printed pages.

The defendants H. C. Jackson and White, and to a somewhat less extent Archer, had borne the burden and heat of the struggle to keep the company out of absolute financial ruin. In order to save the company, H. C. Jackson and White had used their credit and resources to their full limit. For years the company had been ever before them. Their financial future was largely bound up with it. They had labored, spent, and risked for it. It did not seem to them that the complainant's husband, W. W. Jackson, under whom she claimed, had ever been of much use to the company, although in its earlier days he seems to have spent considerable time in writing about it and in talking about it. When the directors or their executive committee were auditing the bills against the company and issuing vouchers for the payment of such bills, they realized that the enterprise was being finally wound up. The hope of large profits which had buoyed them up through many periods of doubt, struggle, and difficulty were now at an end. They not unnaturally thought that they were entitled to have their claims against the company treated in a liberal and generous way. They did not feel that the complainant stood in this respect on the same footing with themselves. This feeling was very natural. It was very human. Nevertheless, in a court of equity the complainant's rights as a shareholder in proportion to the number of shares she held were exactly the same as theirs. If they had any claims as creditors against the company, they were entitled to have them paid. As a stockholder she was entitled to insist that no claims against the company should be paid except those for which the company was liable.

After paying all the claims presented against the company, including those to themselves to which complainant objects, there still remained a surplus of some \$16,000. The complainant points to the way in which they dealt with this \$16,000 as showing that H. C. Jackson, White, and Archer were at or about the time they passed upon the claims against the company disposed, consciously or unconsciously, to ignore her rights. They distributed this \$16,000 among themselves and a certain C. H. Shattuck, who, by the terms of the agreement with Blair and Fulton, had no interest in it. They paid \$10,000 of it to



H. C. Jackson, \$1,000 to Archer, \$2,500 to White, and \$2,500 to Shattuck. These payments were not made absolutely. Each one of them, when he withdrew the money from the Citizens' Trust & Guaranty Company, gave a bond executed by the Citizens' Trust & Guaranty Company conditioned that the person who withdrew the money would repay it, if it should be necessary, to pay the debts of the railroad company, or in case the amount so withdrawn was greater than the amount that would be due to the person withdrawing it on final settlement among the stockholders who united in the sale to Blair and Fulton. The bonds so given appear to have been delivered to the persons who withdrew the money. It should be remembered that at the time these withdrawals were made the complainant held more stock than did Archer and something over two-thirds as much as White. She was not given the opportunity to withdraw anything, nor was there any substantial sum left for her to withdraw if she had asked permission to do so.

By the decree below the defendants who made these withdrawals, or authorized them, are required to account to the complainant for her share of the sums so withdrawn. That portion of the decree below has not been appealed from. It has been necessary, however, to refer to this feature of the case because it undoubtedly played a large part in convincing the complainant that she has not received fair and just treatment. It does throw a good deal of light upon the way in which the defendants H. C. Jackson, White, and Archer looked at the complainant and her rights at the time when these transactions took place.

Under such circumstances a court of equity must scrutinize with some care the action taken by these defendants in passing upon the claims.

[1] The complainant says that many of the claims were improperly and unjustly allowed. These objections of the complainant appear to have been all carefully considered by the special master. Most of them he overrules. He frankly states that in many cases the evidence on the question as to the nature and amount of the claim is not altogether satisfactory, but, on the whole, he believes that there is not sufficient evidence to show that the claims which he allows were not valid claims against the company and justly owing by it. His conclusions in these matters have been confirmed by the court below. Where, on questions of fact of this character, the special master and the judge below concur, the appellate court will accept their findings, unless the record shows them to be clearly erroneous. Except in one instance, we see nothing in this record to justify us in coming to any such conclusion.

[2] When the defendant White became a stockholder in the company, he paid \$2,500 for his stock. None of the other individual stockholders who sold their stock to Blair and Fulton appear to have paid anything for it. When the directors were dividing the \$350,000, Mr. White made a claim on them for the return of this \$2,500. They paid it to him. In so doing they paid out \$2,500, for what was not a debt of the railroad company and for what they must, if they had thought

about it, have known was not a debt. To this payment the complainant objects. She is entitled to object. There being no controversy over the facts, the question presented to us is one of law purely, and we are of opinion that the special master and the court below erred in not requiring the return by the defendant White of this \$2,500.

There are three items as to which the court below overruled the findings of the special master.

H. C. Jackson had made a personal contract with one Gregory for the delivery to Gregory, in certain contingency, of bonds of the railroad company. He paid Gregory \$3,000 for a release from this contract. The directors of the railroad company repaid this sum to Jackson out of the \$350,000. The special master held this payment was improper.

By an error of calculation the directors overpaid H. C. Jackson \$382.52 on salary account. The special master held that this sum should be returned by H. C. Jackson.

\$500 was paid the defendant Archer as a retainer to defend probable suits which might be brought against H. C. Jackson by W. W. Jackson, George Mastin, and J. H. Gregory. The special master found that these claims were claims against H. C. Jackson and that the company was under no obligation to defend them.

The learned judge below sustained exceptions made by the defendants to the disallowance by the special master of the above-mentioned claims. We have not the benefit of his statement of the reasons which led him to take such action. As the record stands before us, it seems to us the special master was right, and the defendants who received the above-mentioned sums should be required to return the complainant's share of them to her.

[3] The complainant says that H. C. Jackson and Archer induced her to unite in selling the stock to Blair and Fulton by telling her that the debts of the company did not exceed \$276,000. There was actually paid out under the authority of the directors \$333,858.86. We have held that \$6,382.52 of this amount was improperly paid to H. C. Jackson and White and must be returned by them. Deducting the last-mentioned sum from the total amount originally expended will leave the amount we hold to have been properly paid out for the indebtedness of the company, \$327,475.34. Complainant says that this is \$51,475.34 more than Archer and H. C. Jackson told her the debts would amount to. She asks that they be required to put her in the position she would have been in had the facts been as she says they represented them to be. In other words, she asks that they be required to pay to her her proportion as stockholder of \$51,475.34, or in the neighborhood of \$4,500.

It suffices to say that we do not find from the record that H. C. Jackson and Archer, or either of them, in any way bound themselves to complainant to make good any loss she might suffer by reason of the debts of the company exceeding \$276,000, nor do we find that at the time they made such representation to her they knew it to be false or made it in reckless indifference as to whether it was true or false. They do appear to have told her that they believed the indebtedness

would not exceed \$276,000. There is nothing to show that such statement was not made in good faith. Neither in contract nor in tort is the complainant entitled to recover against H. C. Jackson or Archer, or either of them because of such statement.

There remains for consideration:

Third, complainant's rights under a contract with H. C. Jackson.

[4] The contract in question is dated April 14, 1898. By it, in consideration of \$2,500 cash paid by W. W. Jackson and one J. H. Gregory, and the undertaking by the said Gregory to indorse certain notes of the railroad company and an assumption by him of some contingent liabilities on its behalf, H. C. Jackson sold "an undivided one-eighth in the first mortgage bonds of the Little Kanawha Railroad Company on its present mileage of thirty miles, which mortgage provides for the issue of first mortgage bonds in the amount of \$15,000 per mile, making the total authorized issue \$450,000." These bonds were subject to certain enumerated prior liens aggregating \$140,000. By the terms of the contract two-thirds of the one-eighth of the bonds so sold were to go to Gregory and one-third to W. W. Jackson. W. W. Jackson's interest in this contract was subsequently assigned to his wife; the transaction taking the form of an assignment by him of his interest in the contract to H. C. Jackson and of the latter's reassignment of such interest to the complainant.

The complainant says that \$140,000, the amount of the prior liens provided for in the contract, should be deducted from the \$450,000, the total issue of bonds mentioned in the contract. This leaves a balance of \$310,000.  $\frac{1}{24}$  of \$310,000 is \$12,916.66, which is the amount that the special master found to be due on this contract from H. C. Jackson to complainant. The defendant H. C. Jackson sets up various defenses to this claim.

First, he says he assumed no personal obligation under the contract of April 14, 1898. Such construction of the contract does not appear to us to be reasonable.

Second, he says that the Cartwright contracts, to which W. W. Jackson assented, made impossible the carrying out of the contract of April 14, 1898. With this contention we cannot agree. By the consent of every one, the Cartwright contracts were ended. It was the obvious intention of all the parties that every one interested should return to the position he or she occupied before those contracts were made. The defendant Archer had a claim against the company for \$18,000 of bonds. This claim arose out of an agreement made years prior to the Cartwright contracts. Archer assented to those contracts. When the \$350,000 received from Blair and Fulton was distributed, Archer made a claim against the company for the par value of these bonds. H. C. Jackson assented to the payment of this claim. No one then contended that Archer had waived his claim to these bonds because of his assent to the arrangements with Cartwright. Other persons who had claims against the company were in the same position as Archer and were dealt with in precisely the same way. The present reliance of H. C. Jackson upon the Cartwright contracts is quite obviously an afterthought of his counsel.

Third, H. C. Jackson says that the contract of April 14, 1898, was assigned by W. W. Jackson to him and was reassigned by him to the complainant, and the latter assignment expressly released him from any personal liability under the contract of April 14, 1898. We do not so understand the purport of the language of such assignment. In our view the assignment intended to transfer to the complainant whatever rights W. W. Jackson had assigned to H. C. Jackson. H. C. Jackson did not wish to incur any personal liability by reason of the assignment and so said. We do not think it reasonable to assume that any of the parties intended that the complainant should not take under the assignment from H. C. Jackson all that H. C. Jackson had received by the assignment from W. W. Jackson.

Fourth, H. C. Jackson says that the complainant by claiming as a stockholder under the Blair and Fulton option is estopped to demand bonds under the agreement of April 14, 1898. We see no basis for this contention. Her rights as a stockholder arose under a contract of January 12, 1899. This contract was in no wise connected with the contract of April 14, 1898. In consequence of the agreement of January 12, 1899, she became a stockholder. Such agreement did not affect any rights she had acquired under the agreement of April 14, 1898, to demand bonds from H. C. Jackson.

Fifth, H. C. Jackson says that complainant waived any rights that she had to bonds by becoming a party to various option agreements, plans of reorganization, and the like. That result does not seem to us naturally to follow from anything that she did with reference to these agreements.

Sixth, H. C. Jackson says that the complainant is not entitled to any bonds because no bonds were issued. Bonds were not issued because H. C. Jackson, who controlled the company, did not think it expedient to issue them. Doubtless the reason he did not think it expedient to issue them was that he had no reasonable hope of being able to sell any of them. When he came, as director of the company and a member of its executive committee, to settle with Archer, Barstow, and the other persons who had claims against the company, for bonds, he and all the other directors treated these claims as if they were valid claims for an amount of cash represented by their par value.

The special master reached the conclusion that the complainant was entitled to recover from H. C. Jackson upon this contract of April 14, 1898. We think in so doing that the special master was in principle right and that the learned court below was in error in sustaining the exception of the defendant H. C. Jackson to so much of the master's report. Certain modifications, however, in this matter should be made in that report. To carry the \$140,000 of prior liens from April 14, 1898, to the time they were paid, say October 14, 1901, a period of three years and six months, must have cost the company at least as much as legal interest on the amount of those liens for that time would have amounted to. If the principal of these liens was entitled to priority over complainant's claim, the interest on them was equally a prior claim. Interest at 6 per cent. for three years and

six months on \$140,000 is \$29,400.  $\frac{1}{24}$  of this sum is \$1,225. From the amount found by the special master to be due from H. C. Jackson to the complainant should be deducted, therefore, the sum of \$1,225, reducing the amount so due to \$11,691.66. Nor do we think that the complainant is entitled to interest on this sum from April 14, 1898, as allowed by the special master. Under the construction put upon the contract by the parties, we do not think that the complainant is entitled to the principal of this sum until the division of the \$350,000 received from Blair and Fulton was completed, say December 1, 1901.

We are therefore of the opinion that, with the exceptions herein specially mentioned, the special master's report should be confirmed.

In view of the form in which the special master's report of the adjustments between the complainant and the defendants H. C. Jackson, White, and Archer was made, it will be more convenient for a new calculation to be made in the court below of the sums which in accordance with this opinion and following the principles of the special master's report, should be paid and received by the respective parties. When such calculation is made, interest on the amounts severally to be paid should be brought down to the date at which, in accordance with the mandate of this court, the final decree below shall be passed. It follows that the decree below, in so far as it is inconsistent with what is herein stated, must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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## ROBERTSON v. TERRITORY OF ARIZONA.

(Circuit Court of Appeals, Ninth Circuit. July 3, 1911.)

No. 1,933.

### 1. HOMICIDE (§ 298\*)—MAKING ARREST—RIGHTS OF OFFICER.

Instructions, on the trial of a peace officer charged with homicide committed while attempting to arrest the deceased for a misdemeanor, considered, and, taken as a whole, *held* to correctly charge that, while defendant did not have the right to kill the deceased for attempting merely to avoid arrest by running away, he had the right to overcome actual resistance to arrest by such force as was necessary even to the taking of life.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.\*]

### 2. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—WEIGHT TO BE GIVEN TESTIMONY OF DEFENDANT.

On a trial for homicide in which defendant testified in his own behalf, an instruction, referring specifically to his testimony, that, if his statements were convincing and carried with them a belief in their truth, the jury had a "right to receive and act upon them," and, if not, they had a "right to reject them," was not erroneous, read in connection with a general instruction correctly stating the rules to be applied to the consideration of the testimony of all witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1995; Dec. Dig. § 823.\*]

### In Error to the Supreme Court of the Territory of Arizona.

William D. Robertson was convicted of homicide, and, from a judgment of the Supreme Court of the Territory of Arizona (108 Pac. 217) affirming that of the court below, brings error. Affirmed.

Plaintiff in error was indicted in the district court of Graham county, Ariz., for the murder of one Wayne Purseley. At the time of the alleged murder, the plaintiff in error was the town marshal of the town of Safford in Graham county, and, in the performance of his duties as such town marshal, was endeavoring to arrest the deceased. The plaintiff in error pleaded not guilty to the indictment, was tried before a judge and a jury, which resulted in a verdict of conviction, and he was sentenced to a term of 15 months in the territorial prison. On appeal to the Supreme Court of the territory of Arizona the judgment of the lower court was affirmed. *Robertson v. Territory*, 108 Pac. 217. From this judgment plaintiff in error sued out this writ of error.

The facts of the case, as summarized by the Supreme Court of the territory in its decision, and which under the stipulation of counsel are to be taken as the statement of facts for the purpose of this writ of error, are, in substance, as follows:

On the day of the homicide there was in progress in the town of Safford, Graham county, Ariz., a celebration of the independence of the republic of Mexico. A large crowd had assembled in the town, attracted by the celebration, and some of the persons participating therein had become intoxicated. Wayne Purseley, of whose homicide the plaintiff in error was convicted, was among those in that condition. The deceased had a violent altercation with one Campbell and was using violent and threatening language against him. The plaintiff in error was at that time the marshal of the town of Safford. To him Campbell, after having been severely maltreated by the deceased, appealed for protection against further assaults by the deceased. The plaintiff in error, responding to this appeal, approached the deceased, who was demanding of the people holding him to be let loose to get at Campbell. The plaintiff in error remonstrated with him, saying: "Here, Wayne, that won't do. You can't do that. There are too many women and children on the street to be talking that way. You will have to go with me." Deceased said he would not go. The plaintiff in error then placed his hand upon deceased, who knocked the plaintiff in error down. A bystander attempted to calm deceased, and the deceased knocked the bystander down. The plaintiff in error again took hold of the deceased, and they clinched and fell, the plaintiff in error on top. The crowd interfered, rescued the deceased from the plaintiff in error, and took him away to a neighboring house. The plaintiff in error went to a saloon and got his revolver, and called upon a friend of the deceased to assist him, saying to him: "I have got to get him. Will you go with me?"

Meanwhile the friends of the deceased had been unable to keep him in the house where they endeavored to have him remain to have the wounds that he had received in the contest with Campbell further dressed. The deceased, however, resisted the efforts of his friends to restrain him indoors, and going through the house came into the yard, where he encountered the plaintiff in error. The plaintiff in error addressed the deceased as an officer, saying that the deceased must come with him, and referred to his conduct. A bystander asked that the deceased might be allowed to return to the house to have his wounds further dressed. The plaintiff in error said that he would take the deceased to the doctor or anywhere else that he wanted to go. The deceased said that the plaintiff in error should not arrest him, and, according to some testimony, applied opprobrious epithets to plaintiff in error, and struck him. At this juncture the brother of the deceased interfered, and many other people of the crowd rushed in, and there was confusion. The brother of the deceased told the plaintiff in error that he should not arrest the deceased. Thereupon plaintiff in error pulled his gun. The brother grabbed the gun and attempted to wrest it from the officer. In the meantime the deceased was striking at the officer with an open knife. The deceased, his brother,

and the plaintiff in error were all together engaged in a struggle. The plaintiff in error struck the brother of the deceased over the head with his gun, and the brother died. Deceased continued fighting with the plaintiff in error. The plaintiff in error struck him twice over the head with the gun; but the blows did not stop the onslaught of the deceased. The officer became exhausted and fired upon the deceased, and still the deceased did not stop, and he again fired, and the deceased fell mortally wounded and died almost instantly. Many of the facts are contradicted, and a number of witnesses testified that at the time the fatal shot was fired the deceased was retreating and had declined further to struggle; but the evidence, as a whole, tends to establish the facts as above stated.

Walter Bennett, Kibbey, Bennett & Bennett, W. K. Dial, and Stoneman & Jacobs, for plaintiff in error.

John B. Wright, Atty. Gen. of Arizona, and W. J. Galbraith, for the Territory.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge (after stating the facts as above). The plaintiff in error complains of the instructions given to the jury by the trial court:

[1] 1. That the instructions were based upon the theory that the deceased was being arrested by the plaintiff for a misdemeanor, and not for a felony; and that the instructions were so drawn as to mislead the jury. The plaintiff in error requested the court to instruct the jury that:

"The deceased was in the actual commission of a misdemeanor in the presence of the plaintiff in error, who was at that time a peace officer, to wit, the town marshal of the town of Safford, in Graham county, Ariz., and that it was the duty of the plaintiff in error as such peace officer to then and there arrest the deceased, Wayne Purseley."

Had this instruction been given by the court as requested, and had stopped there, there might have been ground for this criticism; but not for complaint, since it was an instruction requested by the plaintiff in error. The court gave the first clause of the instruction as requested, but specifically limited it to the time when the plaintiff in error first encountered the deceased in the street. The court said:

"This instruction is to be limited in its effect to the time at which, under the testimony, the defendant went into the street, and to the time in which the incidents covered by the testimony which occurred in the street were in their progress."

This was not the time when the tragedy occurred. The plaintiff in error failed at this time to accomplish the arrest of the deceased. In this encounter the crowd interfered, rescued the deceased, and took him away to a neighboring house. In the second encounter, when the deceased came from the house into the yard, the situation took on an entirely different complexion, and there is evidence tending to show that the deceased became an aggressor. The deceased declared that the plaintiff in error should not arrest him, and there was evidence that he struck the plaintiff in error. The plaintiff in error thereupon pulled his gun. A brother of the deceased attempted to take the gun away from him. In the meantime the deceased was striking at the

plaintiff in error with an open knife. The plaintiff in error struck the deceased twice upon the head with the gun, but the blows did not stop the onslaught of the deceased. The plaintiff in error became exhausted, and fired upon the deceased, and still he did not stop. Then it was that the plaintiff in error fired the fatal shot. How did the trial court treat this part of the affray in its instructions to the jury? The court said:

"Where an arrest is sought to be made, though for a misdemeanor only, and the person sought to be arrested resists by the use of a deadly weapon, the officer has the right, if he believes, and has reasonable grounds to believe, that the other will kill him or inflict great bodily harm upon him, to use his own weapons even to the taking of life."

Further on in the instructions the court said:

"It was entirely within his rights (that is to say, within the rights of the plaintiff in error as an officer) to use force to overcome resistance. You must observe the difference between resisting arrest and running away. Be the offense ever so trivial, if he actually resists arrest and fights back against arrest, the officer may use all force necessary and summon all the assistance that the surrounding circumstances offer him, to enable him to overcome that resistance even to the infliction of bodily harm, or, if necessary in extremity, the infliction of death. This duty of the officer to avoid infliction of injury or death only occurs when the man seeks to avoid arrest, but it does not devolve upon him to avoid the infliction of injury or death if it be necessary to overcome resistance, but he may inflict it only if it is necessary, and he may go only so far as it is necessary to effect arrest or overcome resistance. If the officer's life becomes in jeopardy during the course of the attempt to overcome resistance in making the arrest, he has the right as anybody else to protect himself from bodily harm or death."

We do not think that these instructions, taken as a whole, were misleading; or that in this final affray the jury understood that they were instructed that the plaintiff in error could use no force other than was necessary to arrest the defendant for a misdemeanor committed in his presence, or that he could not defend himself from the assaults of the deceased. The act of the deceased in committing a misdemeanor in the presence of the officer was, of course, the original cause for the arrest; but, if the jury believed the testimony, the cause had grown to include the actual forcible resistance of arrest by the deceased, and a necessity had been thrown upon the plaintiff in error to overcome such resistance and defend himself against the assault of the deceased. Whether the jury gave to this testimony the weight it was entitled to receive, or whether they believed that the deceased was retreating and had declined further struggle when the fatal shot was fired, as some of the witnesses testified, is another question, and one with which we are not called upon to deal. The only question this court has to determine is whether the trial court in directing the attention of the jury to this testimony did so with proper instructions as to the law applicable to that situation. We think it did, clearly and distinctly, and that there is no ground of complaint.

2. It is objected that the court did not give the last clause of the requested instruction as follows:

"And that it was defendant's duty as such peace officer to then and there arrest the deceased, Wayne Purseley."



The court gave the instruction in its appropriate place, and in appropriate language, and more favorable to the defendant than the requested instruction, as follows:

"You are instructed as a matter of law that it is not only the right but the duty of a peace officer to arrest a person who is committing a public offense in his presence, and that in making such arrest he may use such force as is necessary to overcome all resistance and may repel force with force and need not give back; and, when the offender puts the peace officer's life in jeopardy, the officer may use sufficient force to overcome the resistance he encounters even to the taking of life."

[2] 3. It is next objected that the instruction of the court singled out the plaintiff in error from among all the other witnesses who were examined in the case, and, calling attention to his special interest in the case, instructed the jury that they were to consider the very great interest he must have and feel in the result of the case, and the effect the verdict would have upon him, and determine to what extent, if any, such interest would color his testimony or affect his credibility; that, if his statements be convincing and carry with them belief in their truth, the jury had the "right to receive and act upon them"; if not, they had the "right to reject them." This instruction had been twice approved by the Supreme Court of the Territory. *Halderman v. Territory*, 7 Ariz. 120, 60 Pac. 876; *Prior v. Territory*, 11 Ariz. 169, 89 Pac. 412.

In the present case the Supreme Court held the instruction not to be error, but said it was in some respects an undesirable instruction, and recommended to the District Courts that its use be discontinued. *Robertson v. Territory*, 108 Pac. 217. It is contended that this recommendation is an admission that the instruction does not correctly state the law, and, if the instruction should be given again by a district judge, the Supreme Court would hold it to be error. We do not so understand the opinion of the Supreme Court. The instruction appears to be substantially in accord with recognized authority. In the case of *People v. Cronin*, 34 Cal. 191, 195, 204, substantially the same instruction was given to the jury, and the instruction was sustained by the Supreme Court of the state in the following language:

"The instruction of the court in relation to the credibility of the defendant, who offered himself as a witness, was in all respects legal and proper. We do not agree with the learned counsel for the defendant in holding that it is not competent for the court to single out a particular witness and charge the jury as to his credibility. On the contrary, the less abstract the more useful the charge. Jurors find but little assistance in the charge of a judge who deals only in the general and abstract propositions which he supposes to be involved in the case, and leaves the jury to apply them as best they may."

In *Reagan v. United States*, 157 U. S. 301, 306, 15 Sup. Ct. 610, 611 (39 L. Ed. 709), the instructions in a number of cases of a similar import, including the instruction in the *Cronin Case*, were referred to as an authority for the approval of an instruction in the case before the court, in the following language:

"The law permits the defendant at his own request to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you, and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be con-

sidered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit."

But the specific objection is made to the instruction that it told the jury that if the statements of the defendant "are convincing, and carry with them a belief in their truth, the jury had a "right to receive and act upon them; if not, they had a right to reject them." It is contended that this instruction authorized the jury to reject the testimony of the plaintiff in error unless it in itself carried the belief in its truth, even though it might be corroborated by the testimony of other witnesses. This is another instance where an instruction taken singly and by itself may be considered open to criticism, and perhaps it was this criticism that moved the Supreme Court of the territory to say that the instruction was in some respects undesirable and recommended that its use be discontinued. But the instruction should be taken in connection with the preceding instructions, where the court told the jury that, in determining the credibility of any witness and the weight to be given to his testimony, the jury had the right to take into consideration, among other things, "the probability or improbability of the truth of his statements when considered in connection with the other evidence in the case." When the instruction in question is considered with this instruction upon the same subject, we do not see how the jury could have been misled as to the consideration they were required to give to the defendant's testimony if corroborated by the testimony of other witnesses.

It is objected further that the jury were instructed that they had a "right" to receive the defendant's statements if they were convincing and carried with them a belief in their truth; whereas, the instruction should have been that they "should" do so, that is to say, the instruction should have been imperative and not permissive. We think this objection is hypercritical. It will be presumed that the jury would do what they had a right to do, and that they would not refuse to receive defendant's statements if they were convincing and carried with them a belief in their truth, simply because the court had not told them that they "should" do so. The instruction might be improved, as indicated by the Supreme Court; but we cannot hold that it contained error prejudicial to the defendant.

After carefully considering all the objections urged against the instructions by the plaintiff in error, we are of the opinion that they do not contain any error for which the case should be reversed.

The judgment is therefore affirmed.

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In re MALLOY.

(Circuit Court of Appeals, Eighth Circuit. May 18, 1911.)

No. 109.

1. HOMESTEAD (§ 33\*)—ACQUISITION—CHARACTER OF OCCUPANCY.

Under the homestead law of North Dakota (Rev. Codes 1905, § 5049), which exempts to every head of a family a homestead, consisting of the dwelling house in which he resides and not to exceed 160 acres of land,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

if not within a town plat, and which, under the decisions of the Supreme Court of the state, is to be liberally construed, while occupancy is essential to initiate a homestead right, such occupancy may be constructive.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 44-49; Dec. Dig. § 33.\*]

**2. BANKRUPTCY (§ 396\*)—HOMESTEAD EXEMPTION—RIGHT OF BANKRUPT.**

A bankrupt, more than a year before his bankruptcy and when unmarried, proved up on a government homestead in North Dakota, and after staying on the land three months longer left his furniture in the house and went away. He was compelled later to go to a hospital, where he remained until the following June, when he married, obtained employment in a town 100 miles from his farm, and rented a house until April 1st following; it being then too late in the season to put in a crop. In December he was adjudged a bankrupt. He and his wife intended at all times to remove to the farm as soon as circumstances rendered it feasible and make it their home. Before their marriage his wife had also proved up on a homestead, and sent some of her furniture to his house, where it was left. *Held*, that such occupancy, together with their bona fide intention, impressed the land with the homestead character, and that he was entitled to have it set aside as exempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 670; Dec. Dig. § 396.\*]

Petition for Review of Order of the District Court of the United States for the District of North Dakota.

In the matter of M. F. Malloy, bankrupt. On petition by the bankrupt to review the order of the District Court (179 Fed. 942). Reversed.

John E. Greene and L. J. Palda, Jr., for petitioner.

Bessie & Greer, for trustee.

Before HOOK, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. M. F. Malloy, a single man, entered as a homestead under the laws of the United States, and resided thereon, 160 acres of land, the subject of this controversy. He made final proof some time during the year 1908. The exact date is not disclosed. He continued to reside upon said land subsequent to making his final proof, and during the summer of 1908, for three months. He had a house upon the land, the exact character of which is not disclosed; but the referee, in the summary of the evidence, states that it was better than the average homesteader's house and reasonably well furnished. Upon leaving the premises, three months after final proof, he went to Williston, N. D., where he remained for some time, engaged apparently in a debauch or spree, resulting in his being required to enter a hospital at Fargo, where he remained until June, 1909, when he married. In leaving his place, he left, not only his furniture therein, but some of the furniture which his subsequent wife owned, and which she had used upon a homestead upon which she made final proof, and thereafter transferred to Mr. Malloy's house before he made his final proof. Upon Malloy's marriage in June, being broken in health, and it being too late in the season to cultivate a crop upon his land, he obtained employment as an accountant at

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Minot, N. D., a town about 100 miles from the land, and leased a house until April 1, 1910, in which he and his wife resided. At the time of renting the house in question he stated to the landlord of whom he rented that he should want the place only until about spring, when he intended to move out on his farm. The testimony of other residents of Minot showed that, during casual conversations while visiting at Malloy's home in Minot, he and his wife spoke of their purpose and intention of moving upon his homestead in the spring. An attachment, however, had been levied upon the land before these statements were made. On the 1st day of February, 1910, petitioner was adjudged a bankrupt, and claimed the land in question exempt as a homestead. He filed his petition with the referee for an order requiring the trustee to set apart said land as a homestead. Upon the hearing the referee made the following findings of fact:

"(1) That Mr. Malloy, while a single man, in good faith resided upon the land in question as a home for three months during the summer of 1908, after he had made proof thereon.

"(2) That he has never abandoned such land as a home, or had any permanent home elsewhere.

"(3) That since the end of the three months after proof Mr. Malloy has never actually lived upon such land, or done any overt act indicating an intention so to do.

"(4) That since their marriage neither Mr. Malloy nor his wife have ever actually resided upon such land, nor done any overt act indicating their intention so to do.

"(5) That since the marriage neither Mr. Malloy nor his wife have done any overt act indicating an intention to abandon such home.

"(6) That it has at all times since the marriage been the bona fide intention of Mr. Malloy and his wife to make such land their permanent home, and to return thereto and actually reside thereon as soon as circumstances rendered it feasible."

The referee also made an order that the trustee forthwith set apart to petitioner as exempt the homestead claimed by him. From this order of the referee the trustee filed his petition for its review, and upon hearing the District Court decided that, under the facts, the land in question was not a homestead under the laws of the state of North Dakota, and reversed the order of the referee. Petitioner brings the case to this court.

Section 5049, Revised Code of North Dakota 1905, is as follows:

"The homestead of every head of a family residing in this state, not exceeding in value five thousand dollars, and if within a town plat not exceeding two acres in extent, and if not within a town plat not exceeding in the aggregate more than one hundred and sixty acres, and consisting of a dwelling house in which the homestead claimant resides, and all its appurtenances, and the land on which the same is situated, shall be exempt from judgment lien and from execution or forced sale, except as provided in this chapter."

The principal contention in this case upon the part of the trustee is that the land never became impressed with the character of a statutory homestead, for the reason that it never had been actually occupied by petitioner or his wife subsequent to their marriage, that subsequent to the marriage they had done no act of a physical character which indicated an intent to reside thereon in the immediate or near future, and such was the holding of the learned district judge.

While the summary of the evidence certified by the referee is very meager, we think it sufficient to sustain the findings of fact made by him. From those findings we are advised that the land in question was the home of petitioner, occupied by him as such during the summer of 1908 for at least three months subsequent to his making final proof in the United States land office; that petitioner never abandoned such land as a home, or had any permanent home elsewhere. While it is true that the land in question did not have the character of a statutory homestead while petitioner was a single man and not the head of a family, yet upon his marriage petitioner became the head of a family and entitled to a homestead exemption under the statute of the state. The Supreme Court of North Dakota, in the recent case of *Dieter v. Fraine*, 128 N. W. 684-686, say:

"It is settled beyond all cavil by previous holdings of this court that the constitutional and statutory provisions of homestead right are wholesome and salutary regulations in furtherance of a wise, generous, and humane public policy, encouraging the establishment and maintenance of homes; that statutes providing for homestead exemptions are remedial in character, and should be liberally construed, with a view of carrying into effect the obvious purpose of their enactment; and that the object sought by the adoption of this constitutional provision and the enactment of statutes in furtherance thereof 'was to protect and preserve the home, not for the benefit of the head of the family, but for the benefit of the family as a whole. \* \* \* It was the protection of the family which was the purpose in view, and, this being true, it is the duty of the courts in construing said provisions, to give effect to such plain intent.'"

While occupancy is essential to create a homestead right, yet, considering the purpose and policy for which the exemption laws are enacted, it is now accepted law that such occupancy may be constructive, as well as actual. *Davis v. Kelly*, 62 Neb. 642, 87 N. W. 347; *Cameron v. Gebhard*, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832; *Kingman v. O'Callaghan*, 4 S. D. 628, 57 N. W. 912.

It is held that the purchase of vacant, unimproved land, for the purpose of occupying it as a home, followed by acts of improvement, indicating such intent, and subsequent actual occupancy, impresses the homestead character upon such premises from the time of the purchase.

Such being the law, and having in mind the "generous and humane public policy" that caused the enactment of the homestead exemption law, we are of the opinion that it was not necessary for both or even that one of the parties should, after their marriage, actually go upon the land to impress it with the character of a homestead. It being at that time his home, he being then the head of a family, it was his homestead, exempt from execution or attachment, and could not thereafter be conveyed or incumbered by him alone.

The case of *Brookken v. Bauman*, 10 N. D. 453, 88 N. W. 84, is cited and much relied upon by the trustee. Reading the decision of that case in the light of the facts there before the court, we find nothing in conflict with our views herein expressed.

The land being impressed with the homestead character, we think the referee was correct in his finding that it had not been abandoned. The fact that petitioner's wife, before the marriage, removed some of

her furniture to his place, is strong evidence indicating that they contemplated future marriage and residence upon the place. His going to Williston, leaving his furniture and her's upon the premises, as aforesaid, does not indicate any intent to abandon the place as a home. His illness, requiring him to enter a hospital, was sufficient excuse and justification for his remaining away during that time, and did not indicate an intention on his part to abandon the place as a home. His recovery and marriage in June following, after the seeding period had passed, was, we think, a sufficient justification for himself and wife to remain away from the premises until the following spring, and it was commendable for him to seek and obtain employment for the purpose of earning a livelihood during such absence. In this regard the referee says:

"That since the marriage neither Mr. Malloy nor his wife have done any overt act indicating an intention to abandon such home.

"That it has at all times since the marriage been the bona fide intention of Mr. Malloy and his wife to make such land their permanent home, and to return thereto and actually reside thereon as soon as circumstances rendered it feasible."

While it is true that the establishment of a homestead may not be shown by mere intent alone, unaccompanied by acts indicating such intent, yet, where the homestead character is once established, mere absence therefrom does not indicate abandonment, unless such is shown to be the intent of the parties. We do not think that the absence of petitioner and his family from the land, under the circumstances disclosed, indicates an intent to abandon the land as their home.

For these reasons, the decree of the District Court, reversing the order of the referee, was erroneous, and such decree of the District Court is vacated and set aside, and the cause is remanded, with directions to enter an order confirming the order of the referee.

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RYDER et al. v. TOWNSEND.

(Circuit Court, N. D. New York. April 1, 1911.)

1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—SILO.

The Harder patent, No. 627,732, for a silo, having a continuous opening from top to bottom, claim 4, which covers broadly in combination braces between the edges of the walls forming the opening, door sections for closing the opening, and reinforcing strips for the door sections, was not anticipated, discloses invention, and is entitled to a fairly liberal construction and range of equivalents. Also *held* infringed.

2. PATENTS (§ 167\*)—VALIDITY—BROAD AND SPECIFIC CLAIMS.

When an inventor makes an invention and in his specification points out a specific construction, he may claim the specific construction and also have a general broad claim, and when this is done, in order to sustain the broader claim, it is not necessary that he should point out in his patent that the specific construction shown is not essential to the invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 167.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

**3. PATENTS (§ 288\*)—SUIT FOR INFRINGEMENT—RIGHT TO SUE USERS.**

Where infringing articles are in use in the district in which the owner of the patent resides, although made elsewhere, he is not subject to criticism for exercising his legal right to sue the users in that district instead of going to the district of the manufacture and there bringing suit against the maker.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 288.\*]

In Equity. Suit by Edgar S. Ryder and others against Edward Townsend. Decree for complainants.

Samuel Owen Edmonds, for complainants.

Briesen & Knauth (Hans v. Briesen, of counsel), for defendant.

RAY, District Judge. [1] On the 27th day of June, 1899, on an application filed February 4, 1899, letters patent No. 627,732 were issued to George D. Harder for certain improvements in silos, the invention relating "to silos or tanks of that class in which a continuous opening is made from top to bottom, through which the contents are removed at intervals." It was particularly designed for tanks for holding ensilage, or silage, as it is sometimes called. The patentee in his specifications, says:

"I do not herein claim, therefore, the vertical opening from top to bottom, nor the round construction of the tank or silo, nor the means for closing formed in sections and inserted so as to be removable from the top downward and arranged to be pressed against the wall or any part of the wall in an outward direction, as I am aware that these devices and elements are very old in the same or analogous structures."

The patentee, Harder, then says:

"My invention relates *particularly* to the special form of brace or stay-piece for holding the edges of the opening at the proper distance from each other to prevent collapse, and, further, in the special means for holding the sections of the door firmly in place."

The claim in issue is broad, and limited only in that it relates to the braces between the edges of the walls forming the opening extending substantially from the top to the bottom of the silo, the door sections for closing this opening, and reinforcing-strips for the door sections or openings, and by the words "substantially as described," meaning, of course, that he claims what he has described in these regards and their substantial equivalents.

To understand what the patentee was speaking of, and the utility of the parts referred to, it is necessary to inform ourselves as to what a silo is and its uses. Used almost universally for packing therein, until taken out for feeding, green cut forage, such as corn, stalks and all, which is necessarily moist and fermentable, and contains considerable acid, and which, so far as possible, must be excluded from the air until actually fed lest it spoil, and which must be packed in evenly, solidly, and firmly with the least possible air spaces, the silo should be cylindrical and from 25 to 50 feet high, and from 10 to 15 feet in diameter, the diameter being uniform from top to bottom so as to secure uniformity in the settling of the contents and exclude air spaces, and constructed of upright staves tongued and grooved together and made

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

perfectly smooth on the interior so as not to interfere with or impede the easy and uniform settling of the silage. This, with a suitable foundation and bottom, and a suitable roof or covering, with an opening for the entrance of the ensilage when and as cut and carried into the tank, forms the best wood silo known so far as preserving the ensilage is concerned, if we add suitable hoops extending about it at proper intervals so as to keep it in place; that is, prevent its too great expansion or out-bulging when newly filled, or its collapse when the contents are wholly or partially removed and shrinkage of the wooden staves occurs. These hoops must be strong, adjustable, and capable of being tightened. If the problem of an efficient and useful silo ended here, Harder, the patentee, would be outside the art entirely. But thus far we have provided a receptacle for the silage and means for preserving it only. We have made no provision for removing a part of it at intervals, during the barn-feeding season, say, one or twice each day during the winter and early spring. Hence the necessity for the vertical opening on one side from top to bottom which was found better or more labor saving than a series of openings the one above the other with a closed space between. This last construction necessitated going in and lifting about one-half the contents a greater or a lesser distance, while with the continuous opening a man may go up the ladder on the outside of the silo and, without entering (except at long intervals), rake out the desired quantity. But this continuous opening must be kept closed and air tight (so far as reasonably possible) after the silo is filled, and the means for closing such opening must be in sections so that it can be removed section by section, and from the top downward as the ensilage is removed or fed out, a few inches in depth each day. If an opening is made at the bottom of the silo and the contents taken out there the air enters, permeates the mass above, and the fodder or ensilage is spoiled. To put in sliding sections of door to close this continuous opening supported by cleats was easy enough and within the skill of the ordinary farmer or mechanic, but this did not prevent leakage or exclude air and interfered with the settlement of the ensilage. Neither did this construction prevent a collapse of the structure when the ensilage was wholly or partially removed. With the door sections held in position when the silo was full by the outward pressure of the contents alone the continuous opening from top to bottom so weakened the structure that when the contents were removed and even at other times, the staves would spread apart and towards this open doorway. Hence the edges of this doorway must be kept in normal position—that is, apart and upright—and braces for this purpose were inserted extending from side to side across this doorway at intervals. And it was desirable and necessary to have the sections of door fit in tightly and be self sustaining, not trusting to the pressure of the ensilage behind them, in the interior of the silo. To efficiently hold the edges of the walls of the silo on each side of this doorway apart and in position by means of braces, it was necessary to strengthen or reinforce such edges with additional material. Put in a brace from one side of the doorway to the other, each end of the brace resting against the edges of the side walls, and almost any inequality of pres-



sure on the respective ends of the brace, or even on the contents of the silo, would result in the inward bending of the one "edge" and the outward bend or spring of the other "edge." Harder set himself to the problem of providing better and more efficient means of so bracing the doorway or adjacent walls of the main body of the silo as to prevent springing out of position and collapse, maintaining, so far as possible, an even interior surface and without interfering with the sections of the door and their movement; and also to the problem of providing better and more efficient means for holding the sections of this door extending from top to bottom of the silo firmly in place while at the same time being made easily movable and air tight. He was an improver, and in his line of improvement in silos of this construction a pioneer in the silo art.

#### Cannon's Patent.

Before going into what Harder actually did we will refer to what had been done by way of a prior patent to one Warren B. Cannon, granted May 9, 1899, on application filed October 17, 1898, No. 624,751. Cannon in his specifications, said:

"The object of this invention is to provide a silo having a series of door-openings one above another for putting food into the silo from the cutting machine and removing the same" (from the silo).

Also:

"A further object consists in the peculiar and convenient means of fastening the doors in the door openings, as particularly set forth below."

Harder assumed a silo (circular in form) with a continuous opening or doorway from top to bottom of the silo, closed with a continuous door made in sections, so as to be removable section by section, and he set himself to properly bracing such doorway to keep it and the rest of the silo in proper position, and also to providing special means for holding these sections of his continuous door for closing the doorway firmly in place. Cannon, on the other hand, did not deal at all with a continuous vertical doorway or opening, extending from top to bottom of the silo, but with a series of doors, the one above the other with a closed space integral with the walls of the silo, between, and means for fastening these several and distinct doors in their several openings or doorways. Fig. 1 of the Cannon patent shows this clearly and distinctly. Fig. 3 shows his door, 7. I do not consider it necessary to go into the history of the development of the silo from the hole in the ground to the modern portable silo of wood such as is described in the patent in suit, or the stone or brick silos with cement linings. It is obvious that the braces of the Harder patent would be superfluous in stone or brick silos. The special means for holding the sections of the door in place might not be. Cannon had several openings in the side of the silo, the one above the other, each forming a separate and distinct doorway and each calling for a door. He had door frames for each opening consisting of an upright strip on each side grooved to fit the adjacent stave. The inner faces of these side pieces were cut or mortised out to form a shoulder into and against which the door itself when put in position (from the inside of the silo) would fit. To

the ends of the short staves between these doors or doorways, he attached strips of metal running from side to side of the door opening and projecting somewhat above the staves at the bottom of the doorway and below the staves at the top of the doorway so as to form a shoulder at the top and bottom of this door frame for the door itself to rest against as well as against the shoulders in the side pieces. This completes his door frame, and does not differ materially from the old-fashioned frame of the farm stable window, the window made detachable from the inside or to swing inwardly, the projection of the shoulders being on the outside to aid in keeping out the cold. In this silo these projections of the shoulders are on the outside as the pressure of the ensilage comes from the inside of the silo and the shoulders prevent the doors from being pushed out entirely and also aid to make the door air tight. Cannon's door was made of short staves tongued and grooved together and also held together with outwardly projecting cleats, so outwardly projecting for the purpose of furnishing a handle when pulling them into position or removing them from position (done from the outside), and was also provided with a rubber packing strip on its outer face running around its outer edge. When brought into position this rubber packing would come against the shoulders of the door frame before described. Each door had four bolts, one near each corner with head on the inside of the door, the bolts projecting outwardly with screw threaded end. He had two "securing trusses" or long bars with holes therein for receiving such bolts, such trusses having end projections (projecting towards the body of the silo). Put the door in position, slip the "securing trusses" on the bolts, put nuts on the bolts and turn them down and the door was drawn securely and firmly against the shoulders of the frame and the end projections of such securing trusses against the outside of the door frames or sides of the silo itself and the door was held securely in position. Unscrew the nuts, remove the trusses, and the ensilage having been removed, the door was pushed in on the ensilage below and then taken away. This was held patentable, or at least was patented in the Patent Office in 1899, about 10 years ago. He claimed:

"A round silo, constructed of staves, having a series of door-openings and shoulders and flanges for the doors to fit against, in combination with the doors, the detachable trusses fitting against the staves of the silo (by means of the projections on such trusses), and binding bolts projecting outward from the door and passing through the trusses."

It is seen that this in no sense anticipates Harder. Cannon had no use for braces as he did not have a continuous opening from top to bottom. The spaces between his door openings were filled with a continuation of the body of the silo itself and these formed sufficient braces. The method of holding a detachable door or window in a frame having shoulders for it to press against by means of headed bolts extending through such door far enough to take on a bar of wood, or iron, and receive nuts for drawing the door firmly against the shoulders, the bar of wood extending beyond the opening on each side so as to be drawn against the walls of the building, was so old and so common years before Cannon was grown to manhood that courts

ought to take judicial notice of it, but Harder did not copy this method in improving on the prior art. What did he do?

### Harder's Improvements.

After showing a round silo bound together by hoops, Fig. 1, with a continuous opening from top to bottom, Harder says:

"As a matter of course the edges of this opening must be braced by cross-pieces inserted between the edges [of the opening, by "edges" meaning the termination of the walls of the silo on each side of the opening] to prevent the structure from collapsing. These braces are made in special form as I now proceed to explain."

He then describes one form of his brace which consists of a straight bar having at each end thereof a flange or bearing at right angles, substantially, to the bar. These bearings or flanges are adapted to bear against the edge of one thickness of the silo wall where it ends and the opening begins, but not to overlap the entire edge of the silo wall so as to interfere with the door sections which are to close the opening. Outside of this bearing, at each end of the brace, and reaching beyond the end of the brace proper (which now has a shoulder consisting of the "bearings" fitting against the side walls of the opening) is an inclined extension of the brace fitted to bear against the side walls of the silo and on the outside thereof. These extensions have, each, two holes to receive bolts, which preferably are headed on the inside and have a screw threaded and projecting outwardly to receive nuts. However, they may be riveted or placed in a fixed position. He also provides an additional outside bar on this brace to make it stronger, but this is in no way essential to the Harder invention. This is the Harder brace aside from its more secure attachment to the silo itself. We have seen that by means of the "bearings or flanges" at right angles to the brace proper and adapted to bear against the edge of one thickness of the wall of the silo, the brace would keep the walls of the silo at the sides of the opening from pressing into the opening, collapsing, but it might drop down or slide down or fall out. In providing means for making sure that the braces are maintained in proper position, Harder has combined therewith his means and manner of holding the sections of his continuous door in place and also means for strengthening the edges of the silo walls at each side of this continuous opening.

First: On each side of this continuous opening he attaches an additional piece of timber, *f, f*, shown in Fig. 1, which may or may not be integral from top to bottom. This is outside the main wall of the silo, but attached, and it is seen that this may as well be all of one piece, double thickness, tongued and grooved so as to form a part of the wall proper of the silo, but making it of greater strength and rigidity at this point or at these points each side of the doorway. The one structure is the plain equivalent of the other. In either structure we have reinforced the silo walls at the points next the continuous door opening so as to maintain rigidity and prevent the collapse of the silo. However, there may be an advantage in having the reinforcing

strip outside the stave of the wall proper at this point, as we shall see. Of this reinforce, *f*, Harder says:

"Referring now to Fig. 2, it will be observed that a casing or reinforce, *f*, is provided on each side of the opening and fixed upon the edge of the wall so as to overlap said edge and afford a bearing for the flange, *d*, and extension, *e* (being parts of the brace before described), the first bearing against the edge of the reinforce and the second on the outside thereof."

Second:

"The brace is held by bolts, *g* (the bolts before mentioned), which pass through the reinforce and through the stave (at the edge of the opening) so as to bind the whole together."

It is at once seen that if this stave at the end of the silo wall next the opening and the reinforce is all of one piece, double thickness properly grooved and tongued to the silo wall so as to make it a part thereof, and then cut out on the inside so as to form a flange and shoulder for the door section itself to fit into and rest against the bolts would not be necessary for holding the staves and reinforce together, but only to hold the brace to this part of the silo wall. Such a piece made of double thickness would not only form a part of the silo wall, but make a door casing on each side of the opening. In this shoulder, whether formed in the one way or the other, the door section can be moved up and down as the braces, or the bearings or flanges thereof "adapted to bear against the edge of one thickness of the silo (the reinforce), but not to overlap so as to interfere with the door sections," do not extend inwardly far enough to interfere with the movement of such door sections. These braces, thus attached, whether we have the stave of the silo with the reinforce at each side of the opening, or the single piece made of twice the thickness of the stave, keep the walls of the silo in position and effectually prevent collapse.

### The Door Sections.

Harder says:

"The door is composed of sections, *h*, which may be simply cross staves dovetailed and made so as to be placed one on top of the other with the ends bearing on the outside (not outside of the silo but outside piece) against the reinforce, *f*."

And further:

"That part of the reinforce against which the ends of the pieces, *h* (the side edges or ends of the door sections), bear is provided with rubber or other suitable lining to form an air-tight packing."

It will be remembered that Cannon placed his packing on the door itself, about its outer side next its edges. Harder continues:

"The pressure of the contents of the silo may be relied upon to press outwardly the pieces, *h* (forming the door sections), to form an air-tight joint, if constant care be used to press the material (ensilage) down in filling the silo so as to create a sufficient pressure; but this constant care on the part of the workman cannot be relied upon, and I have therefore provided a metallic strip or plate, *i*, extending from top to bottom (of the opening or doorway) and arranged to overlap the edge of the stave at the margins of the opening on the inside (inside of the silo). The bolts, *g*, pass through this plate and

are held in any suitable manner. Preferably the bolts are headed on the inside and are provided with nuts on the outside, so that they may be turned up to draw the flange (overlap of the metallic strip or plate, *i*), in closely after the pieces, *h* (door section), are inserted, or the bolts may be riveted or otherwise set in fixed position, the parts being adjusted so that the pieces, *h* (door sections), may be crowded down one after the other firmly in place and so closely fitting as to bear tightly against the packing."

It is seen that the construction is such that, whether we use the reinforcement or the double thickness with a shoulder cut in, when the metallic strip, or plate, *i*, is added we have a continuous groove or slideway with a rubber packing in which the door sections may slide or be moved from the top to the bottom of the doorway. And it is perfectly obvious that the insertion of the door sections is intended to be and must be at the top whence they are slid down into position as the silo is filled. When the removal of ensilage has progressed down to one of these sections it may be slid or moved up and taken out, or moved up and left in, and tacked in place so as not to fall on the one in or about the opening below, or, if the bolts with nuts are used and not put in a fixed position, the nut may be turned up after the section is slid or moved upward and the compression of the metallic strip, *i*, will hold it in place above that part of the opening in actual use. In short, in emptying a silo by feeding it is not necessary to take out more than the top section of door, if that, as they may be moved up and fastened, the one after the other, and found there when the fall comes and the silo is again filled. This is an advantage, as the sections are not in danger of being lost, misplaced, or injured, as is the case when actually taken out. Of course it is optional with the farmer whether or not he will wholly remove the door sections. As the hoops binding the silo together pass entirely about it and cross the opening these have been used as a ladder, if sufficiently numerous, although this is not wise, for obvious reasons.

#### Commercial Success and Adjudication.

Silos thus constructed, and with a door opening and braces and door sections as described, and which silos may be and are made in sections so as to be easily transported, and which may or may not have a roof, depending on whether erected inside or outside a building, have proved a commercial success. The Harder patent was held valid in the Third Circuit by the Circuit Court of Appeals, although the defendant claims it did not there appear that there was any prior art in silo construction. It is obvious that this construction may be varied in many ways without departing from the spirit of the alleged invention. For instance, we may substitute a wooden strip for the metallic strip, *i*, or we may do away with that strip entirely and cut out in the single piece next the opening, made of double or greater thickness, a groove or slideway for the door sections. The one would be the substantial equivalent of the other for all practical purposes, although the groove, or slideway, cut in a suitable piece of timber, would be more expensive than the groove formed by adding the metallic strip, and there would be no way of clamping the door sections by means of the bolts and nuts unless the bolts were made movable in the grooved timber or

frame, and so attached to the door section as to draw it against the shoulder when the nut is turned up. And in such case it would be impossible to move the door section up or down until the bolt is removed. However numerous, inexpensive devices can be substituted for this mode of drawing the door sections against the flanges or shoulders of the door frames without interfering with their up or down movement.

Claim 4 of the Harder patent in a silo or tank having the continuous opening from top to bottom does not purport to claim the door sections or the means or mode of inserting, removing, or holding them in place alone. It does in such a silo claim the combination of (1) the braces between the edges of the walls forming the opening; (2) door sections for closing the opening; and (3) reinforcing strips for the door sections. As the door sections of themselves—that is, the sections of the door—have no reinforcing strips, but the silo wall, next the opening and on both sides thereof, each, has a reinforcing strip or strips overlapping the wall proper on the outside of the silo (see Fig. 2), or overlapped by the wall proper when used on the inside of the silo (see Fig. 3), against which, or against the flange or shoulder formed by such overlapping, the sections of the door rest and are pressed, we must either read the words “and reinforcing strips for the door sections” as meaning reinforcing strips for the use of and to support the door sections proper, or as forming a part of the door sections proper, although in no way connected therewith except when in use by pressing the one against the other, if we take the specification as properly defining the door section proper, viz.:

“The door is composed of sections, *h*, which may be simply cross-staves dovetailed and made so as to be placed one on top of the other with the ends bearing on the outside against the reinforce, *f*.”

In both Fig. 1 and Fig. 2, the sections, *h*, or door sections, are pointed out by *h*, and as the sliding or movable parts of the door. In a broader sense “door sections” may be construed to mean, or include, that part of the silo which takes in or includes the opening, the door proper, or sections of the door proper when in position, and also the staves next the opening and the reinforcing strip, against which staves and strips the door sections above described abut.

This combination of door sections proper and braces and reinforcing strips, for keeping and maintaining in position the walls of the silo next the openings for the double purpose of preventing collapse of the silo structure and enabling the door made in sections to perform its function, was new, and in my judgment disclosed patentable invention. Clearly it was not anticipated. I do not mean to indicate that it was a new or patentable conception for Harder to use braces of some sort and a reinforce to keep the walls next the opening in normal position and prevent collapse. It was not a new idea with him and would have occurred to any ordinary farm hand, or at least any carpenter and joiner. In Farmers' Bulletin, No. 32, U. S. Department of Agriculture, 1895, four years prior to Harder, Charles C. Plumb, B. S., gave a historical description of silos and their uses; ideas as to their cost, form, and construction; and in his “Miscellaneous Suggestions” said:

"The feeding door should be about 2½ to 3 feet wide, and extend in sections from the sill to within 3 or 4 feet of the top, each section being about 5 feet long. Portions of the wall 2 to 3 feet wide should be left between the sections of the door at sufficient intervals to make the wall perfectly strong. Some persons prefer iron rods for this purpose, and then have a continuous line of doors from top to bottom. Boards as long as the door is wide must be placed horizontally in the frame, edge to edge and flush with the inside of the silo, resting against cleats nailed on the inside of the casing. These boards may be put in place as the silo is filled. The studs on each side of the door should be re-enforced to give sufficient strength to the silo wall at this point."

### Does Defendant Infringe?

The defendant is a mere user of a portable round stave silo with a continuous opening on one side for feeding, or taking out the ensilage and permitting ingress and egress, extending from top to bottom, and which has a brace or braces extending across said opening to prevent collapse and the ends of which brace engage with the edges of the silo walls respectively next such opening, that is, is placed between the edges of the walls forming the opening, and which silo has, also, door sections for closing the said opening and reinforcing strips for the door sections. If Harder is entitled to a broad construction the defendant infringes as he is within this broad claim 4, of Harder. But Harder is, of course, limited to what he has described and its well-known equivalents. Not to his precise forms, however. He is entitled to a liberality of construction commensurate with his described structure and disclosed invention. Harder, in a circular silo, with the continuous opening combined a door made in sections (removable) with braces or stay pieces of special form, and also with special means for holding the several sections of the door firmly in place and also with reinforcing strips for the door sections in the sense or senses referred to. The circular silo used by the defendant having the same continuous opening, combines a door made in sections (removable), with braces or stay pieces of special form, and also with special means for holding the several sections of the door firmly in place, and also with reinforcing strips for the door sections in the same sense Harder uses the expression, and in the same place in his silo Harder has the strips in his, and for the same precise purpose, to prevent collapse. However, the special form of defendant's brace, in some respects, differs from the special form of Harder's brace, and the special means of defendant for holding the sections of the door firmly in place differ somewhat from the special means of Harder, and the reinforcement of defendant's structure next the opening also differs somewhat from Harder's.

### Differences.

Commencing with the reinforcement of defendant's structure, we find that it answers to every function and purpose of Harder's reinforcement and is its equivalent. It is made in one piece of more than twice the thickness of the stave, but is tongued and grooved to the staves so as to form a continuation of the walls of the silo and make them strong and rigid at the beginning of or next the opening on each side thereof. These reinforcements also receive the brace or braces be-

tween them to prevent collapse. These thick, heavy reinforcements of the defendant extend further into the interior of the silo than the other staves. Each reinforcing piece is grooved on the face next the opening, and this groove extends from the top to the bottom of the opening, and carries the door sections which may be moved up and down therein. On the part of this reinforce inside or beyond the groove (looking into the silo), it is rounded for a purpose to be described. The portion of this reinforce outside this groove presents a flat surface against which the end of the brace abuts and an extension inwardly of the brace, which is made thick, and also a prolongation of such brace fits into the groove and upon the rounded portion of such reinforce. In this construction this brace actually fills the groove at this point so that door sections inserted from above cannot slide below it. A section is cut from the upper back of this brace forming a shoulder so that a corresponding flange of the door section above fits into the cut or shoulder. This brace would be just as efficient and fully perform all its necessary functions if it did not extend inwardly to the groove so as to obstruct the groove or runway and prevent the up and down movement of the door sections. This brace for its width up and down serves to close that part of the opening. The rounded portion of this reinforce answers to the metallic strip or plate, *i*, of the Harder patent, except it cannot by bolt and nut be drawn against the door sections. This brace has an extension and a shoulder as seen. It is a straight bar, and has the equivalent of a bearing or flange at right angles therewith adapted to bear against the edge of one thickness of the wall of the silo. It does, in fact, overlap and interfere with a door section at that point, but, as stated, it was evidently made that way designedly and not necessarily. The brace has no inclined extension outside the bearing fitted to bear on the outside of the silo wall, but it does have an extension inside the bearing extending into and against the side of the groove. This extension might just as well be on the outside of the silo and fitted to bear on the outside of the wall as on the inside of the groove. The function and mode of operation in performing it is the same as in Harder's brace. The construction is more cumbersome. This brace is made in two parts connected with a hinge with shoulders which is cut into the brace from the outside. Press the hinge inwardly and the brace is loosened and drops out. Place the ends of the brace in the grooves and press outwardly and the brace becomes rigid in place and is held there. This method or mode and means of holding a brace in place is old. It is, of course, less reliable and efficient than Harder's. The mode of putting the brace in and of taking it out differs from Harder, but its function in the combination is the same.

The silo used by the defendant has door sections of suitable height made in two pieces, but fitted together by a half round on the end of the one piece and a rounded groove on the end of the other with felt or other material in the bottom of the groove. These are hinged together. The outer ends are rounded out to fit the half round of the reinforce before described so that when in place they are moved up or down at will sliding on said rounded portion, except when brought



in contact with the brace. Cut off the inner projecting portion of defendant's brace which can be done without impairing its function or efficiency and these door sections would slide past the brace. Each of these door sections may be slid in or out at the top and elevated to or fastened at any desired point and tacked temporarily in position. They are in all respects the equivalent of Harder's door sections proper. How and by what means are they so brought together and against the reinforced edges of the silo at the opening, and on both sides thereof, that they press firmly against the flange or rounded part of the reinforced wall so as to exclude the air? As stated, the outer ends of these door sections are grooved to fit on the rounded portion of the reinforce. In the bottom of these grooves is placed rubber or felt or some suitable material so as to make a tight joint or closure. Bend the hinge by pressly inwardly, and the door section is so much shortened that the ends can be placed on the rounded part of the reinforce. Now close the door section by bringing the hinge into position, and the grooved ends are pressed firmly against the rounded portions above described, and we have a tight joint in the center and at the ends of the door sections. These sections may be removed by pushing in on the center, operating the hinge, the ensilage behind having been removed, when the section will fall out or easily be pushed out.

Defendant's door sections have also a flange on the upper outside edge of the bottom section formed by a cut-out portion behind it. The next section has a flange on the inside lower edge formed by a cut-out portion in front and a similar flange formed in the same way on its upper edge or side. When the one section is pressed down on the one below the flanges enter or fit into the cut-out portion, or the flange of the one shuts by the flange of the other tending to make a tight joint. These are elaborate door sections, and may be superior to those of Harder, but they are the equivalents of his, and perform the same function in obedience to the same law and in substantially the same way. It is, of course, true that if Harder is confined to the special and particular or exact form of door sections and mode and means of holding them in place described, and to the special and particular and exact form of brace described, and the special and particular and exact form of reinforce described, and his claim 4 covers nothing more or broader, defendant does not infringe as he does not use them.

However, he does use their mechanical equivalents in the same combination where the office and end of the combination is substantially identical with Harder's, and where each element of the combination performs the same function in the combination as does the corresponding element of Harder. I take it that the patent law is settled that a patentable combination is infringed when the alleged infringer has all the same elements in his combination, or their substantial equivalents, operating in substantially the same way, each performing the same function in the combination, even if it does something more and is an improvement, and the two combinations as a whole operate in substantially the same way and produce the same result or serve the same purpose. A person cannot avoid infringement by changing the form of construction of one or more of the elements or improving it merely, or

by changing the mode and manner or means of putting the elements together unless he changes the mode of operation of the combination as a whole. I do not see that infringement of Harder's combination is avoided by substituting a heavy, cumbersome and two-part brace, the parts hinged together, in place of Harder's simple and effective brace. I cannot see that the defendant avoids infringement by an improved door section, if it be an improvement, or by his substituted means of pressing these door sections into place. The hinge is plainly an equivalent for the bolt and nut where used. The pressure of the door sections into place is by a leverage action of the hinge. It was in the silo art in 1903, and is an improvement in the construction of door sections as applied therein, but was old in analogous arts. See patent to Edward Winslow Gilbert, No. 720,419, dated February 10, 1903, application filed September 13, 1902, for an improvement in silos, which says:

"A special feature of my invention consists in the construction of the doors and the seating of same in the doorposts, while the construction of the cross-braces *E* form another feature of my invention, as will be more fully described in detail."

Gilbert has a doorpost each side the door opening; that is, a reinforced stave, or thick, heavy stave at each side of the opening. This has a groove to receive the corresponding tongue of the adjacent stave so that the doorposts form a continuation of the silo walls. He has a two-part door section hinged together. He cuts a groove or runway in the face of the doorpost next the opening. He has no rounded portion like defendant's structure, but instead of a groove in the outer ends of the door sections he rounds them outwardly so they fit into the groove or runway in the doorpost. These door sections will run up and down in this groove when the hinge is slightly sprung. These doorposts, answering to the reinforce of Harder, project outwardly and on a line with the outside of the silo walls, and are so cut out as to form a shoulder for the brace. The brace extends from side to side of the door opening, but is located outside. It bends sharply backward at each end to fit the shoulders of the doorpost against which it abuts and presses, holding the walls in position so as to prevent springing and collapse. The brace at such end then turns at a right angle and projects through an opening in the outward extension of the doorpost and is fastened with a nut. The shoulders prevent a springing into the opening and the nut, provided with a suitable washer or plate next the doorpost, prevents movement or springing of the post away from the opening. The hoops, adjustable, encircling the silo, prevent any outward movement of the silo walls or doorposts.

In Hoard's Dairyman of June 26, 1896, we find a circular silo constructed outside the barn but opening into it. This silo was lined and had an opening into the barn extending from sill to plate and was 2½ feet wide. The article says:

"There are ¾ inch rods that cross the doorway at intervals of two feet, passing through the studding on each side of the door and held in place by nuts while the door consists entirely of separate spruce boards, one and one-fourth inches thick by eight inches wide, matched. A projection of an inch

of the lining on one side of the doorway, into which one end of the boards are thrust, with the pressure of the silage against them, holds them in place. But one board is removed at a time, thus exposing much less silage to the air than when regular short doors are set at intervals."

This does not show or tend to show anticipation of Harder, but rather serves to emphasize the crude condition of the art at that time and the improvement Harder made. I find a statement in Bulletin, No. 40, vol. 3, entitled, "The Silo and Silage in Indiana," issued in June, 1892, by Purdue University Agricultural Experiment Station, as to the door of a silo which shows the then crude ideas on this subject. It reads:

"The door of the silo should be located on the side most convenient for feeding from, and extend from the floor to within two or three feet of the top. A well battened, double icehouse door, made in several sections, not exceeding four feet long each, is most satisfactory. Temporary boards should be fitted in the door casing, flush with the inside edge, to hold back the silage. These boards may be held in place by strips nailed against the casing, and can be removed from time to time as the silo contents are lowered."

In 1903, Farmers' Bulletin, No. 32, "Silos and Silage, Revised Edition," was issued. It is some eight years later than the original edition before quoted from and described, "The Stave Silo and Its Construction." As to the feeding doors this "Revised Edition" says:

"In constructing the silo, when the place is reached where the doors are desired, one stave should be sawed nearly through in the right place for the top and bottom of each door, cutting with the saw a bevel of about 45 degrees. When the construction of the wall is finished, the saw may be inserted at the points where the staves have been partly sawed and the other staves may be sawed through to secure a door of the desired width. The pieces sawed out of the staves should be used in making the doors. Two cleats 2 or 3 inches wide and long enough to reach across the door may be sawed with the proper curvature from 2-inch plank and firmly bolted to the sections of the staves before they are sawed out (Fig. 4). When the silo is filled, two thicknesses of tarred paper should be tacked over the entire inner surface of the wall, including the doors."

Plumb, in 1903, was evidently ignorant of the Harder invention, or he would not have abandoned the continuous door with braces for the single small doors, the one above another with sections of the silo wall between in place of braces. I quite agree with the Circuit Court of Appeals, Third Circuit, Judges Acheson, Gray, and McPherson, *Ryder v. Schlichter*, 126 Fed. 487, 491, 61 C. C. A. 469, 473, in its construction of claim 4 of the Harder patent. The question was squarely up and commanded thorough consideration. It is evident that the prior art was considered as the court said:

"Harder's invention may not have been of primary importance, but he seems to have been among the first, if not the very first, to make silo building a commercial art, and his structure is an unquestionable improvement in several particulars over all its predecessors. It is entitled to protection, and to a reasonable application of the doctrine of equivalents."

The answer in that case set up over a dozen prior patents and a greater number of alleged prior uses. How many, if any, were in evidence, does not appear.

The question of suitable feeding doors in any silo, particularly the

high ones, which will save labor in taking out the contents at frequent intervals and in small quantities without exposing the remainder to air, is of great importance to users.

Prior to the final decision of the Schlichter Case, November, 1903, the Economy Company, the maker and seller of the defendant's silo, became the owner of the Gilbert patent, before referred to, issued February 10, 1903, and commenced the manufacture and sale of silos in accordance therewith. Complaint was made that this structure infringed the Harder patent, and in that claim the Economy Company acquiesced and paid damages. Thereupon the Economy Company changed the construction of its silo to its present form by substituting for the iron brace of the Gilbert patent, which did not interfere with the movements of the door sections, the heavy cumbersome double piece brace which does. I cannot escape the conviction that it is purposely constructed in its present form for that very purpose, as such construction is unnecessary to the strength of the silo or its proper operation.

Second, the Economy Company instead of cutting out a groove in the back part of the reinforce or timber next the opening fashioned it with a half round at that point and changed the form of the ends of the door section to correspond. As this cumbersome brace, never removed in actual use, fills a few inches of the opening wherever a brace is inserted, it is said that the opening is not "continuous" I take it that a reproduction of the Harder silo made in accordance with his patent except that the brace is extended inwardly so as to interfere with the runway, or up and down movement of the door sections, and the substitution of a hinged door section does not avoid infringement if Harder is entitled to any range of equivalents whatever.

I find nothing in the Van Deusen patent, No. 546,204, dated September 10, 1895, or the Roberts patent, No. 257,762, dated May 9, 1882, that even suggests anticipation of Harder. Van Deusen claimed (claim 2), "The combination with a silo provided with a series of doors arranged one above the other for the removal and insertion of the silage" the reciprocatory piston and rake, neither of which had anything to do with the doors. He shows and describes a series of doors, the one above the other, with an interval of silo wall between, and each door is pivotally connected to a bail journaled in the silo wall acting as a hinge on which the door swings. To fasten them he has a cross-bar pivoted to the door in the center, with staples in the side walls of the silo with which the ends of this swinging bar engage. The moment these doors are opened the silage falls out unless boards are put across on the inside. The efficiency of such a door may be doubted but in any event Van Deusen shows nothing like the combination of Harder or like that of the structure, Economy silo, used by defendant.

In Roberts, the walls of the silo are rabbeted (cut out) to receive the ends of planks fitted in as the filling progresses, a strip of some fabric impervious to air first being placed across the opening, rabbets and all. Evidently the pressure of the ensilage is relied on to keep the planks in place. Evidently he was not dealing with a stave silo, and he

is very far from a combination which strengthens the walls next the continuous opening in such a silo and combines therewith means, braces, for keeping the walls in position, preventing collapse, and door sections which may be moved up and down, or removed entirely, at the same time forming reasonably air-tight joints.

[2] It seems plain to me, and the evidence fully sustains the proposition that Harder first came into the field with such a combination, and claimed (claims 1, 2, and 3), first, the specific devices in combination, and, second (in claim 4) the combination generally not limited to the specific things pointed out in the specifications. This last claim, in question here, is not limited in terms to any specific form of brace, or door, or reinforce, and for the court to do so would be rewriting the claim and importing into it limitations not found in the claim itself, and certainly not imposed by any action of the Patent Office or by the prior art. The Circuit Court of Appeals in this circuit has many times held that a rewriting of claims is not permitted. And when an inventor makes an invention and in his specifications points out a specific construction he may claim the specific construction and also have a general broad claim, and when this is done, in order to sustain the broader claim, it is not necessary for the patentee to point out in his patent that the specific construction shown is not essential to the invention. The law gives him ample protection whether he does or not. *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935; *Int. T. R. Co. v. Dey et al.* (Second Circuit) 142 Fed. 736, 744, 745, 74 C. C. A. 68, 76, 77.

I am satisfied that claim 4 of the Harder patent is valid, and that defendant infringes.

[3] It is contended that the complainants should have gone into Maryland where the Economy Company makes the infringing silos and brought suit there. I do not see much point in this contention. The complainants reside in the Northern district of New York. The record shows several of the infringing silos in use in the Northern district of New York. The law gives the complainants the right to sue these users in the district where both parties reside and test the questions involved. The user may discontinue the use of the silo complained of or contest. He has his election. The maker and seller may assume the defense of its own device which it puts on the market if it would protect that market abroad. Such manufacturer may keep still and allow the use of such product in other districts to be enjoined. The party offended against is not under obligation to go far from home and prosecute the original wrongdoer at the place where the infringing device is made. It seems to me plain that, without incurring the displeasure or reprobation of the courts a person injured in person or property may seek redress in any forum where the law of his country says he may. So far as the payment of tribute by the farmer is concerned it is immaterial whether he pays to the complainants or to the Economy Company as both operate under patents.

There will be a decree for the complainants for an injunction and an accounting, with costs.

**EMERSON & NORRIS CO. v. SIMPSON BROS. CORPORATION.****SAME v. STRUCTURAL CEMENT STONE CO.**

(Circuit Court, D. Massachusetts. June 5, 1911.)

Nos. 655, 656.

**PATENTS (§ 328\*)—ANTICIPATION—PROCESS OF MAKING ARTIFICIAL STONE.**

The Stevens patent, No. 624,563, for a process of making artificial stone by the use of sand molds for drawing the surplus water from the stone compound by absorption, is void for anticipation by the prior public use of substantially the same process by one Berthelet for two years or more in the ordinary course of his business of making artificial stone.

In Equity. Suit by the Emerson & Norris Company against Simpson Brothers Corporation and same against the Structural Cement Stone Company. On final hearing. Decrees for defendants.

Louis W. Southgate and O. Ellery Edwards, Jr., for complainant.  
Emery & Booth and Emery, Booth, Janney & Varney, for defendants.

HALE, District Judge. These suits are for infringement of claim 1 of Stevens' United States patent, No. 624,563, for process of making artificial stone. The claim at issue is as follows:

"1. The process of forming artificial stone consisting in molding the stone compound while in a plastic or semiliquid state in or on a mold formed of relatively dry sand and then allow the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or nonliquid form, substantially as and for the purpose set forth."

The process consists substantially in: First, molding the stone compound while in a plastic or semiliquid state in or on a mold formed of relatively dry sand; and, second, letting the mass remain until the sand absorbs the surplus moisture. The former practical process of manufacturing artificial stone was by means of a rigid mold prepared in the shape of the desired block. Such mold was usually of wood or plaster of paris, or some material strong enough to resist force. The stone compound, in a wetted mass, was shoveled into the bottom of the box. An excess of water had to be avoided in order to give the stone texture, strength, and a good appearance. The process of tamping was then applied to the layer. This process consisted in the workman taking a heavy tool and ramming the mixture, in order to tightly compress it in the bottom of the box to reduce its volume, eliminate the air holes in it, and make the mass as dense as possible. After the layer had been pounded or tamped, and so reduced, another layer of the wetted compound was shoveled in, and tamped, and this process was continued until the mold was filled; the top of the mold was then evened off; and the moist block was taken out and allowed to stand and harden.

It is asserted that Stevens is the inventor of the process of doing away with this old system of making artificial stone. He relied upon the use of dry molding sand to extract or absorb the moisture from

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the stone compound, instead of pounding it out. In his specification he thus describes his process:

"I first take a box of suitable dimensions, corresponding to a molder's flask, the inner walls of which I prefer should serve as the faces against which all of the outer plane faces of the stone article shall be molded except the ornamented and opposite faces thereof. In the bottom of this box I place a suitable layer of fine molder's sand of any suitable thickness and in a just sufficiently moistened condition to hold its form when pressed to any desired shape. In other words, I propose to have this sand as dry as possible for the intended purpose. Into this sand with a suitable pattern I impress the shape of the ornamented face desired. \* \* \* I next pour into the impression thus made the stone compound in a plastic or semiliquid state, sufficiently wet to flow easily and to a depth corresponding with the desired thickness of the hollow stone."

In reference to the ingredients to be used he says:

"The cement being dry ground Portland or similar cement, and the sand being ground stone of the selected variety, its fineness depending on the character of the work to be produced."

And he points out the final step in his invention to be the use of the molding sand:

"The molding sand in my present invention being comparatively dry and relied upon to extract or absorb the moisture from the stone compound."

The claim of the patent provides for allowing "the mass to set until the sand absorbs the surplus moisture from the compound, thereby converting the latter to a solid or nonliquid form." This process relies upon drawing the water from the wet compound by capillary attraction instead of employing the old method of tamping or ramming the compound in a hard mold. The defendant says that the Stevens patent is void by reason of anticipation.

1. The contention of the defendant is that the Stevens process of making artificial stone has been anticipated by one Charles A. Berthelet, who manufactured artificial stone by this process during the years 1881, 1882, and 1883, in Milwaukee and Racine, Wis. Berthelet's use had its conception in the tangible basis given by two patents to an Englishman by the name of Sellars—an English patent, No. 1,379, dated April 9, 1877; and a United States patent, No. 244,321, dated July 12, 1881. These are for the same invention, and disclose a mold consisting of sand and paraffin for casting concrete, as described in the United States patent "in a liquid or semiliquid condition so as to obtain castings of sharp, clear, well-defined outline." The American patent provides for "a lubricating binding material which is not affected by alkalis, such as paraffin, and a finely divided body material such as sand or charcoal." There is much testimony that while Berthelet's use was suggested by the Sellars patent, and while he acted for a while under the Sellars patent, he used, in fact, a much broader scheme than any which the Sellars patent taught. The evidence tends to show that he did not rely upon paraffin as a binder, but used molds of slightly moistened sand and a liquid concrete of a creamlike consistency. Sometimes he used paraffin, and sometimes he operated with moist sand without paraffin, and poured the liquid concrete into molds which absorbed the surplus water, and thereby he converted the concrete into solid artificial stone. The testimony tends very

strongly to show that he achieved his result by absorption or capillary attraction. He produced stone letters and numerals, ornamental window copings, signs, and plaques. He followed the Sellars practice rather than his patent; and there is much evidence that Sellars' practice involved absorbent sand molds. From his testimony it appears that he did not always wet or dampen the sand and paraffin for the molds, "but, when the mold had become too dry by exposure, water was added to give it a consistency which would admit of its being readily molded by the pressure of the hand." He varied the amount of paraffin which he mixed with the sand and found, as he says, that "the decrease of paraffin rendered the mold more porous and the increase of paraffin allowed the use of stronger concrete, and enabled a casting of a finer detail."

Up to the fall of 1881, Berthelet operated a sewer pipe manufactory; but he then turned his pipe works into a letter factory. He and his wife had visited Sellars at Birkenhead, England, where Sellars had explained the process to them of making liquid concrete in sand molds. Berthelet himself is not living; Mrs. Berthelet has testified very fully, not only from memory, but from letters and a diary which she kept. There is also the testimony of other witnesses who had means of observation in reference to the conduct of Berthelet's manufactory during the years he was making artificial stone. From the testimony I am induced to believe that the letters and numerals produced by Berthelet, and the panel upon the Blatz Brewery which has stood the test of time, were made from artificial stone produced from sand molds by absorption, or capillary attraction, after the manner set out in the claim of the patent in suit. The burden of proof rests upon the defendant, every reasonable doubt should be resolved against it, and the greatest scrutiny should be given to testimony of a long past prior use. I think the defendant has met the weighty burden of showing that the process described in the Stevens patent was known to Berthelet long before the invention of Stevens.

But the plaintiff urges that Berthelet's use at best was merely experimental. It appears that Berthelet did at first experiment, but that he soon after changed his sewer pipe business for the letter business. His own letter written in 1882 shows that he was engaged in making artificial stone products as a business; that he had \$2,500 invested in it; and that his endeavor was then to make it a remunerative and permanent business. He afterwards gave it up, but not until it had passed far beyond the period of experimentation and had fully put an operative process into practice. It is true that the letters made by Berthelet and his associates were crude; that they did not have the perfection of finish that is acquired by the present use of the Stevens patent, or by the improvements upon such patent. But the testimony is convincing that the products of his process must be held to be "artificial stone"; that they were made substantially as described in claim 1 of the Stevens patent; that they were made in the ordinary course of business; and that their manufacture illustrated and taught the use of substantially the method described by the patent in suit. I must come to the conclusion that, as a business, for profit and not for ex-



periment, for more than two years, Berthelet openly made artificial stone letters and other artificial stone articles by use of sand molds, by drawing the water from the stone compound by means of absorption. I am constrained to find that Berthelet did make a public use of the processes described by Stevens in claim 1 of his patent, that his manufacture of artificial stone was not inchoate or embryonic, but that it met the severe tests of the courts. *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Gayler v. Wilder*, 10 How. 496, 13 L. Ed. 504; *Smith & Griggs Mfg. Co. v. Sprague*, 123 U. S. 256, 8 Sup. Ct. 122, 31 L. Ed. 141; *Brush v. Condit*, 132 U. S. 39, 48, 10 Sup. Ct. 1, 33 L. Ed. 251; *Reed v. Cutter*, 1 Story, 590, Fed. Cas. No. 11,645; *Walker on Patents* (4th Ed.) § 95. I come to this conclusion after a careful study of the record, and with great deliberation. I am conscious of a disinclination to uphold any prior use that destroys the pecuniary value of a patent which has met with commercial success and has been of value to the community. I cannot undertake to decide, however, how far this commercial success is due to the patent in suit, or how far it is the result of improvements made by others upon the Stevens process.

This patent has been before the Circuit Court for the Eastern District of New York, in *Donaldson v. Roksament Company* (C. C.) 170 Fed. 192, and upon a contempt proceeding in (C. C.) 176 Fed. 368. In those cases the learned judge of that court held that the Sellars patents were not anticipatory of the Stevens patent. But the record here does not show that in those cases the Circuit Court passed upon the question of Berthelet's prior public use.

It is not necessary for me to discuss the other questions of anticipation raised by the record. A careful study of the whole testimony in the case has forced me to the conclusion that the Stevens invention was anticipated by Berthelet's prior use, and that the patent in suit is void by reason of anticipation.

The decree must be: Bill is dismissed, with costs.

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#### DRAPER CO. v. STAFFORD CO.

(Circuit Court, D. Massachusetts. April 14, 1911.)

No. 651.

#### PATENTS (§ 328\*)—INFRINGEMENT.

The Draper patent, No. 527,014, for a loom, discloses patentable invention, but the claims must be limited to a construction in which the detector, which determines the degree in which the weft thread in loom weaving has been drawn from the bobbin, is mounted independently of the shuttle and to substantially the mechanical means described. As so construed, *held* not infringed.

In Equity. Suit by the Draper Company against the Stafford Company. Decree for defendant.

Fish, Richardson, Herrick & Neave and W. K. Richardson, for complainant.

William A. Copeland and Wilmarth H. Thurston, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ALDRICH, District Judge. Under old conditions in loom weaving, the weft thread, as the shuttle was thrown, was delivered from the spool or bobbin until it was wholly drawn from the spool or bobbin, and as a result it sometimes, and perhaps oftentimes, happened that the end of the thread was left in the cloth between the selvages, thus creating a defect or imperfection which was particularly detrimental in weaving the finer goods. In order to unravel the imperfection and remedy the defect, it was necessary to stop the machine, and means had been devised for stopping the machine automatically, to the end that the imperfection might be removed.

It is plain enough that, under such conditions in loom weaving, any means for determining the degree in which the weft thread had been drawn from the bobbin as it was approaching exhaustion, to the end that the bobbin might be displaced and another, filled with weft thread, supplied before the thread upon the operating bobbin should be broken at its end and the loose end left in the body of the cloth, would be looked upon as a meritorious and substantial improvement in the loom-weaving industry.

This proceeding is one to restrain alleged infringement of patent 527,014 which was issued to G. O. Draper, October 2, 1894.

The following claims are the only ones in issue:

"1. In a loom, a shuttle carrying an exposed cop or bobbin of filling, a detector independent of the shuttle to contact with the filling at predetermined intervals to determine its volume, and devices intermediate the detector and a filling supplying mechanism to cause a new supply of filling to be placed in the shuttle when the former supply shall have been exhausted to a predetermined amount, substantially as described.

"2. In a loom, a lay having a shuttle-box, and a shuttle therein open at one side to expose the filling on a bobbin or cop within said shuttle, combined with a detector independent of the shuttle to enter the latter and contact with the filling wound on the bobbin or cop, for the purpose set forth."

There were inventions earlier than Draper's based upon the idea of furnishing mechanical means for detecting the condition of the weft on the bobbin as it was approaching exhaustion, and of substituting a bobbin filled with thread before the thread upon the one in use had been fully run out and broken midway or at other points which might create a defect in the cloth.

Without going very much into the prior art, it is sufficient to say that earlier patents covered the idea of detecting the measure at which the thread had run out, and means were suggested for a detector which should operate intermittently or at predetermined intervals. In some of the earlier devices, the detector was suggested as something to be installed inside the bobbin. In others, as mounted upon the shuttle, and in some of the earlier patents, at least, the idea of mounting the detector independently of the shuttle was perhaps present. It is probably true, however, that no practical way of doing this was either conceived or demonstrated prior to the Draper invention.

It is apparent that the Patent Office, at the time the Draper patent was under consideration, deemed the state of the art to be such that it covered the idea of ascertaining at intermittent periods the

extent to which the thread had been drawn from the bobbin or cop, and, when it had reached a certain point of approximate exhaustion, of displacing the operating bobbin and substituting another with a fresh supply of thread, thus avoiding the imperfection which might result from a possible or probable loose end left between the selvages. Such phase of the art is so apparent that it seems quite unnecessary to make an analysis of the different patents, like that to Crawford and Templeton, the two Brooks patents, the Rush and Oldfield patent, and others, because it is true in a very broad sense, at least, that these ideas, including that of automatically replenishing the weft, had a substantial status in the then existing art.

While none of these inventions came into commercial use, the same is true of the Draper patent in question.

The reasonable view of the situation would seem to be that everything substantial in the Draper patent, except the idea of mounting the detector mechanism independent of the shuttle, was present in the prior art; and, while it is true that the idea of mounting the detector mechanism independent of the shuttle had been previously, in a shadowy way, suggested, still Draper seems to have been the first to develop the idea in a way to have it accepted as something useful in the loom-weaving industry; and he seems to have been the first to conceive and describe a practical means for operating a detector thus independently mounted.

The Patent Office apparently acted favorably with reference to Draper's application for a patent, upon the sole supposition that his idea of independent mounting, reinforced by a particular description of mechanical means for making the detector operate intermittently upon the weft thread as it was being drawn from the bobbin, and at a predetermined point to operate with favorable results upon a bobbin holding the nearly exhausted weft thread, involved invention.

The Draper construction, as described, contemplated a detector pivoted to the lay, and an important feature in his train of mechanism was a rock-shaft which, at a predetermined point, is operated upon by the end or point of the detector, and performs the function of starting mechanical means which introduce a fresh bobbin or cop into the shuttle.

While what Draper did would, of course, not be accepted, under the established rules of patent construction, as an invention in the pioneer field, or as one broadly covering every possible mounting of a detector outside and away from the shuttle, it would seem that, in view of the fact that he conceived, or at least made practical, the idea of pivoting the detector upon the lay, in connection with means which made it operate independently of the shuttle, and especially in view of the fact that subsequent improvements, including those in actual commercial use, very largely, if not altogether, employ the idea of separate mounting; it would seem that what he did should be accepted as involving patentable invention. Indeed, the defendant does not very stoutly contend otherwise. The more substantial defenses are upon other lines.

Viewing the invention as one of considerable merit, and as one

in which the inventor should be looked upon, at least in a pretty substantial way, as the original discoverer of the idea of mounting the detector independently of the shuttle (though unknown to Draper it had previously, in an imperfect way, been in the minds of others), the claims should not, under the strictest rule of construction, be limited to the exact and particular means described.

Among other things in the inventor's specification is the following:

"Believing myself to be the first to combine with a loom a detector which shall come in direct contact intermittingly with the mass of filling on a bobbin or cop in a shuttle, and thus prevent further weaving of cloth by the filling then in the shuttle when the said filling has been nearly exhausted from the said bobbin or cop, I do not desire or intend to limit my invention to the exact shape shown for the detector, nor to the exact position shown for it on the loom, nor to the exact shape of the trigger connected to the rock-shaft for operating the devices at the opposite end of the loom."

At the arguments, considerable stress was placed upon what is said in this particular part of the specification. It cannot be accepted, however, as of much weight upon the question whether the claim shall be construed narrowly or broadly, because what is now conceded to have been the then state of the art, taken in connection with the action of the Patent Office, makes it apparent that, when that part of the specification was formulated, Mr. Draper was under a misapprehension as to what had been done by others in the field which he thus undertook to cover.

This case seems to resolve itself into a situation in which it is not so much a question as to just how broadly the claims of the Draper patent should be construed, as one whether the defendant, who is operating under a patent, is using the same idea and substantially the same means. A careful reading of lines 41-63 of page 3 of the specification of the Draper patent, which have reference to the operation of the detector, makes it perfectly clear that the defendant is not using the particular construction which Draper described. There is no occasion, however, for saying that the Draper invention is one which limits itself to the particular mode of operation described. Indeed, probably such a view would be unwarranted.

Holding the view that the Draper claims should be limited to the idea of independent mounting and to substantially the construction and the mechanical means which Draper described, and holding the view that the defendant's construction and mode of operation are to be accepted as clearly and radically outside of the Draper patent, there is no occasion for passing upon the question of the particular limit which shall be placed upon its claims. This results because the defendant's machine does its work on different principles, and through substantially different mechanical and structural means.

Apparently under the Draper construction the bobbins are changed without stopping the loom, while in the defendant's it is the shuttles which are changed, the loom for the instant stopping, but that is not viewed as a detail of decisive or essential importance upon the question of equivalents and infringement, and it would likewise seem that no great consequence should attach to the thin leaf-spring, marked "32," which is mounted in the side of the defendant's shuttle, as a par-

ticular differentiating feature. This spring performs no essential function, and no very important one, save that of protecting the yarn or thread upon the bobbin from the forceful points of the defendant's feelers or detectors, which are called fingers or slides, one of which operates, as the lay beats up, to contact with the disk of the shuttle spindle, while the other operates to impinge upon or contact with the thin spring and force it against the weft upon the bobbin. The fact that this thin leaf-spring prevents actual physical contact between the finger and the weft would seem not to be a controlling fact.

As illustrated in argument, the leaf-spring in question is no more a functional detector or feeler than is the glove in the ordinary grasp or hand-shake. But aside and beyond these details, it is the general structural plan in respect to the instrumentalities back of the leaf-spring which force contact with the thread upon the bobbin, that broadly differentiates the defendant's scheme of mechanical means from that arranged and described by Draper.

There being, under these views, no infringement, it results that the bill should be dismissed.

Bill dismissed.

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In re McCARTNEY.

(District Court, M. D. Pennsylvania. July 3, 1911.)

No. 1,753.

**BANKRUPTCY (§ 91\*)—ACT OF BANKRUPTCY—EVIDENCE.**

On an application to have an alleged insolvent declared an involuntary bankrupt, evidence *held* to require a finding, not only that the alleged bankrupt was insolvent, but also that, while insolvent, he had permitted his wife to obtain a preference through legal proceedings, and had not, five days before the selling or final disposition of his property affected by such preference, revoked or discharged the same, so that he should be adjudged a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 91.\*]

In Bankruptcy. On petition to declare W. J. McCartney an involuntary bankrupt. Granted.

Wm. Maxwell, for petitioning creditors.

E. J. Mullen, for bankrupt.

WITMER, District Judge. Certain creditors of W. J. McCartney, on October 26, 1910, presented their petition praying that he be adjudged a bankrupt, representing that while insolvent the said W. J. McCartney suffered and permitted certain of his creditors to obtain a preference through legal proceedings, and not having, five days before the selling or final disposition of his property affected by such preference, revoked or discharged the same. To this the alleged bankrupt made reply, denying his insolvency. Testimony was taken and reported to the court.

It appears: That on August 1, 1910, Mrs. Margaret McCartney entered three judgments against the said W. J. McCartney, her husband,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the court of common pleas of Sullivan county, to wit: No. 61, September term, 1910, debt, \$500; No. 62, September term, 1910, debt, \$1,500; and No. 63, September term, 1910, debt, \$500. That she caused writs of fieri facias to issue on her said judgments, followed by writs of venditioni exponas, on which the personal property of the alleged bankrupt was seized by the high sheriff of Sullivan county, levied, and advertised for sale, to take place on Friday, the 28th day of October, 1910, at 1 o'clock p. m. Judgment was also entered in said court against the alleged bankrupt by one John Hassen, Jr., on August 1, 1910, for \$100, with like proceedings following.

That the alleged bankrupt suffered or permitted these preferences within five days preceding the selling or final disposition of his property is not denied. His answer is to the effect that, while he was unable to discharge these obligations, he is nevertheless solvent, having more than sufficient assets to meet his liabilities, as required by section 1, subd. 15, of the federal bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]). From a careful examination of the testimony and the application of common sense in the inspection of the proceedings adopted by the wife of the bankrupt in her effort to enforce the collection of her claims, or possibly remove from the reach of her husband's creditors his personal property, the court has no difficulty in arriving at a true solution of this case. It matters not much whether the debtor was actually unable to pay the money alleged to be due his wife, or simply unwilling to do so. The conduct of the husband and of his wife is convincing that they, believing that the husband's property was insufficient to meet all of his honest debts, a preference over some of them was necessary to secure for the wife the money represented by the judgments entered. It would be difficult to reach any other conclusion, when considering that the whole proceeding was timed to the maturing of the husband's obligations in bank on which Mr. Frost was the indorser and having declined to renew such indorsements.

The testimony is, however, otherwise convincing that the aggregate of the property of the alleged bankrupt is at a fair valuation not sufficient in amount to pay his just debts. W. J. McCartney is unquestionably insolvent and unable to pay his lawful debts, and having stood by while his creditors secured judgments against him and levied upon his property, suffering and permitting such judgments to be taken and such levy to be made, has committed an act of bankruptcy under paragraph 3a, § 3, c. 3, of the bankruptcy act of 1898 and its supplements.

The said W. J. McCartney is therefore hereby adjudged a bankrupt accordingly.

## In re BODEK.

(District Court, E. D. Pennsylvania. June 22, 1911.)

No. 3,992.

**1. BANKRUPTCY (§ 59\*)—ACT OF BANKRUPTCY—LEVY—VALIDITY.**

A debtor attacked the validity of a sheriff's levy relied on as an act of bankruptcy, in that he had preferred the creditor by failing to discharge the lien, and showed that the sheriff's return was false, so far as it recited a levy and that subsequently the debtor was adjudged a bankrupt, because the records of the bankruptcy court disclosed that no adjudication had ever been entered. The testimony of a deputy sheriff showed that no actual levy had been made. *Held* to show the invalidity of the levy to constitute an act of bankruptcy, though the balance of the sheriff's return might be secure against collateral attack.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. § 59.\*]

**2. EXECUTION (§ 145\*)—LEVY—DIRECT ATTACK.**

A debtor may directly attack a levy, though a part of the officer's return may be secure against a collateral attack, and he may question the validity of the levy where he has steadily denied its validity.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 376-380; Dec. Dig. § 145.\*]

In the matter of bankruptcy proceedings against Samuel Bodek. Issue of validity of a levy alleged to constitute an act of bankruptcy found in favor of bankrupt.

Samuel W. Cooper, for petitioning creditors.

Alex. J. Brian, for alleged bankrupt.

J. B. McPHERSON, District Judge. The bankrupt waived his demand for a jury trial, and the issue raised by the petition and answer was thereupon submitted to the court. [1] It has now been heard, and the evidence satisfies me that the so-called levy made by the sheriff was not valid, and therefore that the only act of bankruptcy charged in the petition, namely, preferring an execution creditor by failing to discharge the lien, was not committed. In part, the sheriff's return upon the writ is manifestly not true. It recites that he "Levied Feb. 7, 1911, upon the personal property of the within-named defendant at No. 17 South Fourth street, and afterwards the defendant was adjudged a bankrupt in the United States District Court for the Eastern District of Pennsylvania;" for the records of this court disclose that no adjudication has ever been entered. [2] The rest of the return might perhaps be secure against collateral attack, but it may still be attacked directly by the bankrupt himself. The testimony of the deputy sheriff shows clearly that he made no actual levy. *Stuckert v. Keller*, 105 Pa. 386, is not in point. There a levy was made in form, although the sheriff did not seize or even see the goods, but he was prevented from levying in fact by the wrongful act of a third person, a temporary bailee, who afterwards attempted to transmit title by a levy and sale on his own account. The controversy was between the respective purchasers under these two levies, and the Supreme Court

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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held the irregular levy on the first execution to be good on the distinct ground that the debtor, who might himself have objected to it successfully, was present at the sale and made no protest—thereby waiving his rights. The second sale was held to be of no validity, because the execution creditor, the temporary bailee, had wrongfully kept the sheriff from making a levy upon the first execution, and was therefore attempting to take advantage of his own wrong. Here, however, the debtor himself protested from the beginning against the levy, and has steadily denied its validity. He had an undoubted right to question the fact, and to have it determined by a proper tribunal.

I therefore find the issue in favor of the bankrupt.

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**ANDERSON LAND & STOCK CO. v. McCONNELL et al.**

(Circuit Court, D. Nevada. December 24, 1910.)

No. 783.

**1. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION.**

Proof that haying was done on the respective meadows of parties claiming prior appropriation of water for irrigation, without evidence as to whether the hay was raised by artificial irrigation or by the use of a natural overflow, was insufficient to establish an appropriation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**2. WATERS AND WATER COURSES (§ 35\*)—RIPARIAN OWNERSHIP—COMMON-LAW DOCTRINE—ABROGATION.**

In Nevada the doctrine of riparian ownership as a foundation for rights to water has been abandoned; all rights to the use of water by reason of necessity arising from the arid nature of the country being founded on prior appropriation only.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 27, 28; Dec. Dig. § 35.\*]

**3. WATERS AND WATER COURSES (§ 151\*)—APPROPRIATION—ABANDONMENT.**

Abandonment of an appropriation of water for irrigation is a question of intention to be evidenced by overt acts; but, when such overt acts appear, the right to appropriate water ceases and cannot be resumed as against intervening rights of others.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 155; Dec. Dig. § 151.\*]

**4. WATERS AND WATER COURSES (§ 142\*)—APPROPRIATION.**

Where complainant's predecessor in title, though conceding a prior appropriation by defendants, was entitled to the unused water naturally flowing to him from defendants' land, and was entitled to insist that such unused water be not diverted elsewhere, but should be allowed to return to the stream and serve his appropriation, such unused water was not waste water, but excess above the water defendants were entitled to appropriate, which they could not by subsequent enlargement of their ditches, etc., appropriate to complainant's prejudice.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. § 142.\*]

**5. WATERS AND WATER COURSES (§ 130\*)—NATURAL WATER COURSES—CHANNEL.**

Where, though a water course spread out over a meadow in delta formation and was broken up into several channels, it could be identified on

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



the surface, and flowed in a defined course through low depressions, it was a natural water course, and subject to appropriation by the landowner, though there was no definitely defined channel on the surface.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 145; Dec. Dig. § 130.\*]

6. *WATERS AND WATER COURSES* (§ 152\*)—*APPROPRIATION—PRIORITY—EVIDENCE.*

In an action to determine water rights for irrigation, evidence *held* to require a finding that complainant was entitled to priority as a prior appropriator as to certain streams.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

In Equity. Suit by the Anderson Land & Stock Company against Charles McConnell, revived after his death *pendente lite* in the name of Thomas A. McConnell, executor of the will of Charles McConnell, deceased, and Thomas McConnell individually. Decree for complainant.

See, also, 171 Fed. 475.

Mack & Green and J. W. Dorsey, for complainant.

Cheney, Massey & Price and Harry Warren, for defendants.

VAN FLEET, District Judge. This is a suit in equity to determine conflicting rights of the parties to the waters of three natural water courses known as "Quin River," "Eight Mile Creek," and "Twelve Mile Creek," sometimes called "Three Mile Creek." The complainant is the owner of about 4,000 acres of land formerly belonging to Henry Hoppin, and known and herein designated as the "Hoppin Ranch." Respondent, Charles McConnell, was the owner of about 6,000 acres adjoining the Hoppin ranch on the north and of two smaller neighboring ranches called herein the "Upper Eight Mile" and "Upper Twelve Mile" ranches, respectively. Pending the determination of the suit, respondent, Charles McConnell, died and Thomas McConnell, as executor, was substituted. Charles McConnell filed a cross-bill alleging rights by prior appropriation to the waters of the streams in controversy, and Thomas McConnell individually has filed a cross-bill setting up a right by appropriation of the waters of Quin river and Eight Mile creek, prior to the complainant and subsequent to that of the respondent Thomas McConnell as executor. Thomas McConnell's land consists of 160 acres at the southwesterly corner of the main McConnell ranch and adjoining the Hoppin ranch.

It appears from the evidence that Quin river rises in the mountains of northern Humboldt county in this state, and flows in a generally southwesterly direction and, so far as affects this controversy, passes first through the McConnell ranch and then through the Hoppin ranch immediately below and adjoining on the south. In passing through the McConnell ranch, it separates into several channels or sloughs. Hardin slough, which puts out from the river above the McConnell ranch is west of the main river channel, uniting with it again on the Hoppin ranch, and is not in controversy in this litigation. The first slough east of the river, apparently having no fixed local desig-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nation, but named by the complainant and respondents respectively, "Beef Corral Slough" and "Main Slough," branches from the river in the northerly portion of the McConnell ranch, and flows in a southwesterly direction approximately parallel to the river channel onto the lands of the Hoppin ranch, and there rejoins the main river channel. "Eight Mile Slough," so called, a natural water course, not heading in the river but apparently on the McConnell meadows, and hereafter found to be a part of the channel of Eight Mile creek, is easterly of and approximately parallel in its course to that of Main or Beef Corral slough, and after passing through the McConnell meadows proceeds through the Hoppin ranch in the same general southwesterly direction until it unites with the main Quin river channel near the lower southwesterly corner of the Hoppin ranch. Eight Mile creek rises in a range of mountains on the easterly side of the Quin River Valley, and, after passing through the Upper Eight Mile ranch of Charles McConnell situated at the point where Eight Mile creek emerges from the mountain canyon, flows in a northwesterly course for about two miles over sagebrush lands not owned by the parties hereto until it enters the easterly line of the main McConnell ranch. Upon entering the McConnell meadows, its visible channel largely disappears and in its natural state uninfluenced by artificial diversions the waters flow across the McConnell meadows, flattening and spreading out fanlike but generally following a definite course through low depressions first northwesterly and then southwesterly for a distance of a half or three-quarters of a mile, until they reach and unite in the natural channel above referred to as Eight Mile slough. Twelve Mile creek, formerly known as Three Mile creek, rises in the same range of mountains as Eight Mile creek, and emerges from a canyon at a distance of about four miles southerly from the latter, passes through the small ranch above mentioned belonging to Charles McConnell, designated as Upper Twelve Mile ranch, which is situated at the point where the stream debouches from its canyon, and, after passing in a northwesterly direction through about two miles of sagebrush land not belonging to the parties, enters the Hoppin ranch at its southeasterly corner, and, proceeding in the same general northwesterly direction, spreads over and disperses itself in the Hoppin meadows, the waters then flowing southwesterly with no defined channel until they reach Eight Mile slough and Quin river. Canyon and Pole creeks, mentioned in the evidence, lie successively to the south of Twelve Mile creek, and, substantially paralleling its course, flow toward Quin river. They enter the Hoppin ranch on its southerly boundary, and their waters are used and can be used only on the southerly portion of the Hoppin ranch; no claim being made by the respondent to the waters of these creeks.

The Hoppin ranch was purchased by James P. Anderson, grantor of the complainant, in 1900. Prior thereto Charles McConnell and Henry Hoppin do not appear to have had any differences over the use of the waters in controversy. The water on the main McConnell ranch was diverted by ditches and dams upon the McConnell meadows and pasture, returning by natural flow to Main or Beef Corral slough and

Eight Mile slough, and after being used by McConnell naturally flowed to and was diverted by Hoppin by various ditches and dams situate partly on his own place and partly in the southerly portion of the McConnell ranch, upon the Hoppin meadows and pastures. There was no cultivation on either ranch by plowing; the water being used to raise wild hay and natural pasturage.

Shortly after the purchase of the Hoppin ranch by Anderson, McConnell began to construct new ditches and to enlarge and extend existing ditches so as to lead the waters of Quin river and Eight Mile creek upon certain lands in the southeasterly corner of his ranch and upon the Thomas McConnell lands above mentioned. These lands, formerly in sagebrush, were on higher ground easterly of the McConnell meadows and have been set out in alfalfa, about 160 acres in all. The character of the soil of these latter lands and the natural configuration of the ground is such that none of the water so diverted naturally reaches the Hoppin meadows. In addition to this new diversion, Charles McConnell, in 1906, after the beginning of this litigation, built a ditch from the Upper Eight Mile ranch diverting the waters of Eight Mile creek from their channel and carrying them in a course approximately parallel to the channel, but to the south thereof, to the westerly portions of the McConnell ranch, where they were used upon the alfalfa fields just mentioned and entirely consumed. In 1902 alfalfa was also planted by McConnell at the Upper Twelve Mile ranch, and all the waters of Twelve Mile creek diverted thereon so that no water reached the Hoppin ranch from that source. The result has been that except in certain years of abundant water, as for example the years 1906 and 1907, the irrigated lands of complainant in the westerly, northerly, and easterly portions thereof have been deprived of water which they had previously enjoyed, leaving unaffected by lack of water supply only certain portions of the southerly part of complainant's ranch which were served by the waters of Pole and Canyon creeks.

The case was tried in open court, and the taking of evidence consumed 10 or 12 days. Approximately 30 witnesses were examined. During the trial testimony was offered concerning the history of these ranches for approximately 40 years. The complexity of the problems involved has been increased by the fact, as shown by the evidence, that by numerous natural waterways or sloughs other than those above named, and by a large number of ditches constructed by the parties, the waters of Quin river and of Eight Mile creek have been mingled; dams have been built, both temporary and permanent, and have been washed out; and ditches constructed and abandoned. It has not been possible for either the witnesses or the court in all instances to satisfactorily define the locations of the ditches or dams as to which testimony has been offered, and the testimony covering so broad a period is naturally very conflicting. Furthermore, it appears that at the time of the yearly recurring spring season of flood the waters of all these streams spread over the lands of the parties and for the time afford sufficient water for all. It appears also that in years of abundant water both parties have sufficient for their uses even after

the diversions herein complained of; the difficulty arising only in years of average or insufficient water.

[1] The evidence, as indicated, presents all the perplexities which may be expected from the nature of the subject. There is much testimony in the record which is vague and much that is inconclusive and in many instances sharply conflicting. For example, many witnesses have testified that haying was done on the respective meadows at various early dates without giving any definite information as to whether the hay was raised from irrigation by artificial means or by the use of natural overflow which would found no right of appropriation. *Walsh v. Wallace*, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692. The court must also inevitably disregard some testimony in cases of conflict without any imputation upon its sincerity. As stated by Judge Hawley in *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 Fed. 99:

"One can naturally understand that lapse of memory comes with lapse of time, and that any man, however conscientious or honest, may be mistaken as to events that transpired 40 or more years ago; and the truth of such matter, as to the time of any given transaction, can often only be solved by comparing the testimony of the witnesses with known and uncontradicted facts as to the date of other events which all concede occurred at or about the same time. One can also readily understand the uncertainty, and sometimes, if not always, the unreliability, of the testimony of witnesses who attempt to give with any degree of precision the amount of land under irrigation, or the exact amount of water flowing in a river, stream, cut, canal, or ditch, by merely looking at it."

The questions presented for solution are largely those of fact, and as to the general principles of law applicable to those facts, when ascertained, there is little, if any, controversy.

[2] In the state of Nevada the doctrine of riparian ownership as a foundation for rights to water has been definitely abandoned, and rights to the use of water founded, by reason of necessity arising from the arid nature of the country, upon prior appropriation only. The rules governing such right of appropriation, so far as necessary to state them, have been codified in *Cutting's Compiled Laws of Nevada*, as follows:

"Sec. 354. All natural water courses and natural lakes, and the waters thereof which are not held in private ownership, belong to the state, and are subject to regulation and control by the state."

"Sec. 356. There is no absolute property in the waters of a natural water course or natural lake. No right can be acquired to such waters except as usufructuary right—the right to use it, or to dispose of its use for a beneficial purpose. When the necessity for the use of the water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of a natural water course or lake except at such times as the water is required for a beneficial purpose."

"Sec. 357. No person shall be permitted to divert or use any more of the waters of a natural water course or natural lake than sufficient, when properly and economically used, to answer the purpose for which the diversion is made; nor shall any person be permitted to waste any such water, and all surplus water remaining after use, unavoidable wastage excepted, shall be returned to the channel by the persons diverting the same without unreasonable delay or detention."

"Sec. 358. Any person who has acquired the right to use the water for a beneficial purpose may change the place of diversion and manner of use; *provided*, such change does not substantially injure the rights of others."

An able exposition of the law of prior appropriation as obtaining in this state, but not necessary to be here restated, will also be found in *Hewitt v. Story*, 64 Fed. 514, 12 C. C. A. 250, 30 L. R. A. 265, and *Union Mill, etc., Co. v. Dangberg*, *supra*, decided by the late Judge Hawley. Having these general principles in view, we will proceed to examine the history of the settlement and cultivation of these ranches and the appropriations of waters made by the respective parties, or their grantors; and it will be most convenient to consider this history in its relation to the several streams whose waters are in controversy:

As to Twelve Mile creek: Charles McConnell drove a band of sheep to Quin River Valley in the fall of 1869 and established a camp at what is now the Upper Twelve Mile ranch at the point where the stream emerges from its canyon in the mountains. During the year 1870 shearing corrals were built, and a small ditch was taken from the creek to keep the dust down while the men were shearing. A small garden for vegetables, apparently about one-half acre in extent, was planted in 1871. Charles McConnell married in 1872 and took his wife to the Twelve Mile camp. In 1876 he moved to the Upper Eight Mile ranch and took his buildings with him. The evidence of any continued use of water at the Twelve Mile ranch after such removal is quite vague and unsatisfactory. It tended to show that as late as the early nineties various Indians, at uncertain intervals, cultivated a small garden patch on the place and raised vegetables by means of water; but it wholly fails to show the nature of their right thereto. The respondents endeavored to establish that these Indians occupied the position of tenants toward McConnell; but I find the evidence entirely insufficient to establish any such relation.

Henry Hoppin came to the Quin River Valley and established himself on the present ranch of the complainant in 1870. He diverted the waters of Twelve Mile creek where it entered his boundaries by a ditch, now existing, at least as early as 1877; and such diversion continued unbrokenly down to its interruption in 1902, and without any interference or claim adverse thereto by Charles McConnell.

The testimony as to the beneficial use of water at the Upper Twelve Mile ranch by the respondents or their predecessors during the period approximating 26 years, from the time Charles McConnell moved away in 1876 to the time that Thomas McConnell, Jr., began to put in alfalfa in 1902, shows only such a vagrant, occasional, fugitive, and uncertain use as conclusively raises a presumption of abandonment. Charles McConnell's needs in that stream apparently ended when he moved his home to the Upper Eight Mile ranch, and no definite right to those waters was thereafter asserted by him.

[3] Abandonment is a question of intention, to be evidenced by overt acts; but, when such overt acts appear, the right to appropriate water, like any usufructuary right, ceases and cannot be resumed after the rights of others have intervened. *Hewitt v. Story*, 64 Fed. 515, 516, 12 C. C. A. 250, 30 L. R. A. 265, and cases therein cited. It is entirely clear from that evidence that the respondents have no rights

whatsoever in the waters of Twelve Mile creek except in subordination to complainant's appropriation, and that the complainant has the right to the entire flow thereof unobstructed by any acts of diversion by the respondents.

As to Quin river and Eight Mile creek: The first settlement on Eight Mile creek was made by one Rose in 1867 at the place now called the Upper Eight Mile ranch, where the stream emerges from the mountains on the east of the Quin River Valley. Rose made some small cultivation of the ground and used some water from the creek. He was apparently a squatter and is not connected in any chain of title with respondents' ownership of the land. He was there only one season and was succeeded by one Peter Flynn. The old Idaho stage road ran by the place, and Flynn kept a station for travelers by stage. He had a small vegetable garden and a small field of barley irrigated by ditches from Eight Mile creek. The amount of acreage under cultivation is variously estimated and widely divergent in the testimony. Flynn sold to Charles McConnell in 1872. McConnell, as heretofore stated, moved his home from Twelve Mile creek to Eight Mile creek about 1876, and remained there for 20 years, or until he removed to his present location on the main McConnell meadows near Quin river in 1896. After this last removal, further cultivation of the Upper Eight Mile ranch was abandoned, and the fields grew up in sagebrush; the place of use of the water hitherto diverted at the upper ranch being apparently transferred with the change of the home. This situation continued until about 1906, when, as stated above, the old ditch at the upper ranch was continued northwesterly parallel to the creek until it entered the main McConnell ranch south of the creek channel and was used to divert all the waters of Eight Mile creek upon the newly planted alfalfa fields.

It seems to be practically conceded by complainant that Flynn was the first appropriator on Eight Mile creek; but the amount diverted is in dispute. The testimony as to the quantity of land under cultivation at the Upper Eight Mile ranch or station is, as indicated, very unsatisfactory, and the estimates of the acreage cultivated show a wide variance. It was shown, however, that in this country an abandoned cultivated field grows up with sagebrush and other desert vegetation, and that such new growth is so distinguished by its size, color, and manner of growth from the ancient undisturbed growth outside the cultivated area as to present a natural line of demarcation between the two areas and affords thereby a definite basis for accurate determination of the acreage formerly cultivated. Complainant's engineer testified that, taking this sharply defined demarcation as a basis, he had surveyed the ground thus shown to have been under cultivation at the Upper Eight Mile ranch, and the result of the survey showed 6.77 acres of such land. This is the only evidence of a definite nature on the subject, and, in the absence of any satisfactory evidence to the contrary, I must accept this estimate as a reliable index of the fact; and the extent of the right to the water by the Flynn appropriation, which does not appear to have been extended through the McConnell occupancy, will be determined upon this basis.

The main McConnell meadow or ranch, as indicated above, is watered both by the waters of Eight Mile creek and of Quin river. The first settlement at this latter place seems to have been made by a man named Anderson, not connected with the complainant. For perhaps two or three years prior to 1871 this man Anderson had been cutting wild grass or hay in the vicinity of the delta of Eight Mile creek. There is some evidence that he had made a ditch from Quin river; but it is too vague to predicate a finding of appropriation and continued use in favor of respondents to any extent. McConnell bought him out in 1871. As has been stated, Hoppin settled at his ranch, now owned by complainant, in 1870.

According to the witness Cogswell, who worked for McConnell from 1872 to 1875, crops of natural grass or hay were gathered from both the Hoppin and McConnell ranches and were grown by the natural overflow from the streams and without resort at that time to artificial irrigation by either party. Before very long, however, it is evident that the parties began to build dams and ditches to divert the waters of Eight Mile and Quin river upon their ranches, and in the course of years an elaborate system of irrigation was built up upon each ranch. Some of these dams were purely temporary in character, consisting of brush and manure which was renewed each year. Many were not connected with ditches, but were placed in the natural sloughs and depressions to swell the waters onto adjoining land, whence they would flow back to the stream below the dam. The natural slope of the land on both ranches was such that the waters diverted above would return to Eight Mile slough or Beef Corral slough, where they would be again diverted, and so on in a cycle many times repeated. It naturally follows that all the waters of Eight Mile creek and a large part of the waters of Quin river were successively used each season first on the McConnell place as above indicated, and then in the natural course of their flow upon the Hoppin ranch in the same manner. As long as Hoppin and McConnell were neighbors, the system of irrigation thus pursued was satisfactory to each and to a considerable extent in conjunction. Each ranch as far as appears had sufficient water, and there is nothing to show that either ranch used an excessive amount of water. During this period the use of the waters was confined, on both ranches, to the irrigation of the meadow land, largely, and to a lesser extent to pasture lands. It is at once apparent that, in the case of a system of irrigation upon two adjoining ranches developed and maintained in the manner and by the means as above stated, during a period practically identical in time, the question of prior appropriation must necessarily be, as in this instance, difficult of ascertainment. It will be necessary for that purpose first to get as near as may be the exact facts as to the times of construction and location of the more important ditches. These ditches are designated by letters on respondents' map and by names on complainant's map.

"A" ditch begins at a dam diverting part of the waters of Quin river situated above the northerly boundary of the McConnell ranch, at a point designated as Upper Diversion. This Upper Diversion dam is apparently very old; built, as indicated, possibly as early as 1876.

In 1903 the "A" ditch was built from a natural slough running out at Upper Diversion dam, thence in a southeasterly direction through McConnell's pasture lands to a fence a little north of Eight Mile creek (marked "128 A" on complainant's map). Eight Mile ditch had been apparently built southerly from Eight Mile creek in 1895; how far does not appear, but at that time its water, which came from Eight Mile creek, crossed over into the "C" ditch hereafter described. The space between point 128 A and the head of the old Eight Mile ditch was connected by a ditch in 1904 and 1905 after the beginning of this litigation. It diverts a portion of the waters of Quin river upon the sagebrush and alfalfa land above referred to in the southeasterly portion of the McConnell ranch. The evidence shows that its waters do not thereafter reach the Hoppin land below.

"B" ditch is a short ditch beginning like "A" ditch in a natural slough served by the Upper Diversion dam and terminating in pasture land in the northerly part of the McConnell ranch. Prior to the building of the "A" ditch, such water as was diverted by the Upper Diversion dam passed through the "B" ditch. It was apparently there as early as 1880; but the witness Hayward says that in 1865 it was used only in periods of high water. The testimony as to its use at periods other than of high water is indefinite and unsatisfactory, and I conclude that it was only so used.

"C" or Alfalfa ditch and "E" or Company ditch both properly begin, as indicated on complainant's map, at a dam in Quin river called the "Lower Diversion Dam." The two ditches diverge just below the township line between township 46 north, range 38 east, and township 47 above. The Lower Diversion dam is properly placed as on complainant's map at a point in Quin river near the easterly and westerly half section line of section 32, township 47 north, range 38 east. Apparently a dam at lower diversion existed as early as 1876, and at that time a short 30-yard ditch led out of it to the east. A ditch was extended from this point to the point 22 F below the township line where the "C" ditch and "E" ditch now diverge, in the years 1881 and following. This portion was built by Charles McConnell and Henry Hoppin under a joint appropriation which will be hereafter referred to. There is evidence that "C" or Alfalfa ditch from the point 22 F on complainant's map was commenced in the fall of 1897 and used in the spring of 1898. It is impossible to tell from the testimony with absolute accuracy how far it went at that time; but it extended apparently but little below the McConnell buildings, and its waters flowed down into Eight Mile Slough. In 1901, 1902, and 1903 it was further extended to Charles McConnell's alfalfa lands and the lands of Thomas McConnell at the southeasterly corner of the McConnell ranch, in which use its waters are lost to the complainant's lands below. "D" or Middle ditch is a fork of the Alfalfa ditch serving the same alfalfa lands and completed between 1901 and 1903.

"E" or Company ditch, as above stated, began at the Lower Diversion dam in 1881 under the joint construction of McConnell and Hoppin. Between then and 1884 it was extended as far south as the point in the southeast quarter of section 6 on McConnell's ranch de-



scribed on complainant's map as "14 J." Through part of this course it runs through natural sloughs or channels previously existing. Its southerly limit at the time of the transfer of the Hoppin ranch to Anderson, the immediate predecessor of complainant, appears to have been about the easterly and westerly half section line of section 7 on the McConnell ranch. In its course this ditch at that time irrigated part of the land on the McConnell ranch between Beef Corral slough and Eight Mile slough, and, passing to the east of Eight Mile slough, spread its waters upon the McConnell meadows at that point. All this water flowed by natural gravitation toward Beef Corral slough and Eight Mile slough, respectively, and thus went down to the Hoppin ranch.

About the year 1903 the Company ditch was extended by defendants south so as to serve the alfalfa lands and the Thomas McConnell lands heretofore described. Its southerly terminus, like the southerly terminus of the "D" or Middle ditch, is at the division fence between the two ranches; but the water so diverted is entirely consumed on the McConnell land or, as in times of unusual flow, is delivered upon the Anderson ranch at a point where it cannot be beneficially used thereon.

The "F" or Tom ditch was built by Charles McConnell in 1879, and diverts the waters of Beef Corral slough into Eight Mile slough at a point about halfway up the McConnell meadows. "K" or Plowbeam ditch No. 1 is a ditch existing as early as 1883, and is extended to a short distance above the Anderson north fence. It carries the waters of Beef Corral slough into Eight Mile slough. It does not satisfactorily appear by whom this ditch was built; but its location clearly indicates that it was intended principally, if not entirely, for the benefit of the Hoppin ranch. Plowbeam ditch No. 2 was built in 1877 by Henry Hoppin and enlarged in 1878. It carries the waters of Beef Corral slough, diverted at the point 75 A by means of various natural sloughs and artificial ditches, into Eight Mile slough immediately north of Anderson's northerly fence. From that point in Eight Mile slough dams and a series of ditches radiating southeasterly carry the water of the two sloughs thus intermingled out upon the complainant's meadows.

All of the above ditches except the radiating ditches last mentioned are on the McConnell ranch. In addition, many other smaller ditches and many dams regulated the flow of the water at the time of the transfer of the Hoppin ranch to Anderson.

Upon the last-named ranch, at the time of the transfer, an elaborate system of dams and ditches diverted water from Eight Mile slough both easterly and westerly, from Beef Corral slough likewise in both directions, and in certain seasons from Quin river easterly.

From the above description deduced from the evidence it will be seen that the new Eight Mile ditch and "A" ditch have been constructed, and "C", "D", and "E" ditches have been extended by the McConnells since the transfer of the Hoppin ranch to Anderson, with the result that all of the water in Eight Mile creek and of Quin river has been diverted to the high alfalfa ground on the McConnell ranch and does not reach the Hoppin meadows in the ditches theretofore ex-

isting and hereinabove described. It will be seen that the system of ditches on the McConnell ranch as used prior to the transfer was of mutual benefit, and with the Hoppin ditches was adapted to the successive repeated use of the waters of the two streams, first upon the McConnell meadow land, and later upon the meadows of the Hoppin ranch. Under these circumstances, it is a matter of no surprise to find some further evidence of mutual action between the then owners of the two ranches. In 1880 Charles McConnell and Henry Hoppin filed a joint ditch claim affecting the waters of Quin river, together with a plat showing the course of three different ditches therein claimed. Ditch No. 1, as designated in that claim, started at Upper Diversion and to my mind must be identified with "B" ditch above described. Ditch No. 2 was west of the river and is of no interest in this controversy. Ditch No. 3, however, is clearly identical with the upper or joint portions of the Company or Alfalfa ditches, and it is clearly this ditch which was constructed by Henry Hoppin and Charles McConnell in 1881. Ditch No. 3 plainly benefited not only the lands north of the township line through which it ran, but flowed upon the McConnell meadows, in township 46 north, range 38 east, and after use there flowed down through Eight Mile slough upon the Hoppin meadows. About this time it also appears that there was an exchange of lands between Hoppin and McConnell; Hoppin conveying to McConnell certain tracts in the northerly portion of the present McConnell ranch, and McConnell conveying to Hoppin a considerable quantity of land in the present Anderson ranch, much of which is under the flow of Eight Mile creek and Beef Corral slough. It is claimed by the respondents that the transfer of these lands, in the absence of any clause of reservation, conveyed to McConnell all water rights arising out of the joint location notice. While this might be true as to the Ditches 1 and 2, I think any such intention or purpose clearly negatived as to the waters diverted by Ditch No. 3 which discharged upon the upper McConnell meadows and formed a part of the waters benefiting the lands conveyed to Hoppin in the exchange and thereafter continued to so flow. The parties did not act upon any such theory until after the purchase by Anderson. Not only was the Upper Company ditch constructed by the parties jointly, but it appears from the testimony of the witness Thad Hoppin the flow through the headgate was at all times subject to regulation for the benefit of the Hoppin ranch. The respondents deny Henry Hoppin's part in the construction of this ditch; but the preponderance of evidence and the situation of the parties seem to me conclusive of the fact. As to the waters of Quin river, I conclude that complainant and respondent Thomas McConnell, executor, are each entitled to the waters thereof flowing through the ditch at lower diversion, and that complainant is entitled to regulate the flow in such way as to protect its right to one-half of such waters. This equal right, however, neither prevents McConnell from first using all the water of the ditch on his lands, nor does it give him the right to divert his moiety away from the watershed. The complainant is, I think, clearly entitled to have the water jointly diverted by his predecessors come down to him in the channels that existed

prior to the extensions and diversions later made by McConnell to new lands as above indicated.

As to appropriation from Quin river other than the amount included in the joint diversion mentioned, it is sufficient to say that by a preponderance of the evidence the complainant has established a priority. The amount of water acquired thus and by the joint appropriation will be determined by the acreage to which it was devoted.

With respect to the question of priority of appropriation of the waters of Eight Mile creek other than the amount included in the Flynn appropriation, the matter is difficult of solution. The witness Foster testifies to a ditch across the Hoppin meadows northwesterly of the ranch buildings as being in existence as early as 1873 or 1874. Apparently this ditch was from Eight Mile slough. This evidence itself is not so certain and convincing as could be desired; but, taken in connection with the testimony of Thad Hoppin and others and with the situation of the parties and the natural configuration of the ground, it seems to me sufficiently clear that the first appropriation of Eight Mile waters was made by Henry Hoppin. The McConnell ranch is intersected by numerous small swalelike depressions or natural channels which facilitate the flow and spread of the water, especially during seasons of high water, and naturally moisten the adjacent meadows. In addition to this, Eight Mile creek when it reached the meadow in its natural course spread out fanlike through these depressions as heretofore described and gave its entire flow for the benefit of the meadow before collecting again into Eight Mile slough. The Hoppin ranch has broader meadows, generally flat in character, and largely without these natural advantages, making necessary to a greater extent a resort to artificial means by dams and ditches to spread the water over the fields; and, as water became scarce from more numerous settlements and increased cultivation in the upper part of the Quin River Valley, the Hoppin ranch would be the first to feel the scarcity and the necessary resort to artificial means for the distribution of its water. Such corroboration as these physical facts afford, together with the evidence given by the witnesses Foster and Thad Hoppin, are, I think, sufficient to establish a prior appropriation in favor of the complainant.

[4] Respondents seem to rest their case both as to Eight Mile and Quin river waters upon the contention that Hoppin's use was merely of waste water from the McConnell ranch, and rely upon *Burkart v. Meiberg*, 37 Colo. 187, 190, 86 Pac. 98, 99, 6 L. R. A. (N. S.) 1104, 1106, 119 Am. St. Rep. 279. But I do not think the doctrine of that case applies. In that case it appeared that defendants owned valid water rights in several ditches having their headgates in a natural stream, and with this water had for a number of years irrigated a tract of land. Some of this water by surface drainage from the irrigated land passed upon the field of plaintiff adjoining, where plaintiff, by means of an irrigating ditch running parallel with the common boundary line, collected the water and diverted it for her own uses. Defendants subsequently dug a parallel ditch upon their own land,

thus saving the water which had escaped to plaintiff's land and ditch, and carried it to other lands belonging to them and away from plaintiff. It appeared, however, in that case that plaintiff did not claim by virtue of an appropriation from the same stream. The court says:

"The plaintiff does not assert the right to the use of this water by virtue of an appropriation made from the same stream, or any of its tributaries, which are the source of defendants' supply. She cannot, therefore, like a prior or junior appropriator of water from the same stream, insist upon an economical use by the defendants of their appropriation."

The case, therefore, is not in point for two reasons: First, that here the Hoppins, as we have seen, were the first appropriators, except to the limited extent above noted; and, second, that even if their appropriation was subsequent to that of McConnell, they had the right to insist that the unused water naturally flowing to them from the McConnell ranch should not be diverted elsewhere, but should be allowed to return to the stream to serve their appropriation. There is, strictly speaking, under the evidence, no waste water question in this case. If McConnell as an appropriator prior in right had diverted more than his fields should need, the excess thus diverted was not the subject of any rights resting in him, but was part of the water to which even a junior appropriator would be entitled. It was part of the water appropriated by Hoppin, and could not be diverted elsewhere by McConnell. It is immaterial, so far as respondents are concerned, whether or not Hoppin collected a part of it in a ditch intercepting it on its way to Eight Mile slough.

[5] Respondents also contend with great earnestness that Eight Mile creek and Eight Mile slough do not constitute a continuous water course; that Eight Mile creek ends within the McConnell ranch, and its waters therefore are in no sense subject to appropriation by the complainant based upon a diversion made from Eight Mile slough. It has already been stated that after Eight Mile creek enters the main McConnell ranch and passes onto the McConnell meadow it spreads in delta like form losing its banks and definite channel. The gradient of Eight Mile creek, originally steep, changes as it leaves the higher lands and enters the main McConnell meadows where its *débris*-burdened flood waters naturally meet the overflow of the flood waters of Quin river. The result inevitably follows that with the cessation of rapid flow the *débris* is dropped and a delta is formed, leaving the water to escape to its ultimate destination as best it may, naturally following the lowest places. It appears clearly from the testimony that, despite the spreading of the water over the meadow, the major portion of it flows in a definite course through the low depressions above described, which are so interrelated that, while no definite channel traverses the meadow land, a number of broken or partial channels to Eight Mile slough may be identified upon the surface. Even respondents' engineer admits that the source of the water in Eight Mile slough is Eight Mile creek, and I am left with no doubt upon the evidence that the two constitute but one and the same natural water course. It is not material that no definitely defined channel appears on the surface. Visible banks are not necessary characteristics of a water course.

In *New York, C. & St. L. R. Co. v. Hamlet Hay Co.*, 149 Ind. 344, 47 N. E. 1060, the court says:

"That the banks of the streams are not everywhere clearly and sharply defined is not controlling. The character of the country through which the stream flows must be taken into account. Where the country is hilly or rolling, the fall rapid, and the soil easily cut and washed, there will, in general, be a deep and well-marked channel. Where, however, the country is flat, the fall slight, and the soil turfy and full of roots and strong grass, there the channel will often be shallow and the sides in many places not sharply defined. But as said in *Mitchell v. Blain*, 142 Ind. 604, 42 N. E. 230 (citing authorities): 'A stream does not cease to be a water course and become mere surface water, because at a certain point it spreads out over low ground, several rods in width, and flows for a distance without a defined channel or banks before flowing again in a definite channel. If a water course is lost in a swamp or lake, it is still a water course, if it emerges therefrom in a well-defined channel.'"

See, also, *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611; *Rigney v. Tacoma Lt. & Power Co.*, 9 Wash. 576, 38 Pac. 147, 148, 26 L. R. A. 425; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; 2 *Farnham*, p. 1558.

In *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497, the waters of a spring left their natural channel and flowed underground for a distance of half a mile into a certain creek. The court protected an appropriation from the creek as against a diversion from the springs on the ground that even in the absence of a definite surface channel the continuity of the stream was established by reason of the fact that the springs were the definite source of supply.

Whether, therefore, we consider Eight Mile creek and Eight Mile slough a continuous stream in visible fact, or decide its continuity on the ground adopted in *Strait v. Brown*, it appears sufficiently clear that an appropriator from Eight Mile slough may restrain a diversion from Eight Mile creek.

[6] This brings us to the question of the extent of the rights of the parties in the waters in controversy. The amount of water to which the complainant is entitled from the several streams in question can, I think, best be determined under the evidence by the acreage severally irrigated by these streams. In fact, I find no other practical basis afforded by the evidence. The amount of water necessary for the irrigation of these lands is estimated by complainant's engineer at approximately two miners' inches an acre, and at three miners' inches by respondents' engineer. I am disposed upon all the evidence to adopt the former estimate as being amply sufficient. Complainant's engineer Coleman gives the acreage under irrigation on the complainant's ranch from Twelve Mile creek as 310.14 acres; and, this being not disputed, it would be entitled thus to 620.28 miners' inches of Twelve Mile water. From Eight Mile slough the acreage irrigated on the Hoppin ranch was 608.33 acres, and this area therefore required 1,216.66 inches of water. The Flynn appropriation for 6.77 acres would consume 13.54 inches. Irrigation on the complainant's ranch from Quin river was applied to 125.2 acres of meadow; and 114.6 acres of pasture, irrigated from Beef Corral slough; and 219.85 acres of pasture lying between and irrigated from both the river and the

slough. This total of 459.65 acres would need 919.3 inches of water. These figures will be adopted as the measure of complainant's rights.

It will be obvious that the above estimate of complainant's appropriation from Eight Mile slough includes water diverted from Quin river or Beef Corral slough by the Company ditch, the Plowbeam ditches and Tom ditch into Eight Mile slough above the Anderson ranch. There is not sufficient data in the evidence to segregate the amounts of the waters thus mingled; but a decree may be so drawn as to protect the complainant, if necessary, to the end that Quin river water may continue to swell the Eight Mile water sufficiently to satisfy the appropriation made from the latter channel.

The estate of Charles McConnell has clearly an appropriator's right to the waters of Eight Mile creek and Quin river in addition to what has been specified sufficient to irrigate a considerable acreage of meadow and pasture, but subordinate to complainant's rights. The evidence, however, does not afford any basis on which findings can be made as to the acreage of the McConnell lands irrigated by the streams severally. The total acreage irrigated by McConnell, other than the alfalfa lands, may be determined; but I cannot tell the several tracts lying under the flow of the different streams in controversy. No other satisfactory basis of determining their secondary right seems to be presented. In view of the fact, however, that the Charles McConnell estate may under this decision first use the waters of Quin river and Eight Mile creek to the fullest extent compatible with their obligation to deliver to complainant through the channels named, the amounts of water to which they are entitled as above stated, it does not appear that respondents can or will suffer any injury in this regard.

From what has been said it is obvious that Thomas McConnell individually has no right to any of the water in controversy except in subordination to the other parties herein.

Let a decree be entered in accordance with the findings accompanying this opinion, with costs to the complainant.

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#### PHYSICIANS' DEFENSE CO. v. COOPER, State Ins. Com'r.

(Circuit Court, N. D. California. June 6, 1911.)

##### INSURANCE (§ 2\*)—CONTRACTS OF "INSURANCE"—REGULATION.

An association organized to protect physicians against civil prosecutions for malpractice, which issues contracts to physicians for a specified consideration and agrees to defend at its own cost, not in excess of a specified sum, actions against physicians for malpractice, without assuming the payment of any judgment in any suit defended, is engaged in the business of insurance within Civ. Code Cal. §§ 2527, 2531, defining "insurance" as a contract whereby one undertakes to indemnify another against loss or liability arising from an unknown or contingent event, and providing that any contingent or unknown event which may damnify a person or create a liability against him may be insured against, since the contract is one of indemnity and not one to render personal services

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for another, and such company is subject to the provisions of the statutes of the state regulating the business of insurance therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 11½; Dec. Dig. § 2.\*

For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677.]

In Equity. Suit by the Physicians' Defense Company against E. C. Cooper, as State Insurance Commissioner of California. Application for injunction denied, demurrer to bill sustained, and bill dismissed.

Stanley Moore and Goodfellow, Eells & Orrick, for complainant.

U. S. Webb, Atty. Gen., and E. B. Power, Asst. Atty. Gen., for defendant.

VAN FLEET, District Judge. The bill seeks to restrain the defendant, as state insurance commissioner, from threatened interference by that officer with complainant's business by proceedings to require it to conform to the provisions of the statutes of the state regulating the business of insurance therein. The order to show cause is met by a demurrer which challenges the bill as devoid of equity; and the sole question presented is whether the business in which complainant is engaged is that of insurance, and so subject to the supervision of the insurance commissioner. This question depends upon the nature of the contracts the complainant issues to its patrons; that is, whether they are contracts of insurance.

As disclosed by the bill, the purposes for which the complainant is organized, as stated in its articles of incorporation, are "to aid and protect the medical profession in the practice of medicine and surgery by the defense of physicians and surgeons against civil prosecution for malpractice"; and its plan of business as therein set forth is as follows:

"The association will issue to physicians and surgeons, upon stated and agreed compensation, contracts by which it will undertake and agree to defend the holder of the contract, at its own expense, against any action brought against him for damages for alleged malpractice in relation to or in connection with services performed, or which should have been performed, within the time covered by the contract; but the association shall not in any defense contract issued by it assume or agree to assume or pay any judgment for damages for malpractice rendered against the holder of such contract."

Under the contract issued by it, complainant undertakes, for an agreed and stipulated annual payment in the nature of a premium, to defend the holder "against all suits for damages for civil malpractice based upon professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding five thousand dollars in defense of any one suit, and not exceeding in the aggregate ten thousand dollars in defense of suits based on services rendered by the holder hereof or his agent within one year from the date of this contract."

And the contract provides:

"Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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who, together with the company's attorney, will defend the case without expense to the holder hereof.

"Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error, or other legal proceedings, shall have been exhausted, or until the above-mentioned sums shall have been expended in said defense; providing that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services.

"Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof in any suit defended by it.

"The company shall not compromise any suit or claim for malpractice against the holder hereof."

The foregoing are the material and substantive features of the contract issued by complainant to its patrons; and the contention of the complainant is that, as indicated by its terms, it is purely a contract for personal services and embraces none of the essential features of a contract of insurance. The correctness of this claim must be determined by ascertaining the real nature and purpose of the contract when construed in the light of the provisions of the statute of the state declaring what shall be deemed a contract of insurance as therein defined, ignoring, if necessary, considerations arising from the mere outward semblance or form in which the contract is cast.

Section 2527 of the Civil Code provides:

"Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event."

And section 2531 of the same Code provides:

"Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter."

Section 2532 excepts from the category of insurable contingencies drawings in a lottery or for or against any chance or ticket in such lottery drawing a prize.

It will at once be seen that these provisions are sufficiently broad in their scope to include every contract the effect and purpose of which is to indemnify the holder against any contingent liability as being in its nature insurance; and to include as the proper subject of such contracts any conceivable event of an uncertain or unknown nature the effect of which may give rise to liability or loss, saving only contingencies dependent upon events deemed contrary to public morals.

Wherein the contract involved is lacking in the elements of a contract of insurance as thus defined is not readily to be perceived. Very clearly to my mind it is a contract providing indemnity against a contingent liability. The liability of the holder to be sued is certainly a contingent thing; and the undertaking, in the event of suit, to hold him harmless, limited though it be, is quite as certainly an indemnity.

Complainant argues that the element of indemnity is wholly eliminated by the provision which exempts it from obligation to pay the judgment; and that all it contracts to do is to secure competent counsel and, at its own expense, see that the suit is properly defended. The contract is more or less artfully drawn to put forward this idea,



but not sufficiently so to conceal the fact that such is not its underlying purpose and effect. If the amount of the final judgment was the extent of the liability incurred in the event provided against, the contention might be more plausible; but there are other elements of damnification which such suits entail. Indeed, not infrequently the amount of the judgment recovered is the small end of the loss incurred and suffered by a defendant in the class of litigation covered. In many instances the costs and expenses of such suits—expenses of a nature for which no recoupment may be had—far exceed the amount awarded by the judgment; and these the complainant obligates itself, up to the limit of \$5,000, to pay. This is clearly indemnity; and obviously it is not essential to make it a contract of insurance that it shall indemnify against all loss. But complainant argues that such extra legal costs and expenses, if any are incurred, are not the liability or loss of the contract holder, for he does not incur them; that the liability incurred in this regard, if any, is that of complainant and not the physician. This is begging the question. The obligation rests upon the complainant, it is true, but only by reason of its contract by which it has assumed it; the primary liability to such costs and expenses is incurred by and rests upon the defendant physician, and but for his contract he would be called upon to pay them. It is this very feature that constitutes the contract one of indemnity. But it is contended by complainant that the essential feature of all insurance is a money reimbursement for damage or loss sustained or liability incurred by the insured; and that a contract whereby one undertakes merely to perform certain services for another, and to pay any expenses incurred in such service out of his own pocket, is not reimbursement in money, and so not insurance. This is only another way of putting complainant's claim that this is but a contract for personal services; and, of course, if that were the real nature of the contract, the discussion would be at an end. But, as suggested, the real nature of the contract is to be determined not so much by regarding its form as its effect; and for this purpose its terms may be transposed and its stipulations so stated as to show what is really accomplished. If, as aptly suggested by the Assistant Attorney General, the contract was one which by its terms provided that the holder in the event of a suit against him should himself proceed to defend it and pay the costs and expenses in the first instance out of his own pocket, and that the complainant should thereupon be obligated to reimburse him for such outlay up to the amount of \$5,000, excepting only its liability to pay any part of a final judgment, would any one say that such a contract was not one of insurance? And yet that is precisely the result accomplished under a slightly different guise and by going the other way about.

It is said that, if this is a contract of insurance, then the contract by which an attorney for a stipulated retainer or fee undertakes at his own expense to defend a client in certain litigation or against a certain class of suits, or a contract by which a board of trade undertakes in consideration of an annual payment by its members to prosecute and defend at its own expense all litigation growing out of the

business in which such members are engaged, are equally contracts of insurance. But we are not here concerned with the nature of such contracts. If attorneys and boards of trade are engaged in the business of making such contracts, it may be of interest to the insurance commissioner; but all we are here concerned with is whether the contract under consideration is an insurance contract, and so renders the complainant, which is engaged in the business of putting forth such contracts, amenable to regulation under the insurance laws of the state. That the contract is one of insurance, I entertain no doubt.

Complainant relies, in support of the contention advanced by it, upon *Vredenburg v. Physicians' Defense Co.*, 126 Ill. App. 509, and *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N. E. 567, both involving a construction of the same contract, and wherein conclusions were reached in harmony with complainant's claim that the contract is merely one for personal services. I am unable to acquiesce in the views expressed in those cases. The reasoning proceeds from a consideration of the formal terms of the contract in suit as affected by certain general definitions of the essentials of a contract of insurance as stated in the text books; and both cases ignore the consideration that the liability to loss, incurred in the contingency as to which the contract relates, involves a liability beyond the naked amount of the judgment that may be recovered.

On the other hand, the views herein expressed will be found fully sustained in the later case of *Physicians' Defense Co. v. O'Brien*, Insurance Com'r, 100 Minn. 490, 111 N. W. 396, where the Supreme Court of Minnesota, interpreting the same contract in the light of a statutory definition very similar to and no broader than our own, hold it to be clearly a contract of insurance.

The application for an injunction must be denied, the demurrer sustained, and the bill dismissed; and it is so ordered.

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#### UNITED STATES v. STONE et al.

(District Court, D. Maryland. July 5, 1911.)

##### 1. STATUTES (§ 241\*)—PENAL STATUTES—CONSTRUCTION.

The court, in construing a highly penal statute, may not extend doubtful words beyond their natural meaning in the connection in which they are used; but, though the statute must be strictly construed, it must not be so construed as to defeat the legislative will.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.\*]

##### 2. CONSPIRACY (§ 29\*)—INJURY—DEPRIVATION OF RIGHT TO VOTE—CRIMINAL RESPONSIBILITY—"INJURE."

Pen. Code, § 19 (Act March 4, 1909, c. 321, 35 Stat. 1092 [U. S. Comp. St. Supp. 1909, p. 1396]), punishing persons conspiring to injure any citizen in the free exercise of any right or privilege secured to him by the federal Constitution and laws, covers a conspiracy to deprive a citizen of his right to vote at a congressional election and thereby injure him, within the ordinary meaning of the word "injure," and a conspiracy to deprive illiterate negro voters of their right to vote by preparing the bal-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lots in such a way as to make it difficult to vote for their candidate for Congress is punishable.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 49; Dec. Dig. § 29.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3612, 3613.]

**3. CONSPIRACY (§ 43\*)—DEPRIVATION OF RIGHTS—INDICTMENT—REQUISITES.**

An indictment charging a conspiracy to deprive negro voters of their right to vote at a congressional election, in violation of Pen. Code, § 19 (Act March 4, 1909, c. 321, 35 Stat. 1092 [U. S. Comp. St. Supp. 1909, p. 1396]), need not allege the names of the negro voters whom defendants intended to injure.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.\*]

**4. CONSPIRACY (§ 43\*)—DEPRIVATION OF RIGHTS—INDICTMENT—REQUISITES.**

An indictment, alleging that accused aided and abetted two persons named who conspired to deprive citizens of their right to vote at a congressional election by printing the ballots for the other two with knowledge of their purpose, is sufficient as against a demurrer.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.\*]

**5. CONSPIRACY (§ 43\*)—DEPRIVATION OF RIGHTS—INDICTMENT—REQUISITES.**

An indictment, charging a violation of Pen. Code, § 37 (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1909, p. 1402]), punishing a conspiracy to commit the offense punishable by section 20, punishing any one who under color of any law deprives an inhabitant by reason of color or race of any rights secured by the federal Constitution or laws, which alleges that a state law requires that the official ballots in a designated part of the state shall be arranged in alphabetical order with a designation of the political party, and that sample ballots must be posted before the election, and that in other parts of the state the supervisors of election may arrange the names of the candidates in any order without party designation and without furnishing sample ballots; that the Legislature in enacting the law intended to give the supervisors of election of the counties where the negro population is large the opportunity to so arrange the ballots as to deprive negro voters of the right to vote; and that defendants by the form of the ballots adopted made it extremely difficult for negro voters to vote their choice at a congressional election, etc.—is sufficient as against a demurrer, though it does not allege that the state statute is, on its face, directed against negro voters, and does not disclose an intent to discriminate against negro voters.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.\*]

John E. Stone and others were indicted for crime. Demurrer to each indictment overruled.

John Philip Hill, Edgar H. Gans, and J. Craig McLanahan, Asst. U. S. Atty., for the United States.

William L. Marbury, William S. Bryan, Jr., Edgar Allan Poe, and William L. Rawls, for defendants.

Before MORRIS and ROSE, District Judges.

ROSE, District Judge. Two indictments have been returned against the above-named defendants. They have demurred to each of them. The government says that indictment 354 properly charges a violation of section 19 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1092 [U. S. Comp. St. Supp. 1909, p. 1396; R. S. § 5508]). That section provides for the punishment of any two or more persons who conspire to injure, oppress, threaten, or intimidate any citizen in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the free exercise or enjoyment of any right or privilege secured to him by the Constitution and the laws of the United States or because of his having so exercised the same.

There are two counts in the indictment. They are alike, except that in the first count the right or privilege of the citizens interfered with is said to be the right to vote at the congressional election held on the 8th day of November, 1910, in the Fifth congressional district of Maryland for a representative in the Congress of the United States. In the second count the right or privilege is alleged to be the right to vote at said congressional election for a candidate for Congress without discrimination against them by the state of Maryland acting through its election officers and otherwise on account of their race and color.

In each count it is alleged that the citizens in question were all duly qualified and registered under the laws and Constitution of Maryland and the laws of the United States to vote for such representative in Congress at said election in Charles county, Md.

When we speak of the indictment, it will therefore be understood that what we say is applicable to each of the counts, unless the contrary is stated.

The indictment charges that on November 8, 1910, an election was held in the Fifth congressional district of Maryland to choose a representative in the Congress of the United States. The defendants, Stone and Miller, together with one J. Wirt Wilmer, were under the laws of Maryland supervisors of election for Charles county. Charles county is in the Fifth congressional district. It was their official duty to provide and cause to be printed the ballots to be used at such election. No ballots except those provided by them could lawfully be cast or counted. In Charles county there were a large number of persons of the negro race and of black color, citizens of the United States and of the state of Maryland and residents of Charles county. They were duly qualified and registered voters in such county, and under the Constitution and laws of Maryland and the Constitution of the United States were entitled to vote for a representative in Congress at said election. A large number of said negro voters were illiterate. They could neither read nor write. There is no educational qualification for the right to vote prescribed by the Constitution and laws of Maryland. Stone and Miller constituted a majority of the board of supervisors of election. They conspired together to injure a large number of the duly qualified and registered negro voters in Charles county on account of their race and color in the free exercise of their right to vote at the election named for a representative in Congress. The indictment says that that right is a right secured to them and each of them by the Constitution and laws of the United States. Stone and Miller prepared and had printed and folded the official ballots in such form that any voter could easily vote for the Democratic candidate. It was difficult for any of the illiterate negro voters to vote for the Republican candidate. It would be impossible for many of them so to do. A detailed description of the ballot is given in the indictment. It is not necessary to repeat that description here. The

ballot as described was so peculiar as to suggest that those who directed its preparation must have had some other purpose in mind than to facilitate the qualified and registered voters of the county in voting for the candidates of their choice. It was conceded at the argument that such a ballot made it very much more difficult to vote for the Republican than for the Democratic candidate for Congress. The indictment says that the form of ballot was devised by Stone and Miller with the intent and purpose, on account of the race and color of said negro voters, to make it impossible for many of the duly qualified and registered negro voters of Charles county, and difficult for any of them, to vote at said congressional election for the candidate of their choice; the said Stone and Miller well knowing that said duly qualified and registered negro voters would in all probability vote for the candidate of the Republican party and not for the candidate of the Democratic party.

The defendant Dulany is charged with aiding and abetting Stone and Miller by printing the ballots for them. It is said that he well knew that Stone and Miller's purpose in causing the ballots to be printed in the way they were printed was the purpose already set forth in the indictment.

The defendants say that the indictment is bad because such a conspiracy as is charged against them is not a conspiracy to injure the negro citizens referred to within the meaning of the word "injure" as used in section 19. They argue that no conspiracy is punishable by the statute in question unless the purpose of it is to cause personal or bodily harm to a citizen or to do some act with intent to control or coerce his will. It is contended that the statute is not violated unless the thing which is purposed to be done is in the nature of a threat, an injury, an oppression, or an intimidation. A conspiracy merely to hinder, delay, or obstruct the exercise of the rights mentioned in the statute is not made a crime by it unless the conspiracy contemplates as the means of its accomplishment the doing of bodily harm or the putting in fear. The defendants claim that to give to this section the construction contended for by the government will make it applicable to all fraudulent practices at congressional elections participated in by two or more persons. They point out that this section 19 was originally enacted contemporaneously with many other provisions punishing various specific acts of fraud or corruption at congressional elections.

Those other provisions were repealed in 1894.

[1] The statute is highly penal. The punishments prescribed by it are much more severe than many of those which were prescribed for other election offenses. In such a statute doubtful words are not to be extended beyond their natural meaning in the connection in which they are used.

This prosecution belongs to a class of cases in which the courts have thought it best to insist on the technical as well as the substantial accuracy of all pleadings. Still it remains true that even such a statute, though it should be construed strictly, must not be so construed

as to defeat the legislative will. *Baldwin v. Franks*, 120 U. S. 691, 7 Sup. Ct. 656, 763, 30 L. Ed. 766.

In this case the government does not ask that the word "injure" shall be given any other construction than that which it usually has.

[2] Unlawfully to deprive a citizen of the United States of his right to vote at a congressional election is to injure him in any ordinary use of the word "injure."

The Supreme Court has said of this statute that it covers any conspiracy to prevent the exercise of any of the rights protected by it, or to throw obstruction in the way of exercising such right, or for the purpose or with intent to prevent its exercise. *United States v. Waddell*, 112 U. S. 80, 5 Sup. Ct. 35, 28 L. Ed. 673.

It does not follow that such a construction of the statute will make it the all-embracing enactment that defendants describe. A voter who votes for a Republican candidate for Congress may be in a very general sense injured by a fraudulent practice which results in the return of a Democratic candidate which would not otherwise have been returned. Indeed, every citizen, whether he voted for the Republican or the Democratic candidate, or for neither, might be said to be injured by a fraudulent return. It does not follow, however, that either the Republican voter or the citizens in general are thereby injured in the sense meant by this statute. A public nuisance injures all the public. For all that, it is only some person who is injured in some way differing from that of the great body of the public who at common law may maintain an action for the damage resulting from such nuisance. It is not every wrongful act which alters the result of the election which is punishable under the section in question. It must be some act which is intended to prevent some citizen or citizens from exercising their constitutional rights.

We think that the conspiracy charged is a conspiracy to injure the negro voters in question in the free exercise of a right or privilege secured to them by the Constitution of the United States. Defendants say that, even if this be so, the conspiracy charged is one which necessarily must have been intended to injure voters because they were Republicans and not because they were negroes. The form of ballot made no discrimination as to race or color. It was a ballot upon which no one would find it easy to vote for the Republican candidate. Any man, whether he was black or white, who was illiterate or poorly educated or had clumsy fingers or poor sight, might have found it impossible to do so. All this may be conceded. The right to vote at a congressional election is a right which was not dependent upon the race or color of the voter. The motive of the defendants might have been, as charged in the indictment, to disfranchise negro voters. If they knowingly conspired to prevent legal and qualified negro voters from voting, they offended against the statute. It would make no difference if in trying to do what they wanted to do they also injured other voters.

[3] Defendants say that the indictment is bad because it does not set forth the names of the negro voters whom the defendants are al-

leged to have intended to injure, and it does not say that their names are to the grand jury unknown. This objection is, we think, disposed of by the decision of the Supreme Court in the case of *Williamson v. United States*, 207 U. S. 449, 28 Sup. Ct. 163, 52 L. Ed. 278.

[4] The defendant Dulany says that, whatever may be the case as to his codefendants, he is not charged with any punishable crime. He says he committed no offense in printing the ballots that Stone and Miller told him to print, although he knew why they asked him to print so peculiar a ballot. We think the indictment is on its face good as against him. What the proof may be is another question.

[5] We pass now to the consideration of the demurrer to indictment No. 355. By that the defendants are charged with the violation of section 37 of the Penal Code (R. S. § 5440) by conspiring to commit the offense defined and prohibited by section 20 of the Penal Code (R. S. § 5510). The latter section imposes punishment upon any one who "under color of any law, statute, ordinance, regulation or custom willfully subjects, or causes to be subjected, any inhabitant \* \* \* to the deprivation of any rights, privileges or immunities secured or protected by the Constitution and laws of the United States \* \* \* by reason of his color or race."

Like indictment No. 354, this contains two counts. They differ from each other in the same and in no other respect than that in which one count of No. 354 differs from the other.

No 355 contains all the allegations made in 354. They are phrased in substantially the same language. The material distinction between the two indictments is that No. 355 contains a number of allegations charging that what the defendants are said to have done was done under color of state laws, colloquially described as the Wilson laws. The indictment says that in Baltimore city and in 12 of the counties of the state there are in the aggregate, approximately, 191,451 registered white, and 28,448 registered negro, voters. In that city and in those counties the law requires that on the official ballots the names of all the candidates for each office shall be arranged in alphabetical order with the designation of the party or principle represented by them following after their respective names. Specimen copies of the ballots are required to be posted not less than four days before the election. These counties are commonly called the "non Wilson bill counties." The remaining 11 counties are known as the "Wilson bill counties." In them there are about 39,268 registered white, and 20,345 registered negro, voters. In the latter counties party designations are not allowed on the ballots. The supervisors of election are authorized to arrange the names of the candidates for each office in any order they see fit. No specimen ballots are required to be posted. It is charged that the Legislature in enacting a different election code for the portion of the state in which the negroes were relatively numerous intended "to give the supervisors of election of said Wilson counties the opportunity and power of so arranging the official ballots to be voted in said Wilson counties in any election to be held therein, and so to keep the said arrangement secret as to subject by reason of their race and color a large number of the duly qualified and regis-

tered negro voters, aforesaid, and especially those who were illiterate, being citizens of the United States and of the state of Maryland, and inhabitants of the said Wilson counties, to the deprivation of the right of voting without discrimination by reason of their race and color at any public election to be held in said Wilson counties."

In addition to the objections which were made to the indictment in No. 354, the defendants say that indictment No. 355 is bad because it is not alleged that the so-called Wilson laws on their face directed or made a discrimination against negro voters.

It is argued that, unless the statutes show by their wording that there is the intent to discriminate against negro voters as such, any discrimination made by the defendants in fact was not made under color of these laws, as the word "color" is to be construed in the statute in question.

We think that this contention is answered in the negative by the opinion in the Supreme Court in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

In view of the fact that we have arrived at the conclusion that the defendants must stand their trial, we have purposely refrained from discussing with elaboration any of the questions involved. Many of them will in other forms doubtless arise at the trial.

The demurrer to each indictment will be overruled.

MORRIS, District Judge, concurs.

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FITHIAN et al. v. ST. LOUIS & S. F. RY. CO.

(Circuit Court, W. D. Arkansas. June 22, 1911.)

1. DEATH (§ 9\*)—ACTION FOR CAUSING DEATH—RIGHT OF ACTION—STATUTORY PROVISIONS.

The right of action for causing death created by Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), must be determined by that act.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 9.\*

What law governs actions for wrongful death, see note to *Burrell v. Fleming*, 47 C. C. A. 606.]

2. DEATH (§ 31\*)—ACTION FOR CAUSING DEATH—PERSONS ENTITLED TO SUE.

Since the right of action for injuries resulting in death is based entirely upon statute, no such right existing at common law, the action can be brought only in the name of the person or persons to whom the right is given by the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35-46; Dec. Dig. § 31.\*]

3. DEATH (§ 31\*)—ACTION FOR CAUSING DEATH—PERSONS ENTITLED TO SUE—NEXT OF KIN.

Under Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), providing that every common carrier shall be liable in case of the death of any persons employed by it in interstate commerce to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of the next of kin dependent upon such employé, the next of kin has

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



no right of action where there is no personal representative; the phrase "if none" referring to the beneficiaries, and not to the person to whom the carrier is liable.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 31.\*]

4. STATUTES (§ 200\*)—CONSTRUCTION—GENERAL RULES—PUNCTUATION.

While the punctuation of statutes will not be permitted to defeat the obvious intent of the lawmakers, it will be given consideration when there is a claim that the meaning of the statute is doubtful.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. § 200.\*]

At Law. Action by Jessie Fithian and others against the St. Louis & San Francisco Railway Company. Heard on demurrer to the complaint. Demurrer sustained.

This is an action for the recovery of damages by reason of the alleged wrongful death of Floyd C. Fithian, an employé of the defendant, alleged to have been caused by the negligence of defendant's servants. The action is brought under the employer's liability act of Congress, approved April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171). The plaintiffs are the widow and only child of the deceased. The complainants allege that there is no administrator of the estate; that the plaintiffs are the next of kin of the deceased, and were dependent upon him. The defendant demurred upon the ground that the plaintiffs have no legal capacity to sue, as an action under this act of Congress can only be maintained by the personal representative of the deceased.

Hill, Brizzolara & Fitzhugh, for plaintiffs.

B. R. Davidson, for defendant.

TRIEBER, District Judge (after stating the facts as above). [1] As this is a cause of action created by an act of Congress it must be determined by that act. *Schreiber v. Sharpless*, 110 U. S. 76, 80, 3 Sup. Ct. 423, 28 L. Ed. 65; *Fulgham v. Midland Valley Ry. (C. C.)* 167 Fed. 660; *Walsh v. N. Y., N. H. & H. R. R. Co. (C. C.)* 173 Fed. 494; *Cound v. A., T. & S. F. Ry. Co. (C. C.)* 173 Fed. 527; *Smith v. Detroit, etc., Ry. Co. (C. C.)* 175 Fed. 506; *Hagen v. Kean*, 3 Dill. 124, Fed. Cas. No. 5,899. This leaves for determination whether under this act the next of kin dependent upon the deceased can maintain an action if there is no personal representative, or can the action be maintained only by the personal representative?

The acts for the protection of employés, enacted by the several states of the Union, generally modeled after "Lord Campbell's Act," vary considerably as to the person who is to prosecute the action as plaintiff. Some of the acts require it to be brought by the personal representative for the benefit of those named in the act; others authorize it to be brought directly by the party for whose benefit the remedy is given although there is a personal representative, while others prescribe that the action be prosecuted by the personal representative if there is one, and if not by the beneficiaries. In some of the states the action must be prosecuted in the name of the state for the use of the beneficiaries named in the act, and in Maine and Massachusetts the remedy was at one time by indictment. For a full review of the different acts in the United States, see *Tiffany on Death by Wrongful Act*, c. 6, §§ 90-108.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] As the right of action for injuries resulting in death is entirely based upon statute, no such right existing at common law, the law is well settled that such an action can only be brought in the name of the person or persons to whom the right is given by the statute under which it is sought to prosecute it, upon the well-settled principle that when a statute gives the cause of action and designates the persons who may sue, they alone can sue. *Usher v. West Jersey R. R. Co.*, 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863; *Stewart v. Louisville, etc., Ry. Co.*, 83 Ala. 493, 4 South. 373; *Dacey v. Old Colony R. R. Co.*, 153 Mass. 112, 26 N. E. 437; *Nash v. Tousley*, 28 Minn. 5, 8 N. W. 875; *Columbus, etc., R. R. Co. v. Bradford*, 86 Ala. 574, 6 South. 90; *Railway Co. v. Hunter*, 70 Miss. 471, 12 South. 482; *Little Rock & Ft. Smith Ry. Co. v. Townsend*, 41 Ark. 382; *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Whiton v. Chicago, etc., R. R. Co.*, 21 Wis. 310; *Oates v. Union Pac. R. R. Co.*, 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348; *Wooden v. Western N. Y., etc., Ry. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Hagen v. Kean*, 3 Dill, 124, Fed. Cas. 5,899.

[3] But it is earnestly contended by the learned counsel for plaintiffs that upon a proper construction of the act of Congress an action may be maintained by the next of kin dependent upon the deceased if there is no personal representative, and it is claimed that the words "and, if none, then the next of kin dependent upon such employé" refer to the personal representative and not the beneficiaries. Section 1 of the act of Congress, which provides for this remedy, so far as it is applicable to this issue, is as follows:

"That every common carrier \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part," etc.

The language of the act is too plain to bear such a construction. What was intended by Congress by the words "and, if none" refers to the beneficiaries mentioned in the preceding part of that section. This is clearly shown by the context of the entire section. The beneficiaries first mentioned are "the surviving widow or husband and children of such employé." That is followed by a semicolon. Then the act proceeds, "and, if none, then of such employé's parents," followed again by a semicolon; and then follows, "and, if none, then of the next of kin dependent upon such employé." The words "if none" clearly apply solely to the persons for whose benefit the personal representative is authorized to prosecute the action, and who, in case of a recovery, are to be the beneficiaries.

The importance of having the relationship of the parties for whose benefit the action is brought set out is apparent from the fact that this act does not provide for the survival of the cause of action which the deceased had at the time of his death, but is a new cause of action solely for the benefit of those dependent upon the deceased, and

the measure of damages is the pecuniary loss sustained by those for whose benefit the remedy is given. *Stewart v. B. & O. Ry. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 135, 21 Sup. Ct. 67, 45 L. Ed. 121; *Goodsell v. H. & M. H. R. R. Co.*, 33 Conn. 51; *Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Northern Pacific Ry. Co. v. Adams*, 116 Fed. 324, 57 C. C. A. 196; *Davis v. Railway*, 53 Ark. 117, 125, 13 S. W. 801, 7 L. R. A. 283.

What that measure of damages should be depends to a great extent upon the relationship of the survivors to the deceased and the pecuniary loss sustained by them by reason of his death. The widow and children are naturally dependent upon him to a greater extent than any other relative and entitled to support from the husband and parent. For this reason they would no doubt be entitled to a larger compensation than any other relatives. *Baltimore & Potomac R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624. Next to them the parents are more dependent upon a son than any others, as there is not only a moral, but a legal, duty on the part of a child to contribute toward the support and maintenance of his parents when they are unable to support themselves. The provision for the benefit of relatives other than those before mentioned is not unlimited as the act expressly provides only for such next of kin as were "dependent" upon the deceased. The amount of the recovery must naturally depend to a very great extent upon the contribution by the deceased to those for whose benefit the action is prosecuted by the personal representative. If the deceased contributed nothing toward the support of the next of kin and he leaves no widow, children, or parents surviving him there can be no recovery, because they sustained no pecuniary loss by reason of his death.

The language of the act is clear and unambiguous, and, in the opinion of the court, leaves no room for construction. The personal representative of the deceased, and no one else, is authorized to maintain the action. This is the natural grammatical construction of the language used, and is strengthened by the punctuation—a semicolon—after each class of beneficiaries.

[4] While the matter of punctuation will not be permitted to defeat the obvious intent of the lawmakers, it will be given consideration when there is a claim that the meaning of the statute is doubtful. *United States v. Oregon & C. R. R. Co.*, 164 U. S. 526, 541, 17 Sup. Ct. 165, 41 L. Ed. 541; *United States v. Three R. R. Cars*, 1 Abb. (U. S.) 310, Fed. Cas. No. 16,513; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C. C.) 29 Fed. 546, aff. sub nom. *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.

The only reported case on this question is *Thompson v. Wabash Ry. Co.* (C. C.) 184 Fed. 554, and it was there held that none but the personal representative can maintain the action; the same conclusion reached by this court.

The demurrer to the complaint upon the ground that the plaintiffs have no legal capacity to maintain this action is sustained.

## COOK v. MORAN TOWING &amp; TRANSP. CO.

(District Court, S. D. New York. April 5, 1911.)

## COLLISION (§ 77\*)—TOW AND DRIFTING LAUNCH—FAILURE TO KEEP LOOKOUT.

A tug returning to New York from the sea about daylight in the morning, with two dump scows on hawsers, passed within from 50 to 150 feet of a disabled motor launch containing eight persons who shouted and waved their handkerchiefs, but were apparently not seen, and one of the scows struck and overturned the launch, three of the occupants being drowned, while the others, including libelant, were rescued by other vessels. *Held*, on the evidence, that the tug was in fault and liable for the collision for failing to have a lookout forward where one, if attentive to his duty, would have seen the launch.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140-149; Dec. Dig. § 77.\*]

Collision with or between towing vessels and vessels in tow, see note to *Nielson v. Northern Pac. Ry. Co.*, 100 C. C. A. 581.]

In Admiralty. Suit in personam by Mabelle B. Cook against the Moran Towing & Transportation Company, owners of the tug Julia C. Moran. Decree for libelant.

Hunt, Hill & Betts (George Whitefield Betts, Jr., and Robert McLeod Jackson, of counsel), for libelant.

Frank Verner Johnson (William L. O'Brien, of counsel), for respondent.

HOLT, District Judge. This is an action in personam to recover damages for personal injuries sustained by the libelant by reason of a collision between a motor launch and a scow, alleged to have been caused by the negligence of the tug Julia C. Moran, owned by the respondent, which was towing the scow. On the evening of September 14, 1906, the libelant Mabelle B. Cook was a member of a pleasure party of eight, consisting of four men and four women, who, after dining at a hotel at Sheepshead Bay, embarked about 9 o'clock on a motor launch, owned by one of the men of the party, intending to go to Rockaway Beach, and there take the train to return to New York. The owner of the launch had invited the rest of the party to take the trip. The launch was about 20 feet long, 5 feet beam, and drew about 18 inches of water. She had a 4 horse power gasoline engine. Her freeboard was about three and a half feet. She was decked over forward, for a short distance aft of the stem, and on the sides, but had no cabin, and was substantially an open launch. She had on board no lights, whistle, foghorn, or apparatus of any kind for showing a light or making a noise. The trip the party intended to take from Sheepshead Bay to Rockaway Beach was about five or six miles in length, on shallow waters, protected from the ocean by Rockaway Beach. After the launch had been out about half an hour, the engine became out of order and stopped. Efforts to repair it were made, but they were unsuccessful. A brisk breeze from the northeast sprang up. The launch had a small anchor, to which a rope was attached; it was thrown over, but in a short time the rope broke. Some boards were removed from

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bottom with which the men tried to paddle ashore, but the tide was so strong that they could not accomplish anything. Thereafter the boat drifted through the night, under the influence of the northeast wind, down into the lower bay, and near dawn the boat was in a position above the Romer Shoal and not far above the West Bank Light. At that time the tug Julia C. Moran, towing two empty dumper scows, came up the bay, heading for the Narrows. The first scow was on a hawser 200 fathoms in length, and the second scow trailing behind on another hawser of 85 fathoms, making a total flotilla of more than a third of a mile in length. The tug passed to leeward of the launch. The wind at that time was blowing a stiff breeze, causing a choppy sea. The witnesses from the launch estimate the distance of the tug, when she passed the launch, at from 50 to 150 feet. They testify that several in the launch stood up, waved handkerchiefs and shouted for help, and that a man in the pilot house of the tug opened the window and waved his arm in a backward direction, as though warning them to keep away from the tow. All the men on the tug deny that any one looked out of the window, or saw the launch at all. The tug passed on without stopping. The witnesses from the launch testify that about the time she passed she changed her course to starboard, and some of them assert that if that had not taken place the collision would not have occurred. The witnesses from the tug all testify that there was no change of course of the tug at that place; that from the time she passed the Romer Shoal Light she was headed straight for the Narrows. The tug passed on, and the launch drifted down and came in collision with the front of the last scow, with the result that the launch was tipped over, and all its occupants thrown into the water. Three of them, two women and a man, were drowned. Two of the men and Miss Cook, the libellant, reached the overturned launch, and clung to it, and another man clung to a tool chest which floated from the launch. Later the steamer El Paso, coming up the bay, heard cries for help, saw the people in the water, and put out a boat to rescue them. About the same time, the tug McCaldin Bros. came down the bay, and the El Paso whistled to them to help. The boat from the El Paso saved the man on the tool chest, and the McCaldin Bros. rescued the three on the launch. The other woman of the party was saved in an extraordinary manner. The scow which collided with the launch had gates or doors in the bottom, by which its load was dumped. They had been opened for that purpose at the dumping ground below Scotland Light, and were left open. When the collision occurred, the woman in question went under the scow, and on coming to the surface found herself inside the scow. She clung to a chain fastened along the side of the scow. When the tug reached the Narrows, about half an hour later, her crew proceeded to shorten the hawser as usual, for the purpose of taking the tow through the Narrows on a short hawser, and then discovered the woman in the scow. She was thereupon rescued and brought to New York. The witnesses from the launch who have testified all fix the time which they were in the water at about an hour, but I think in fact they were in the water about 25 or 30 minutes. Miss Cook, when rescued, was almost unconscious; the men with her

on the launch had lashed a rope to her and held her up, but the waves had frequently gone over her. The McCaldin Bros. took the rescued persons to the Marine Hospital, and it was some hours before Miss Cook regained much consciousness. The Marine Hospital having no women attendants, she was removed that afternoon to the infirmary on Staten Island, and the next day to her rooms in New York. She was under medical attendance for about a fortnight, during which time she was in great danger of pneumonia. She suffered much during all that time from pain and nervousness. At the end of about a fortnight, she went to Boston, and thereafter lived there with her mother. She was practically unable to do any work for about a year, being in a weak, nervous, and anemic condition. She had a large number of abscesses, one of which was so serious as to require her being taken to a hospital for an operation, where she remained about a fortnight. About September, 1907, she undertook to resume work in her trade as a milliner, but for a long time could not work but a few days at a time. Her health, however, has steadily improved, and she has now substantially recovered.

The only claim of fault in this case is that the tug did not take suitable means to avoid running down the launch with the scow. The substantial question in the case is whether the lookout on the tug was negligent in not seeing the launch. If, as the witnesses on the launch assert, some one on the tug did see the launch, and failed to prevent its collision with the tow or to rescue its occupants from their dangerous situation, I have no hesitation in saying that the tug should be held for the consequences of the collision. The question, therefore, is whether it was light enough, when the tug passed the launch, for the launch to be seen by a lookout on the tug attending properly to his duty. As all the witnesses on the tug assert that they knew nothing about the collision, none of them has given any direct evidence fixing the time when it occurred. The evidence upon which the respondent relies as to the time of the collision is the evidence of the officers of the steamship El Paso and the tug McCaldin Bros. as to the time of the rescue, and the evidence as to the time when the tug Moran reached the Narrows, from which an attempt is made to compute the time of the collision. The evidence of the officers of the El Paso, which is supported by the entries in the log, is that they left Scotland Light at 4:45, that about 5:30 the captain on the bridge heard a cry for help, that it was still quite dark, and that it took him several minutes to locate the man floating on the tool chest, and several minutes more to discover the three people clinging to the launch. The captain of the McCaldin Bros. testified that it was breaking day when he was hailed by the El Paso. The record kept by an official at the Narrows of the arrival and departure of tugs with tows at that place states that the Moran arrived there that morning at 5:40. The point where the libellant and the others were rescued was perhaps an eighth of a mile above the West Bank Light, and the distance from that point to the Narrows is about four miles. The tide was about the end of the flood. I think that the place of rescue was not far from the place of collision. What tide there was would tend to send them up towards

the Narrows, and the brisk northeast breeze would tend to send them down away from the Narrows. I think that the influence of the wind would more than counteract the influence of the tide, and that the point of collision was somewhat northeast of the point of rescue. But I do not believe that they floated very far before they were rescued. The witnesses who were rescued testify that they were in the water about an hour, but they would naturally much exaggerate the time passed while awaiting rescue in such a dangerous situation. The difficulty which the officers of the El Paso had in seeing the people in the water, when they first heard their cries for help, does not seem to me very weighty proof of the darkness. The rescue was certainly but a few minutes before sunrise. Probably only the heads of the persons in the water were visible, and the surface of the water was made rough by the wind. On the other hand, of the five persons rescued, four testified, being the four that were rescued by the McCaldin Bros. and the boat from the El Paso. They all testify positively that before and at the time of the collision the daylight was sufficient to enable them to see objects at a long distance. They all say that they saw the tug coming a long distance away; that the night had been a clear night, and that they had seen the Coney Island lights all night, and that for some time before the collision they had become dim and substantially ceased to be visible, and the shore line and objects on the shore were visible. Three watches carried by members of the party stopped about 5:15. Upon the whole evidence, my conclusion is that the collision took place between 5:10 and 5:15; that is to say, less than half an hour before sunrise, which occurred at 5:36. The weather reports show that it was a clear morning. The choppy sea raised by the brisk wind undoubtedly would have some tendency to prevent a small boat from being seen, but this boat had a freeboard of  $3\frac{1}{2}$  feet, and was filled with eight people, who, as they passed the tug, were waving handkerchiefs, shouting and making every effort in their power to attract the attention of the men on the tug. It is possible that they were seen from the tug, and that the man who saw them, supposing that their boat was under control, waved to them a warning to keep away from the scows, but all on board the tug deny that they knew anything about the accident, and my conclusion is, upon the whole evidence, that they did not, and that the man who was seen, by the persons on the launch, at the pilot house window of the tug did not see them. But in view of all the evidence in the case, although the question must be admitted to be a close one, I am of the opinion that if the tug had had a proper lookout, attending to his duty, he would have seen the launch. There was no lookout forward. The officers claimed that the wind was so heavy that morning that spray constantly dashed over the stem of the tug, and that the pilot house was a better place for a lookout than the bow. I do not think so. A little spray may have occasionally broken over the bow, but I do not think it was heavy enough or constant enough to justify the tug in not having a lookout forward. There was a man in the pilot house with the captain. If he had been on the deck forward he would have been more likely to see the launch.

against the sky line than in his position in the pilot house. The pilot house windows to windward were closed. The probability is that, noticing no lights, they assumed that there was no vessel in the vicinity. It was perhaps not to be expected that any such launch would be out in such a place at such an hour in the morning. But it is the fundamental duty of all vessels under way, and especially of a vessel under way in a crowded harbor, to keep a lookout in the best place of observation, constantly alert and attentive to his duty, and vessels should be held strictly accountable for the performance of that duty.

My conclusion is that the men on the tug were at fault for not seeing the launch when they passed her, and that the libellant is therefore entitled to recover in this case. I think that she should recover the following amounts:

Loss of wages for one year, at \$10 a week.....	\$ 520 00
6 months' time lost while employed in Boston as a milliner, at \$18 a week .....	432 00
Personal effects lost and destroyed.....	187 00
Paid for medicines.....	100 00
Hospital expenses in Boston.....	52 50
Medical attendance, other than Dr. Gay.....	150 00
Dr. Gay's bill.....	454 00
Pain and suffering, the result of the accident.....	2,000 00
	<u>\$3,895 50</u>

My conclusion is that the libellant should have judgment against the respondent for \$3,895.50, with costs.

### MARKS et al. v. MERRILL PAPER MFG. CO. et al.

(Circuit Court, W. D. Wisconsin. July 28, 1911.)

#### 1. CORPORATIONS (§ 180\*)—STOCKHOLDERS—DIRECTORS—NATURE OF OBLIGATION.

Since majority stockholders and directors of a corporation occupy a fiduciary relation to the minority, no action taken by the majority or by the directors, prejudicial to the rights of the minority, and by which the majority gain an advantage over the minority, will be sustained in equity.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 180.\*]

#### 2. CORPORATIONS (§ 573\*)—SALE OF ASSETS—VALIDITY.

Where a corporation was insolvent and doing a losing business, and its stockholders were unwilling to furnish additional capital pursuant to an equitable plan, and certain of its stockholders thereupon formed a new corporation and purchased the old company's equity in mortgaged water power, the subsequent sale of all the old company's assets to the new for an amount sufficient to pay all of its creditors pursuant to a plan authorizing all of the stockholders of the old company to become stockholders in the new company on the same basis, was neither inequitable nor invalid as an impairment of the rights of minority stockholders who did not see fit to take up their rights in the new company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2293-2296; Dec. Dig. § 573.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



In Equity. Bill by Fred J. Marks and others against the Merrill Paper Manufacturing Company and others. Decree for defendants.

Bulkley, Gray & More, for complainants.

Smart, Van Doren & Curtis, for defendants.

SANBORN, District Judge. Final hearing on bill to set aside a conveyance of the property of the Merrill Company to the Grandfather Falls Company. Complainants are minor stockholders of the Merrill Company. Marks holds 50 shares, Klapperich 100 shares, and Mrs. Scott 50 shares of the capital, the total amounting to \$200,000. The individual defendants are all the stockholders of the Merrill Company. The alleged equity of the bill is that the individual defendants are majority stockholders of the two companies, and were such at the time of the transfer; that the majority stockholders have obtained unauthorized advantage from such transfer, not shared in by the minority; and, therefore, that the transfer is fraudulent and void, and should be set aside, and if it cannot now be avoided on account of the rights of the innocent third persons, such other relief as may be proper should be given.

The proof shows that the Merrill Company was organized January 19, 1905, with a capital of \$160,000, afterwards increased to \$200,000. The corporation was organized for the purpose of making print paper. After the company commenced business it was found that it had insufficient water power. At that time it had a total investment in money in its plant and transmission line of about \$444,000. In order to obtain sufficient water power it purchased certain interests in lands on the Wisconsin river at Grandfather Falls, agreeing to pay therefor \$62,500. This was in April, 1905. The amount paid down was \$2,500, the balance being payable in yearly installments, running five years at 6 per cent. interest. In order to raise the money to develop the Grandfather Falls power, and pay certain debts of the Merrill Company, the attempt was made to increase the stock to \$400,000. Several attempts were made to raise money for the sale of stock, and a plan was adopted by which stock was to be sold on condition that 95 per cent. of the stockholders would subscribe for the new stock, up to three-fourths of the present stock. The persons holding the stock now owned by the minority were solicited to come in on this basis, but refused to do so. The holders of the majority of the stock were willing to take the increased amount but were unwilling to do so unless a large proportion of the stockholders would come in on the same basis. Repeated attempts were made to induce the minority of the stockholders to take the new stock; all of which failed. The Merrill Company was obliged to buy pulp in order to make the paper which it had contracted to sell and was constantly losing money and going deeper into debt. Being unable to raise any more money through the sale of its stock, it could not develop the Grandfather Falls power. In this situation a number of its largest stockholders organized the Grandfather Falls Company, June 1, 1906, for the purpose of building a dam at Grandfather Falls and with power to build and maintain dams, construct and maintain hy-

draulic and electrical plants, sawmills, and paper mills, and carry on a general pulp and paper business. The capital was \$200,000, afterwards increased to \$400,000. Upon its organization the Grandfather Falls Company made a proposition to the Merrill Company to purchase its rights and interests in the lands at Grandfather Falls, and June 14, 1906, the stockholders of the Merrill Company held a meeting and passed a resolution to convey to the Grandfather Falls Company all their interests in the lands at Grandfather Falls in consideration of the repayment of the \$2,500 paid by the Merrill Company for such rights and the assumption of the debts thereon. It was also resolved that they should enter into a contract to procure from the Grandfather Falls Company 2,000 or more horse power for three years, commencing as soon as the power plant should be ready, at a rental of not over \$25 per horse power per year, payable in equal monthly installments at the end of each month. The dam at Grandfather Falls was not then commenced, and it was not expected it would be in operation for a year or more.

In the latter part of the year 1906 the affairs of the Merrill Company were in a very critical condition. There were pressing claims amounting to \$68,393.59 and past-due bonds for \$33,000. It was unable to raise any money to pay these liabilities either by loans from its stockholders or others, or by the sale of stock. In this situation a proposition was made by the Grandfather Falls Company to the Merrill Company to purchase all its property for the amount of its indebtedness. At this time the stockholders and officers of both companies were substantially the same. The Merrill Company being without adequate water power its property was of very small value in proportion to what it had cost. Its value was some \$25,000 less than the amount of its debts. It was not in any position to procure power for some time to come. A plant without water power is worth only what it will bring to wreck, dispose of its machinery and other property to its best advantage. Under these circumstances it was competent for the stockholders and officers of the Grandfather Falls Company to purchase from themselves as stockholders and officers of the Merrill Company all the property of the latter, if this could be done at a fair sale without fraud or undue advantage. The proposition of the Grandfather Falls Company was accepted by resolution of the Merrill Company dated December 15, 1906, and the arrangement was carried out by the execution and delivery of a deed of conveyance to the Grandfather Falls Company by the Merrill Company, January 15, 1907, for an expressed consideration of \$186,000.

The plan of the majority stockholders of the Merrill Company is expressed in a subscription paper which formed the basis of the organization of the Grandfather Falls Company, as follows:

"We, the undersigned, do each for himself, alone, separately and severally, subscribe for and agree to purchase and pay for in cash, at par value, the number of shares of the capital stock of the Merrill Paper Manufacturing Company set opposite our respective names here following: On condition, however, that the owners of not less than 95 per cent. of the present outstanding capital stock of said company each in like manner subscribe for additional stock of said company, equal in each instance to not less than 75 per cent. of his present holdings. And in case said condition shall not be complied

with within 15 days, then we agree to incorporate and organize a corporation under the laws of Wisconsin, to be known as the Grandfather Falls Company, for the purpose of purchasing the lands and water power facilities at Grandfather Falls heretofore owned in common by Messrs. Anson S. Heinemann, B. Heinemann, Harmon, O'Day and Daly Estate, and providing boomage facilities, improving navigation, developing water power thereon, and purchasing and holding the stock of the undersigned in Merrill Paper Manufacturing Company and other stock in manufacturing corporations likely to need or use said power, and for such other purposes as may be agreed upon. And upon such incorporation being effected this subscription shall as to each subscriber stand as a subscription and agreement to purchase at par value the same amounts respectively of the capital stock of said Grandfather Falls Company, and we each severally agree to pay our respective subscriptions on demand of the proper board of directors."

At a directors' meeting of the Grandfather Falls Company February 18, 1907, resolutions were passed for the issuing of a stock dividend in the Grandfather Falls Company of  $133\frac{1}{3}$  per cent. of the holdings of the stockholders in that company. This stock dividend was based upon the shares in the Merrill Company held by shareholders in the Grandfather Falls Company. Two resolutions were passed at the same time as follows:

"The following resolution was then presented and carried unanimously: Resolved that the company's holdings of stock in the Prairie River Improvement & Boom Company, representing property that cost in round figures \$64,000 and carried on our books at that amount; and that the company's property carried on the books under the head of 'Plant' which originally cost to construct the sum of \$—— in round numbers to be valued at \$258,000 and be carried on the company's books at that amount. The following resolution was then presented and carried unanimously: It appearing that after making the valuation aforesaid that a statement of the company's assets and liabilities shows a surplus of over \$163,000; therefore be it resolved that a stock dividend of  $133\frac{1}{3}$  per cent. be declared and the stock therefor ordered issued, subject to the approval of the stockholders at their next meeting."

It will readily be seen that this stock dividend would not add anything to the real interest of the persons receiving it, for the reason that it was substantially proportional. The reason for making the dividend was to aid small stockholders to borrow money on their stock in the Grandfather Falls Company. Some of these stockholders had pledged their stock in the Merrill Company, but that had become worthless by the sale of the assets of that company. If these shareholders could pledge their original stock in the Grandfather Falls Company and add thereto the amount received by them on the stock dividend, their holdings would thus appear to be substantially doubled and they might then perhaps borrow enough more money to pay for their original stock in the Grandfather Falls Company. That it really added nothing to the actual voting power and value in stock interest in the Grandfather Falls Company seems to be entirely clear. At the beginning of the taking of the testimony in this case the following offer was made on behalf of the defendant:

"Mr. Smart: In behalf of the defendant in this case, and particularly the Grandfather Falls Company, we desire to make this statement: That it has been the position of the defendants and the defendant companies to all times that there has been no intent or desire or conspiracy to freeze the complainants in this action, or any stockholders of the Merrill Paper Company, out of the old company or to injure it in any way, and that they have been solic-

ited and every effort has been made to get them to join in saving the property of the Merrill Paper Company. In further evidence of that intent and purpose, we desire to state at this time that the defendants will cause and procure, and do hereby offer to the complainants the opportunity to obtain stock and to become interested in the Grandfather Falls Company on exactly the same basis and terms under which the other stockholders became interested, with this condition, that there should be added to the amount that they would have to pay to get in at the time of the organization of the company, or the reorganization or the purchase of the Merrill Paper Company property a sum equal to the interest on such original amount up to the time of the acceptance of this offer. Mr. More: You make no offer, as I understand it, to issue to them stock in the Grandfather Falls Company equivalent to their stock in the Merrill Company, do you except on condition? Mr. Reid: There is no condition whatsoever. Our statement here is not based upon any such hypothesis. There is no condition attached to this whatsoever. The complainants may become stockholders and members of the Grandfather Falls Company on exactly the same basis that every present stockholder became a stockholder, with interest upon the money when they would otherwise have paid their money in. I did not understand what you referred to when you said something about issuing stock of the Merrill Manufacturing Company. What do you mean? Mr. More: You would issue them stock in the Grandfather Falls Company for the amount of stock which they hold in the Merrill Paper Company, share for share. Mr. Reid: Independently of anything else? Mr. More: Yes. Mr. Reid: No, sir. There isn't anybody that ever got anything on that basis."

Judge Reid represented the defendant in connection with Mr. Smart, and Mr. More is one of the solicitors for the complainant.

After the conveyance to the Grandfather Falls Company, of which complainants had knowledge at or about the time it was made, the company issued and sold its bonds to creditors having no knowledge of the rights of the minority. Complainants delayed bringing this suit until December, 1907, nearly a year after the conveyance. Under these circumstances the sale cannot be set aside; but if the majority thereby obtained any benefit or property interest not shared by the minority or afterwards used their power to obtain any such benefit in any other way adequate relief may be decreed. It is insisted that the sale was not a real transaction. It is said that the business of the Merrill Company went right on after the sale, just as before, and that the sole purpose of the transaction was to deprive the minority of their property rights in the Merrill Company if they declined to join the majority in the purchase of further stock. It is true that the sale would not have been made if the minority had been willing to come in. They were given the alternative to do so, or lose their rights through a sale of the property. Choosing the latter alternative, the question is whether there was any fraud on them, whether the majority have used their position to oppress or injure them in any way, or have gained any undue or inequitable advantage over them. The authorities on this question leave the law in no doubt whatever. [1] The rule is stated by Sanborn, Circuit Judge, in *Jones v. Missouri Edison-Electric Co.*, 144 Fed. 765, 75 C. C. A. 631, where the transaction was condemned, and proper relief directed, as follows:

"The fraud or breach of trust of one who occupies a fiduciary relation while in the exercise of a lawful power is as fatal in equity to the resultant act or contract as the absence of the power. The relation of a stockholder

to his corporation, to its officers and to his costockholders is a relation of trust and confidence. The corporation holds its property in trust for its stockholders who have a joint interest in it. The officers of the corporation, if not technical trustees for the stockholders, are such in so real a sense that any use by them of the property of the corporation for their own profit to the detriment of any of the stockholders is a breach of their trust and their duty, which is actionable in equity. The stockholders of a corporation are jointly interested in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and mutual obligation to do nothing to impair the property or the title. It creates such a fiduciary relation as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit at the expense of others who have the same rights."

The leading case to the same effect in the Supreme Court, where a consolidation was upheld, is *Leavenworth County v. Chicago, R. I. & P. R. Co.*, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064. Other cases in point are *McCourt v. Singer-Bigger*, 145 Fed. 103, 76 C. C. A. 73; *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357; *Wheeler v. Abilene National Bank Building Co.*, 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892; *Figge v. Bergenthal*, 130 Wis. 594, 109 N. W. 581, 110 N. W. 798; *Rogers v. Nashville Co.*, 91 Fed. 299, 33 C. C. A. 517; *Werle v. Northwestern Co.*, 125 Wis. 534, 104 N. W. 743. These decisions, and many others, agree substantially with the rule laid down by Judge Sanborn in the language quoted.

[2] Applying such rule to this case I find that the sale in question was a fair one, that the majority have not obtained any advantage whatever over the minority, and that the bill should be dismissed. The legal relations of the majority and minority are well expressed by the Supreme Court of Illinois, in *Harts v. Brown*, 77 Ill. 226, as follows:

"The stockholders had been called together and they were urged to make advances in proportion to the stock they severally held and thus relieve the company and preserve its existence, but this they refused to do, and as it could not be preserved and must come to an end by a sale under the power in the trust deed, no reason is perceived why appellants might not become purchasers at the sale. They were under no moral or legal obligation to advance their own means, pay the debt and preserve the property for the use of the other stockholders who had declined to join in making pro rata advances to relieve it from debt. Appellants seem to have acted fairly, as they purchased at a sum sufficient to pay all the debts of the company. They chose to do so rather than make an effort to obtain all the property for the debts secured by the trust deed and the certificate of purchase. On the contrary they gave many thousand dollars more than honest creditors might be fairly paid and the company wrong no one. This does not have the appearance of fraud. Appellants had faith that the enterprise could be carried out with success, and that they could thus save the means they had advanced, but appellees, by the course they adopted, manifested an entire want of confidence in its ultimate success. They were even offered the opportunity to come in for a considerable period afterwards and share in the new enterprise by advancing a ratable portion of the means, but they all declined; but when success was achieved they then saw advantages they had lost, and then sought to set aside the sale and have the property restored to the old company, and thus reap the benefits arising from the enterprise and means advanced by others. To do so should show fraud, or want of power to make the sale or the purchase by appellants, neither of which has been done."

Decree for defendants, with costs.

**CARPENTER et al. v. KNOLLWOOD CEMETERY et al.**

(Circuit Court, D. Massachusetts. June 30, 1911.)

No. 701.

**1. INJUNCTION (§ 132\*)—INTERLOCUTORY INJUNCTION—NATURE—PURPOSE.**

An interlocutory injunction is a mere provisional remedy intended to preserve property in statu quo until a hearing can be had on the merits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.\*]

**2. INJUNCTION (§ 134\*)—PRELIMINARY INJUNCTION.**

Whether a preliminary injunction shall be granted depends on whether there is a substantial question between the parties and on the relative degree of injury that will be caused by the preservation of the property in statu quo until final hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 303; Dec. Dig. § 134.\*]

**3. INJUNCTION (§ 136\*)—PRELIMINARY INJUNCTION—SALE OF CEMETERY PROPERTY.**

Where complainants interested in a cemetery instituted a suit to restrain the association from selling its remaining cemetery lands at one time at public auction, claiming that such sale was contrary to the association's charter, by-laws, and a prior agreement, and it was found by a master that the sale was to liquidate the interest of shareholders under such agreement and emancipating the corporation therefrom, that the sale was in violation of the association's by-laws, would operate to repeal certain of them, and would operate to give nonconsenting shareholders very small amounts instead of substantial returns which they had a right to expect from their investment under the plan set forth in the agreement, and would result in the acquisition of the property by a speculative syndicate to the exclusion of parties who had vested legal and equitable rights in the property, complainants were entitled to a preliminary injunction to prevent such sale until a hearing on the merits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

In Equity. Suit by Reese Carpenter and others against Knollwood Cemetery and others. On motion for a preliminary injunction. Granted.

Francis E. Baker, C. H. Tyler, O. D. Young, and I. H. Ellis, for complainants.

Atherton N. Hunt and A. L. Harwood, for defendant Knollwood Cemetery.

Joseph W. Lund, for defendant Beacon Trust Co.

Warren, Garfield, Whiteside & Lamson, for defendant Puritan Trust Co.

Barney & Lee and Thomas Z. Lee, for John J. Cameron.

Wendell P. Murray, pro se.

COLT, Circuit Judge. This case is now before the court on motion for a preliminary injunction. As the defendants' counsel, and to some extent the complainants' counsel, have treated the case as if it were before the court on final hearing, it may be well at the outset to refer to some of the elementary principles governing motions of this character.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] An interlocutory injunction is merely provisional in its nature, and does not conclude any right. Its object and effect are merely to preserve the property in statu quo until a hearing on the merits. [2] The first question to be determined is whether the case shows that there is a substantial question between the parties. If the court is satisfied that there is no substantial question to be tried, no injunction will issue; on the other hand, if it appears that there is a substantial question in the case, then the court will address itself to the second question, namely, the relative degree of injury which will be caused by the preservation of the property in statu quo until final hearing. If it appears that by granting this relief the injury to the respondents will be serious and the injury to the complainants comparatively slight, the injunction will be refused. If, however, it appears that the injury to the complainants will be serious, and the injury to the respondents comparatively slight, the injunction will be granted. Kerr on Injunctions (2d Ed.) pp. 12, 16, 17; High on Injunctions (4th Ed.) §§ 4, 5, 13; Russell v. Farley, 105 U. S. 433, 437, 26 L. Ed. 1060; Shrewsbury & Chester Railway Company v. Shrewsbury & Birmingham Railway Company, 1 Sim. (N. S.) 410; Glascott v. Lang, 3 Milne & C. 451, 455; Great Western Railway Company v. Birmingham Railway Company, 2 Phil. Ch. 597; Jensen v. Norton, 64 Fed. 662, 12 C. C. A. 608; Buskirk v. King, 72 Fed. 22, 18 C. C. A. 418; New Memphis Company v. Memphis (C. C.) 72 Fed. 952; City of Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161; Southern Pacific Company v. Earle, 82 Fed. 690, 27 C. C. A. 185; Denver & Rio Grande Railroad Co. v. United States, 124 Fed. 156, 59 C. C. A. 579; Harriman v. Northern Securities Company (C. C.) 132 Fed. 464; Goldfield Consolidated Mines v. Goldfield M. U. (C. C.) 159 Fed. 500.

[3] Applying these principles to the case at bar, I am satisfied that there is a substantial question to be determined in this case, namely whether the Knollwood Cemetery, under its charter, by-laws, and the Cameron agreement, can sell its remaining cemetery lands at one time at public auction without the consent of all the parties in interest.

Upon this general question the master has found as follows:

"(25) The proposition to sell the unsold portions of the cemetery property at public or private sale at such prices as the directors shall determine, for the purpose of liquidating the interest of the shareowners under the Cameron agreement and emancipating the corporation from that agreement is in effect a nullification of the Cameron agreement.

"(26) Such action cannot lawfully be taken without the unanimous consent of the land shareowners under the Cameron agreement, which consent has not been obtained.

"(27) The proposed sale, while nominally for cemetery purposes, is in fact a sale for the purposes of reorganization and its result would be to nullify the provisions of the Cameron agreement without the consent of all the shareowners thereunder and permit of the proceeds of the sale of the use of lots and plats in the cemetery to be divided contrary to the provisions of the charter.

"(28) The proposed sale of the property is in violation of the provisions of article 12 of the by-laws.

"(29) The proposed repeal of said by-law by action of the directors would be illegal and void."

"(32) The effect of the proposed sale would be to give to the nonassenting

land shareowners a very small amount instead of the substantial returns which they have a right to expect from their investment under the plan set forth in the Cameron agreement and as set forth in the charter of the cemetery.

"(33) No plan for purchasing the property has apparently been worked out, and a sale may result in the acquisition of the property by a speculative syndicate and in the exclusion of parties who have vested legal and equitable rights in the property."

These conclusions of the master were reached after a full hearing and a careful consideration of the case. Without passing upon the question whether the master was right in his conclusions—a question which cannot properly be determined on this motion—it does appear from these findings, and from the able arguments of counsel on both sides, that this case presents substantial and serious questions to be judicially determined.

Upon the question of the comparative injury to the parties if this property remains in statu quo until final hearing, it is clear that, while the defendants may suffer some inconvenience, a serious injury may result to the complainants if the readjustment plan is carried out and the remaining cemetery lands sold at public auction before the questions raised by this bill are judicially settled. The very fact that the complainants contest the validity of the proposed sale would naturally seriously affect the price which could be obtained.

Upon the whole, it seems to me that the complainants have made out a case in which a preliminary injunction should be granted.

Motion granted.

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Ex parte DINEHART.

(Circuit Court, S. D. New York. April 17, 1911.)

1. EXTRADITION (§ 11\*)—COMPLAINT—INFORMATION AND BELIEF.

Where a complaint in extradition was based on the information and belief of the Vice Consul General of the demanding country, and stated that the sources of his information and the grounds of his belief that petitioner committed the crime of murder, and that a warrant had been issued in Mexico for his arrest, and a requisition accompanied by the warrant, and duly authenticated depositions in support thereof were about to be or had been made, was official correspondence that had passed between deponent and the Department of Foreign Affairs of the United States of Mexico and official communications that had passed between the deponent and the Mexican Government at Washington, the complaint was not defective in that it was based on information and belief, and did not sufficiently allege the sources of deponent's information and the grounds of the deponent's belief.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 12; Dec. Dig. § 11.\*]

2. EXTRADITION (§ 11\*)—COMPLAINT—DESIGNATION OF OFFENSE.

A complaint in extradition, charging accused with murder committed in Mexico, the demanding country, was sufficient to confer jurisdiction on the commissioner to issue a warrant of arrest, without charging the facts constituting the substance of the offense.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 12; Dec. Dig. § 11.\*]



Petition of Alphonse Dinehart for a writ of habeas corpus. Denied.  
See, also, *In re Urzua*, 188 Fed. 540.

Richard Krause, for petitioner.

Edward L. Tinker, for demanding Government.

WARD, Circuit Judge. The extradition treaty of April 22, 1899, 31 Stat. at Large, 1818, between this country and Mexico provides for the provisional arrest of persons charged with any crime mentioned in the treaty until the production of the documents on which the claim for extradition is founded:

"Article 10. On being informed by telegraph or otherwise, through the diplomatic channel, that a warrant has been issued by competent authority for the arrest of a fugitive criminal charged with any of the crimes enumerated in the foregoing articles of this treaty, and on being assured from the same source that a requisition for the surrender of such criminal is about to be made accompanied by such warrant and duly authenticated depositions or copies thereof in support of the charge, each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded."

[1] The complaint in this case was verified by the Vice Consul General of Mexico and upon it United States Commissioner Shields issued a warrant for the arrest of the petitioner. He applied for this writ of habeas corpus on the ground that he was illegally detained because the complaint was insufficient to give the commissioner jurisdiction. The objections are that, being on information and belief, the sources of information and grounds of belief are insufficiently stated, and that the substance of the offense is insufficiently charged. He treats the complaint as if it were to be tested in the same way as an affidavit to obtain an attachment—citing *Buell v. Van Camp*, 119 N. Y. 160, 23 N. E. 538; or an affidavit to obtain a third party order in proceedings supplementary to execution—citing *Lowther v. Lowther*, 110 App. Div. 122, 97 N. Y. Supp. 5. Compacts between sovereigns for the reciprocal surrender of fugitives charged with crime and proceedings thereunder are not to be treated in this technical fashion. *Yordi v. Nolte*, 215 U. S. 227, 30 Sup. Ct. 90, 54 L. Ed. 170.

The Vice Consul General states that the sources of his information and grounds of his belief that the petitioner committed the crime of murder, that a warrant has been issued in Mexico for his arrest, and that a requisition accompanied by the warrant and duly authenticated depositions in support thereof is about to be or already has been made, are "official correspondence that has passed between your deponent and the Department of Foreign Affairs of the United States of Mexico, and official communications that have passed between your deponent and the Mexican Government at Washington."

[2] The charge of murder sufficiently advises the petitioner of the offense that he is alleged to have committed, and it is sufficient to advise the court that it is an offense covered by the treaty. It is a common-law crime and needs no further definition as many statutory crimes like forgery, embezzlement, counterfeiting, etc., require.

*In Re Farez*, 7 Blatchf. 34, Fed. Cas. No. 4,644, on which the pe-

tioner relies, arose in 1869 under the treaty with Switzerland (11 Stat. 593). The warrant was held void because it did not show that the commissioner who issued it was authorized to do so under the act of August 12, 1848, c. 167, 9 Stat. 302, and because there was no previous requisition by the foreign government. No contention is made in this case that the commissioner was not authorized to act, and article 10 of the treaty does not require a previous requisition.

I think the commissioner was fully justified in issuing the warrant. As he proceeds he can determine whether the evidence produced before him is sufficient to justify the petitioner's final commitment for extradition. The writ is dismissed, and the petitioner remanded.

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NAYLOR & CO. v. LEHIGH VALLEY R. CO. et al.

(Circuit Court, S. E. D. Pennsylvania. May 11, 1911.)

No. 1,312.

1. ACTION (§ 27\*)—NATURE AND FORM—CONTRACT OR TORT.

Under Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), as amended by Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), giving a remedy where a carrier does not comply with an order of the Interstate Commerce Commission for the payment of money, and providing that the suit shall proceed in all respects like other civil suits for damages, a statutory proceeding to enforce an order of reparation is one sounding in tort for damages.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 27.\*]

2. COMMERCE (§ 94\*)—AFFIDAVIT OF DEFENSE—NECESSITY.

The Pennsylvania procedure act of May 25, 1887 (P. L. 272), requiring affidavits of defense, being applicable only to actions founded on contract alone, does not apply to a statutory proceeding to enforce an order of reparation by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 94.\*]

At Law. Action by Naylor & Co. against the Lehigh Valley Railroad Company and others. Rule to vacate rule for affidavit of defense made absolute.

Thompson & Van Sant and Vivian Frank Gable, for plaintiffs.

Henry S. Drinker, Samuel Dickson, James F. Campbell, James Wilson Bayard, and John G. Johnson, for defendants.

BUFFINGTON, Circuit Judge. In this case we have reached the conclusion the defendants should not be required to file affidavits of defense. The plaintiffs are here seeking to enforce a statutory right by a statutory proceeding. Having secured, in a case against these defendants before the Interstate Commerce Commission, an order for reparation (see *Naylor & Co. v. Lehigh Valley R. R. Co. et al.*, 18 Interst. Com. R. 624, No. 1,511, Opinion and Order No. 168), the plaintiffs served that order on the defendants. On noncompliance by the latter, the plaintiffs brought this action of assumpsit, which in their statement of claim they aver is "to enforce the aforesaid order of the Interstate Commerce Commission, dated June 7, 1910, as provided

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the 'Act to regulate commerce, approved February 4, 1887, and all acts supplemental thereto and amendatory thereof.'"

[1] Waiving for present purposes the question whether, in view of the federal statutory provision, "if a carrier does not comply with an order for the payment of money within the time limit of such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States \* \* \* a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises," the plaintiffs should not have pursued the statutory remedy by petition, a practice followed in *Penn Refining Co. v. Western Co.*, 208 U. S. 208, 28 Sup. Ct. 268, 52 L. Ed. 456, we are clear that in view of the further provision in such federal statute that "such suit shall proceed in all respects like other civil suits for damages," and of the several decisions and rulings in *Parsons v. Chicago*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231, *Ratican v. Terminal (C. C.)* 114 Fed. 666, and *Southern Pine Co. v. Southern Ry. Co.*, 14 Interst. Com. R. 195, that a statutory proceeding to enforce an order of reparation is one sounding in tort for damages.

[2] Such being the fact, the Pennsylvania procedure act of May 25, 1887 (P. L. 272) requiring affidavits of defense, does not apply. In *Corry v. Penna. R. R.*, 194 Pa. 516, 45 Atl. 341, the Supreme Court of that state held:

"Under the act of May 25, 1887, the actions of assumpsit for which judgment may be taken for want of an affidavit of defense are limited to such as are founded on contract alone, and do not include cases in which the cause of action is *ex delicto* or of a mixed character of contract and tort. It was the intention of the Legislature to limit the remedy by judgment for want of an affidavit of defense to causes of action which were either actually in writing, or contracts the whole details of which could be plainly set down in writing, with particular terms and limitations, so that a liability for the payment of a definite sum of money could be expressed."

And in *Kinney v. Mitchell*, 136 Fed. 773, 69 C. C. A. 493, this court held to the same effect. The present suit, therefore, not being one *ex contractu*, no affidavits of defense are required.

The rule to vacate a rule for an affidavit of defense is made absolute.

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### IN RE SPOT CASH HOOPER CO.

(District Court, W. D. Texas, Waco Division. July 20, 1911.)

No. 660.

#### BANKRUPTCY (§ 314\*)—CLAIMS—NATURE AND CHARACTER—TRADE CERTIFICATES.

A bankrupt corporation, having been originally capitalized for \$10,000 and desiring to increase its capital, abandoned the scheme to increase the stock, and in lieu thereof voted to issue trade certificates to the amount of \$10,000, certifying that the owner had deposited with the corporation a specified amount of money entitling him to purchase goods from the corporation at a profit not to exceed 10 per cent., the certificate to be

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taken into account in declaring dividends, and the holder to receive for the use of the amount specified an amount annually equal to the dividend declared, based on \$20,000 and paid on account of stock certificates, a dividend of at least 8 per cent. being guaranteed, and that at the end of two years the certificate was payable in merchandise on demand of the holder after 30 days' notice. *Held* that, under Rev. St. Tex. 1895, art. 653, conferring on private corporations the right to borrow money on the corporation's credit, not exceeding its authorized capital, and to execute bonds or notes therefor, such trade certificates should be regarded as debts of the corporation, provable under Bankr. Act July 1, 1898, c. 541. § 63, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3447), and not stock.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.\*]

In the matter of bankruptcy proceedings of the Spot Cash Hooper Company. On certified question as to the nature of an obligation evidenced by certain trade certificates. Referee's determination, refusing to allow such certificate as a debt, reversed.

J. J. Mitchell, claiming to be a creditor of the bankrupt, Spot Cash Hooper Company, proved, and submitted for allowance to the referee, a claim based upon the following paper, denominated upon its face "Trade Certificate":

"Trade Certificate.

"Incorporated under the Laws of the State of Texas.

"No. 2.

\$100.00

"Spot Cash Hooper Company, Incorporated, of Hillsboro, Texas.

"Capital Stock, \$10,000.

"Trade Certificates Issued, \$10,000.

"This certifies that J. J. Mitchell has deposited with Spot Cash Hooper Company \$100.00, which entitles him or the holder thereof to purchase goods from said corporation at a profit not to exceed 10 per cent. This certificate shall be taken into account in declaring dividends, and the holder shall receive for the use of said sum of \$100.00 an amount annually equal to the dividend declared, based on \$20,000 and paid on account of stock certificates; the holder being guaranteed to receive at least 8 per cent. per annum of said sum of \$100.00. After the end of two years this certificate is payable in merchandise on demand of holder after 30 days notice.

"[Signed] Spot Cash Hooper Company,

"By W. Finch, President.

"Attest:

"W. C. Hooper, Sec. & Treas."

The claim was contested by the trustee on the ground that it was not a debt against the estate, and, in the language of the referee, "the construction of this instrument is the only question involved in this case." It appears from the record that the bankrupt is a corporation, originally organized with a capital stock of \$10,000. In December, 1909, the officers held a meeting to provide for the increase of the stock from \$10,000 to \$20,000. Subsequently, in January, 1910, another meeting was held, at which it was decided to abandon the purpose to increase the stock, and in lieu thereof the meeting voted to issue the trade certificates above described. The face of the certificates expresses the agreement of the parties. It further appears that several of the trade certificates were issued; one to the protesting creditor, Mitchell. The referee held that the claim was not provable, and disallowed it. The question is here upon a petition for review.

Vaughan & Hart, for creditor.

MAXEY, District Judge (after stating the facts as above). By article 653 of the Revised Statutes of Texas of 1895 express authority is conferred upon private corporations to borrow money on the credit

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the corporation, not exceeding its authorized capital stock, and to execute bonds or promissory notes therefor, and to pledge the property and income of the corporation. In the present case Mitchell advanced to the bankrupt \$100, and as evidence of the indebtedness the latter issued to him the trade certificate described in the statement of the case. This paper is not a stock certificate, since all the original stock had been subscribed, and the plan to increase the capital stock had been abandoned. Indeed, the instrument does not purport to be a certificate entitling the holder to shares of stock in the corporation. It is equally apparent that the certificate is not a promissory note, negotiable by the law merchant. It does, however, evidence an indebtedness due by the bankrupt to Mitchell, and guarantees the payment of at least 8 per cent. per annum for the use of the money, which is merely the equivalent of a guaranty of interest at the rate mentioned on the amount of money borrowed. The fact that the certificate is payable in merchandise, after the end of two years, on the demand of the holder, in no way detracts from its value as an obligation to pay. See *Baker v. Todd*, 6 Tex. 274, 55 Am. Dec. 775; *Dumas v. Hardwick*, 19 Tex. 239; *Short v. Abernathy*, 42 Tex. 94; *Bummel v. City of Houston*, 68 Tex. 10, 2 S. W. 740.

In the judgment of the court the claim of Mitchell is founded upon an express contract, the liability is fixed, and the amount was absolutely owing when the petition in bankruptcy was filed. The debt is, therefore, under section 63 of the bankruptcy act, a provable claim. It follows that the order of the referee, disallowing it, should be reversed. The cause will be referred back to the referee, with directions to allow the claim of Mitchell, the same to be paid in due course of administration of the estate.

So ordered.

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#### FELLOWS V. BORDEN'S CONDENSED MILK CO.

(Circuit Court, S. D. New York. June 13, 1911.)

#### APPEAL AND ERROR (§ 1201\*)—CIRCUIT COURT OF APPEALS—MANDATE—EFFECT.

Where the Circuit Court of Appeals had ordered the issuance of a mandate directing the dismissal of a bill, with costs, the Circuit Court had no jurisdiction to grant leave to file a supplemental bill in the nature of a bill of review, without leave first obtained by complainant from the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673-4683; Dec. Dig. § 1201.\*]

In Equity. Suit by Olin S. Fellows against Borden's Condensed Milk Company. On petition for leave to file a supplemental bill in the nature of a bill of review. Denied.

See, also, 180 Fed. 421.

Gifford & Bull, for complainant.

Masten & Nichols and W. D. Edmonds, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. In this cause the defendant presents an order upon the mandate of the Circuit Court of Appeals dated June 7, 1911, directing the bill to be dismissed with costs, and at the same time the complainant presents a petition for leave to file a supplemental bill in the nature of a bill of review and a motion for a rehearing, founded upon his disclaimer filed in the Patent Office June 10, 1911. My duty is to enter a decree dismissing the bill in accordance with the mandate of the Circuit Court of Appeals, and I can do nothing else or further. In re Potts, Petitioner, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; American Soda Fountain Co. v. Sample, 136 Fed. 857, 70 C. C. A. 415.

The complainant may hereafter apply to the Circuit Court of Appeals to authorize this court to entertain this motion, which, because now made without such permission, is denied.

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LESSER v. GEORGE BORGFELDT & CO.

(Circuit Court, S. D. New York. June 22, 1911.)

COPYRIGHTS (§ 82\*)—INFRINGEMENT—ACTIONS—EXHIBITION.

Where there was nothing to show that a copyright alleged to have been infringed was a sculpture or other similar work or that the production of a copy was not feasible, defendant was entitled to have a copy of the alleged infringement, and a copy of the work alleged to have been infringed upon, accompany the petition as required by Supreme Court Practice Rule 2, in effect July 1, 1909.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.\*]

In Equity. Suit by Elizabeth Lesser against George Borgfeldt & Co. for infringement of copyright. On motion to compel complainant to attach a copy of the alleged infringement, and of the work alleged to have been infringed, to the petition. Granted.

LACOMBE, Circuit Judge. The Rule of Practice (No. 2) adopted by the Supreme Court and which went into effect July 1, 1909, provides that "a copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained." No such copies have been submitted, and defendant is entitled to the relief asked for, unless the case comes within one of the exceptions contained in the rule. The record does not show that the copyright is a "sculpture or other similar work," and there is nothing to show that the production of "copy" is not feasible.

Motion granted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## SPENCER v. THE DALLES, P. &amp; A. NAVIGATION CO.

(Circuit Court of Appeals, Ninth Circuit. July 10, 1911.)

No. 1,890.

## 1. COLLISION (§ 51\*)—OVERTAKING VESSELS—MUTUAL DUTIES.

It is the duty of an overtaking vessel to keep out of the way of the overtaken vessel, and the correlative duty of the leading vessel to keep her course and avoid any maneuver calculated to embarrass the overtaking vessel in passing.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 57-61; Dec. Dig. § 51.\*]

## 2. COLLISION (§ 105\*)—OVERTAKING VESSELS—FAULT OF OVERTAKING VESSEL.

The finding of the trial court that a collision between two steamers passing down the Willamette river from Portland, which occurred when one vessel was attempting to pass the other, was due solely to the fault of the overtaking vessel, affirmed, where such finding was made on conflicting evidence, and in view of the burden of proof resting on the overtaking vessel and her duty under the rules to keep out of the way, it being shown that there was ample room for her to do so.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.\*]

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

Appeal from the District Court of the United States for the District of Oregon.

Libel in admiralty by The Dalles, Portland & Astoria Navigation Company, a corporation, against E. W. Spencer, claimant and owner of the steamer Charles R. Spencer, to recover damages suffered by the Dalles City, a steamboat owned by the libellant, in a collision with the Charles R. Spencer, on the Willamette river upon the 31st day of May, 1905. The District Court rendered a decree (178 Fed. 862) for the libellant in the sum of \$6,020.03, from which the respondent appeals to this court. Affirmed.

Coovert & Stapleton and Richard W. Montague, for appellant.

Williams, Wood & Linthicum, Carey & Kerr, and Harrison Allen (Erskine Wood, on the brief), for appellee.

Before MORROW, Circuit Judge, and HANFORD and DIETRICH, District Judges.

DIETRICH, District Judge. This controversy grows out of a collision which occurred between two river steamboats, the Dalles City and the Charles R. Spencer, upon the Willamette river, a short distance above its mouth, on the 31st day of May, 1905. The boats were plying between Portland and The Dalles, and belonged to opposition lines which were aggressively competing for the passenger business of the two terminal cities and intermediate points along the Willamette and Columbia rivers. The first to arrive at any place along the route where passengers were received secured the larger part of the business, and, both boats being scheduled to leave Portland at the same hour, speed became an important consideration. The Charles R. Spencer was the larger, more powerful, and swifter craft, and, with

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 188 F.—55

equal opportunity, could outstrip her rival. Upon the morning in question, they left the Portland docks at about 7 o'clock, the Dalles City passing out through the drawbridges a few hundred feet ahead of the Charles R. Spencer. A struggle at once began, the Charles R. Spencer seeking by her superior speed to pass her competitor, and the Dalles City to maintain the advantage that she had secured in making the start. The Dalles City was apparently under a full head of steam, and moved at the rate of 17 or 18 miles an hour. The Charles R. Spencer, necessarily following practically the same course, pushed close up in her wake, and two or three times essayed to pass, but without avail. Here arises the first substantial conflict in the testimony. Upon behalf of the Charles R. Spencer it is charged that her failures to pass were due to the "jockeying" maneuvers of the Dalles City in swinging across her course from time to time, and thus crowding her out. The charge is denied by the libelant, who puts forth the theory that the difference in speed of the two vessels was at the time insufficient to enable the Charles R. Spencer to climb the swell left by the Dalles City and make the detour which an overtaking vessel must necessarily make in safely passing to the leading position. However that may be, the relative positions of the two vessels remained substantially unchanged for approximately 30 minutes, and until just before the collision occurred. Then the Charles R. Spencer, being at the time close astern of the Dalles City, but a little upon her port quarter, resolved to pass upon her starboard. Accordingly, veering to the right and having called for and received consent to pass, she swung across the course of the Dalles City from 50 to 100 feet in her wake. Upon what followed the evidence is highly conflicting, and the whole case turns. The libelant's version is that immediately upon crossing over, the Charles R. Spencer, either willfully or with gross carelessness, put her wheel hard to port and thus came into contact with the Dalles City. Upon the other hand, upon behalf of the Charles R. Spencer, it is contended that as she lapped up on the starboard quarter of the Dalles City, the latter, to keep her from passing, deliberately swerved to the right, thus intercepting her course and bringing the two vessels into collision.

That which admittedly happened is quickly told. At the time the Charles R. Spencer passed to the right of the Dalles City, the former was running at a speed of about 19 miles an hour, and the latter 17 miles an hour. In a moment of time the prow of the Charles R. Spencer struck the Dalles City a few feet forward from the stern, upon the starboard side. The collision was accompanied with no perceptible shock, but by reason of the greater weight and speed of the Charles R. Spencer and the fact that the two vessels were at the time pursuing divergent courses, the stern of the Dalles City was carried around until she lay almost directly athwart the course of the Charles R. Spencer. In this position she was unable readily to yield to the momentum of the other boat, and, as a result, she careened heavily to port, the bow of the Charles R. Spencer crushed through her guard rail and broke her pitman shaft, and thereupon both the cylinder heads of her engine were blown out, and other damage en-



sued. By the time the *Charles R. Spencer* had succeeded in stopping her engines, the *Dalles City* had turned or had been turned entirely around, and lay with her bow to the stern of the *Charles R. Spencer*, and upon the starboard side.

The decision of the lower court was in favor of the libelant, and the respondent brings this appeal. In form a number of errors are assigned, but in reality only the findings of fact by which the *Charles R. Spencer* alone is held to be responsible for the collision, are assailed.

[1] The controlling principles of law are simple, and, being uncontroverted, may be stated, but need not be discussed. By rule 6 of the Pilot Rules for the Inland Waters of the Atlantic and Pacific Coasts (Edition of August 20, 1908), it is provided that when steam vessels are running in the same direction, the one astern, if she shall desire to pass on the right or starboard hand of the vessel ahead, shall give one short blast of the steam whistle, and the vessel ahead shall signify her consent by a similar blast. Admittedly this provision of the rule was complied with by both vessels, and at the point where consent to pass was asked for and given there was ample room in the river to pass in safety upon the starboard, if not upon the port, side of the leading vessel. Having obtained the assent of the *Dalles City* to pass, it became the duty of the *Charles R. Spencer*, as the overtaking vessel, to keep out of the way of the *Dalles City*, the vessel overtaken. Upon the other hand, while the *Dalles City*, as the leading vessel, had the right of way, and was not bound to yield to the convenience of the *Charles R. Spencer*, it was her correlative duty to refrain from willfully changing her course so as to cross the path of the *Charles R. Spencer*. By pilot rule 6, above referred to, it is expressly provided that "the vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel"; and it may be stated as a general rule of maritime law that the vessel ahead is bound to refrain from any maneuvers calculated to embarrass the overtaking vessel while attempting to pass. *Whitridge v. Dill*, 23 How. 448, 16 L. Ed. 581. Making specific application of these principles, it was the duty of the *Charles R. Spencer*, in passing, to give to the *Dalles City* a wide enough berth to avoid collision, and it was the correlative duty of the *Dalles City* to refrain from changing her course or maneuvering in such a way as to embarrass her rival. Moreover, the duty of avoiding collision being imposed by law primarily upon the overtaking vessel, the burden of proof was in this case cast upon the *Charles R. Spencer* to show that she acted prudently, and that the collision was not caused by any fault upon her part. *Spencer on Marine Collisions*, § 69. It is further well established that if the collision was due to the concurring negligence of both vessels, the damages suffered should be divided equally between the two. *The Schooner Catharine v. Dickinson*, 17 How. 170, 15 L. Ed. 233; *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586.

[2] No useful purpose could be subserved by an extended discussion here of the question of fact whether the *Charles R. Spencer* or the *Dalles City* was the more to blame for the collision. The most that can be said for the appellant is that the voluminous testimony is highly

conflicting, and that it is entirely possible to take the view that the Dalles City was wholly at fault, or that the Charles R. Spencer was alone responsible for the accident, or that the negligence of both vessels contributed thereto. We have the testimony of a number of witnesses in support of any one of the three possible views, and there is nothing inherently improbable in any of the theories, nor is there any admitted or incontrovertible fact or circumstance which is wholly inconsistent with any one of such theories. It is clearly a case of conflicting oral testimony, where it cannot be said that there is a strong preponderance with either party. The District Judge heard the witnesses testify, and observed their demeanor while upon the stand. His finding upon the conflicting evidence was that the Charles R. Spencer alone was responsible for the collision, and that the Dalles City was wholly without fault. Under the well-settled rules of appellate procedure, the finding ought not, under the circumstances, to be disturbed. In *The Alijandro*, 56 Fed. 621, 6 C. C. A. 54, we have said:

"The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the District Judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility will not be reversed unless it clearly appears that the decision is against the evidence. *The Albany* (C. C.) 48 Fed. 565, and authorities there cited."

See, also, *Gaffner v. Pigott*, 116 Fed. 486, 54 C. C. A. 641; *The S. S. Wilhelm*, 59 Fed. 169, 8 C. C. A. 72.

There being no other question for consideration, it follows that the judgment must be affirmed, with costs to the appellee.

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### BALTIMORE & O. R. CO. v. THORNTON.

(Circuit Court of Appeals, Fourth Circuit. June 17, 1911.)

No. 1,019.

1. CARRIERS (§ 356\*)—EJECTION OF PASSENGER—ACTION FOR WRONGFUL EJECTION—DEFENSES—DEFECTIVE TICKET.

Plaintiff paid for her carriage as a passenger from Newport News to Parkersburg, W. Va., by boat to Baltimore and from there over defendant's railroad to destination. She received a ticket stating that it was good to the station printed thereon which was punched, and which contained a printed list of the stations on defendant's road as far as Cincinnati, but the agent neglected to punch it for Parkersburg and plaintiff did not notice the omission. The ticket was properly stamped by the agent, and plaintiff's baggage checked thereon to Parkersburg, the fact of the checking being indicated by the letters "B. C." punched therein. It was also accepted and punched on the boat and by defendant's gate-man at Baltimore, but the conductor on the train refused to receive it, and although she explained the facts ejected plaintiff at Washington, where she was obliged to lay over, but was finally carried to her destination on the same ticket. *Held* that, conceding that as between conductor and passenger the ticket is conclusive evidence of the contract of carriage, it was the duty of the conductor before ejecting plaintiff to use all reasonable means to ascertain therefrom the extent of her rights; that her ticket was not void, but contained on its face evidence that the agent

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had made a mistake in failing to punch any station, and also, in connection with the baggage check referred to therein, evidence which should have been accepted by any reasonable man as a confirmation of her statements, and that in ejecting her he committed a tort for which defendant was liable in damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1427; Dec. Dig. § 356.\*]

**2. CARRIERS (§ 376\*)—EJECTION OF PASSENGER—INVALID TICKET—FORM OF ACTION FOR WRONGFUL EJECTION.**

A passenger who without fault on his part, but through the mistake or negligence of an agent of a railroad company, has been given an invalid ticket, and in consequence is ejected from a train for which he has paid fare, may recover damages therefor from the company, whether the action is on the contract or in tort.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1463; Dec. Dig. § 376.\*]

**3. COURTS (§ 360\*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS—CONTRACTS OF CARRIAGE.**

The legal rights of a passenger, growing out of a contract of carriage is not a question of local law but of general substantive law upon which a federal court is not controlled by the decisions of the courts of the state where the contract was made or the cause of action accrued.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 360.\*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 475; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

**4. CARRIERS (§ 352\*)—EJECTION OF PASSENGER—ACTION FOR DAMAGES—DEFENSE—RULES OF COMPANY.**

The right of a passenger ejected from a railroad train in violation of his rights to recover damages therefor cannot be affected by any rule of the carrier prescribing the duties of its agents or conductors.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1412-1414; Dec. Dig. § 352.\*]

**5. EVIDENCE (§ 121\*)—RES GESTÆ—STATEMENT MADE BY PARTY.**

The time, place, and circumstances under which a statement of a party sought to be introduced in evidence was made are always relevant, and may be shown as a part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 307-328; Dec. Dig. § 121.\*]

**6. APPEAL AND ERROR (§ 971\*)—WITNESSES (§ 275\*)—REVIEW—DISCRETION OF LOWER COURT—EXAMINATION OF WITNESSES.**

It is within the discretion of a trial judge to limit the cross-examination of a party testifying as a witness, and his action is not reviewable by an appellate court except for an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971; \* Witnesses, Cent. Dig. § 924; Dec. Dig. § 275.\*]

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Action at law by Agnes B. Thornton against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. Gray Williams, for plaintiff in error.

J. Winston Read and John N. Sebrell, Jr., for defendant in error.

Before PRITCHARD, Circuit Judge, and DAYTON and CONNOR, District Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CONNOR, District Judge. Defendant in error, hereinafter called plaintiff, instituted this action against plaintiff in error, hereinafter called defendant, and the Merchants' & Miners' Transportation Company, for the recovery of damages alleged to have been sustained by reason of her wrongful expulsion from the car of defendant Baltimore & Ohio Railroad Company. The action was instituted in the corporation court of Newport News, Va., and removed into the Circuit Court of the United States. Plaintiff, in her original declaration, set forth a cause of action sounding in tort. An amended declaration was filed, alleging the same facts as in the original, but averring a breach of contract of carriage. The facts disclosed by the declaration are:

[1] On August 10, 1907, plaintiff purchased from the agent of the Merchants' & Miners' Transportation Company at Newport News a ticket from said point to Parkersburg, W. Va., over the railroad of the defendant, Baltimore & Ohio Railroad Company, via Baltimore and Washington City, paying the fare (\$13.75) charged therefor. She was given a ticket entitling her to travel from Newport News "to the station printed thereon, which was punched." The ticket attached to the declaration contained a printed list of stations over defendant road as far as Cincinnati, Ohio, including Parkersburg. The agent selling the ticket neglected to "punch" the word "Parkersburg," which failure was not noticed by plaintiff. The ticket was duly stamped by the agent at Newport News. She exhibited the ticket to the baggage agent at Newport News for the purpose of having her baggage checked and received from him a check to Parkersburg; he punched through the ticket the letters "B. C.," signifying that the passenger's baggage was checked. Plaintiff entered upon the boat of the Merchants' & Miners' Transportation Company and was carried; that is, her ticket was received and punched by the captain on said boat to Baltimore. She was permitted, upon exhibiting the ticket, to pass through the gate of defendant's yard at Baltimore and directed to enter defendant's train of cars for Parkersburg—the ticket was punched—this was about 8 o'clock a. m. About 20 minutes after boarding the train the conductor came to plaintiff and called for her ticket, which she presented, when he refused to accept it and compelled her to leave the car at Washington, and conducted her to an agent of defendant company to have the ticket fixed. The agent to whom the conductor conducted plaintiff said that he was not authorized to "fix" the ticket—that it could not be done until the next morning. Plaintiff told him that she was a stranger in Washington—without friends. The agent said that probably the other agent, when he came on duty, might possibly fix it up for her that day—to have a seat until he came. When the other agent came in, he beckoned plaintiff to the window "took his pencil and marked on the ticket, and said at the same time, 'Your ticket is all right, it will carry you to any place that is marked on here. Your train will leave this evening at 4:05.'" Plaintiff gave an account of her condition and experience while waiting for the train, which she took, reaching Parkersburg the following morning at about 3 o'clock. Defendant demurred to the declaration, saying:

"For specification of the grounds of its demurrer, this defendant alleges that the ticket declared upon in the count of plaintiff's amended declaration does not, upon its face, conform to the contract of carriage set up by the plaintiff. As between the conductor and the passenger, who is the plaintiff here, the ticket declared upon and filed as a part of the declaration is conclusive evidence of the passenger's right to ride and the extent of that right. The ticket declared upon shows, upon its face, that there was no destination indicated and, therefore, there being no allegation that the conductor used more force than was necessary in ejecting the plaintiff from the Baltimore & Ohio train, the ejection was not wrongful or tortious, and the plaintiff's action in tort cannot be sustained as matter of law. The face of the ticket not entitling the passenger to ride to any destination on the Baltimore & Ohio Railroad, it was the right and duty of the conductor to eject her, using no more force than necessary, and the plaintiff cannot sustain an action in tort for the ejection. Any action the plaintiff may have against the defendant must be by suit for damages for the breach of the contract made by the ticket agent at Newport News, who failed to deliver her a ticket to Parkersburg."

It will be convenient to dispose of the question raised by, and argued upon, the demurrer, before discussing the exceptions pointed to the rulings of the lower court during the trial. Defendant's contention is thus clearly stated in the brief:

"The ticket being invalid upon its face, the ejection was not wrongful; therefore, plaintiff's declaration sounding in tort for the wrongful ejection cannot be maintained. She has mistaken her form of action which is for breach of the contract of carriage actually made and for failure to deliver her a true token or ticket conforming to the contract made."

The court overruled the demurrer, and for this ruling defendant makes its first assignment of error.

Counsel for defendant frankly conceded that, if his proposition that the ticket given to plaintiff by the agent at Newport News was invalid could not be maintained, the demurrer was properly overruled. This invites an examination of the question whether the ticket was so manifestly invalid that it conferred upon plaintiff no right to be treated as a passenger or to be carried to Parkersburg. The ticket was properly stamped, showing the station at which it was issued. There could, therefore, be no suggestion that it had come into the possession of plaintiff through any other than a lawful channel. It was not mutilated. The date was the same day upon which it was tendered. It contained unmistakable evidence that it had been recognized by the baggage man at Newport News, and that the plaintiff had received a check for her baggage—it was "punched" showing that the officer on the boat had recognized it as valid, and that the gateman at Baltimore had passed plaintiff into defendant's station upon it. The ticket contained the names of stations over defendant's road beyond Parkersburg, as far as Cincinnati. The only respect in which there was any ambiguity, therefore, was the failure to "punch" the station to which plaintiff was entitled to be carried. Her claim that she was entitled to go to Parkersburg was not contradicted by any printed or written words on the ticket. It must have been apparent to any person of reasonable intelligence that the agent had neglected to "punch" the station to which plaintiff had paid her fare. In this respect the case differs from those cited by counsel or found in the reports.

Conceding the soundness of the rule that, as between the conductor and the passenger, the ticket is conclusive evidence of the contract with the company and of the extent of the passenger's right to remain on the car and pursue her journey, it is manifest that the conductor could not arbitrarily, or without at least a reasonable effort, by an inspection and resort to such sources of information as the ticket contained, ascertain the terms and provisions of the contract made with defendant, refuse to receive it and expel her from the car. It is well settled that the company may make and enforce reasonable rules prescribing and regulating the conditions upon which persons may become passengers and determining their right to remain on the cars and be carried to their destination. There is no evidence in this record showing any rule of defendant company prohibiting the conductor from accepting the ticket as presented; on the contrary, it is conceded that another conductor, on the same day, accepted the ticket without being "punched," and carried plaintiff over the same route pursued by the first train to Parkersburg. The only change made on the ticket was a slight pencil mark made by an employé of the company who, it seems, had no power to change or "fix it." Conceding that the conductor was under no obligation to accept, as true, plaintiff's statement that she paid \$13.75, the fare from Newport News to Parkersburg, or to resort to any other source for explanation of the ambiguity, than was indicated by the ticket itself, we yet think that the ticket contained, upon its face, information which any reasonable man, under the circumstances, would promptly, and without hesitation, have resorted to and accepted as conclusive evidence of the extent of plaintiff's right to travel on the train. The letters "B. C." punched through the ticket, were plain and of unmistakable meaning. It is attached to, and made a part of, the declaration. It is but a reasonable construction of the ticket to treat the check as a part of the evidence of the contract of carriage and to construe them together. The contract to carry the plaintiff included the carriage of her baggage to the same point, and that this was evidenced by the check referred to on the ticket and limited to the destination of the passenger was well known to the conductor. The law imposed upon the defendant the duty to give to plaintiff, upon payment of the prescribed fare, a ticket for herself and check for her baggage, which entitled her to all of the rights and privileges of a passenger. The possession of the check is evidence that she was entitled to go to Parkersburg as a passenger. *Moore on Carriers*, 548. If, by reason of the negligence of defendant's agent, the ticket was ambiguous or uncertain, it was the duty of the conductor to resort to any source of information on the ticket to explain the ambiguity. "When, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company issuing the ticket, and this probability is so strong that the conductor should, under the circumstances, investigate further before ejecting the passenger," the ticket cannot be said to be invalid. *Kreuger v. Ry. Co.*, 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487.

An examination of the decided cases, cited by counsel, discloses

facts distinguishable from those found in this record. In *Poulin v. Canadian Pac. R. R. Co.*, 52 Fed. 147, 3 C. C. A. 23, 17 L. R. A. 800, Judge Taft says:

"The plaintiff, before he went aboard the train from which he was ejected, discovered that the agent had made a mistake, and that he had not delivered him a ticket which, on its face, entitled him to return from Quebec to Detroit."

The plaintiff relied upon the statement of some person in the office of the ticket agent that the conductor would understand the mistake and make it all right. While the learned judge, writing for a majority of the court, states the rule that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company, plaintiff was not permitted to recover because of his contributory negligence. He said:

"As the conduct of the plaintiff, in attempting to ride on a ticket which he knew did not give him a right to do so was, in our view, negligence in law, the fact that the conductor was negligent could not affect the proper standard of care on the part of the passenger."

Mr. Justice Brown dissented:

In *Railroad Co. v. Hill*, 105 Va. 730, 54 S. E. 872, 6 L. R. A. (N. S.) 899, plaintiff applied to the defendant's agent at Clinchport for a ticket to Appalachia. He paid the correct fare, but the agent, by mistake, gave him a ticket to Duffield, an intermediate point. He put the ticket in his vest pocket and boarded the train. The conductor took up the ticket and put a check in plaintiff's hat, which indicated that he was entitled to ride to Duffield. When the cars reached that station, plaintiff did not leave the train—the conductor demanded that he pay his fare—which plaintiff refused, telling the conductor that he had bought a ticket to Appalachia. He was ejected and sued therefor. The court held that he was not entitled to sue in tort for the ejection, but was entitled to sue for a breach of the contract—the mistake made by the agent in giving him a ticket to Duffield instead of Appalachia. Here there was nothing on the ticket to indicate that a mistake had been made by the agent. Plaintiff simply had a ticket to one station and demanded that the conductor accept his statement—that he had paid for one to another station. The distinction between that case and the one before us is clearly stated in the language used by the court in *Frederick v. Marquette, etc., R. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, quoted with approval by Mr. Justice Buchanan:

"How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company when a ticket is purchased and presented to him? Practically there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger, contradicted by the ticket."

Here, the statement by the plaintiff is not contradicted by the ticket—but, in the light of the check to which the ticket refers and which the conductor could, for the asking, have seen, is fully corroborated. In *Texas & P. Ry. Co. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 852, the ticket was lost. It is true that, there the passenger offered to identify her trunk and show that it had been checked to Dallas, the point to

which she had purchased a ticket. The court held that the conductor was under no obligation to examine it. The reasoning of the opinion is not very satisfactory, and not applicable to the conditions found in this record. In *Shelton v. Erie R. R. Co.*, 73 N. J. Law, 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, the passenger presented a limited ticket which, by its terms, had expired. The agent, by mistake, gave the passenger a limited, whereas he paid for and was entitled to an unlimited, ticket. The court enforced the rule of conclusiveness of the ticket as between the passenger and the conductor holding that the action should have been for breach of contract and not for the expulsion from the car. There was nothing on the ticket to show, or suggest, that a mistake had been made. As in the other cases, the statement of the passenger was a clear contradiction of the ticket. In *Hufford v. Grand Rapids & Ind. Ry. Co.*, 53 Mich. 118, 18 N. W. 580, the ticket was invalid, and the passenger relied upon the statement of the agent from whom he purchased it—in which statement he was mistaken. Cooley, C. J., says:

"If, when the passenger makes the assertion that he has paid fare through, he can produce no evidence of it, the conductor must, at his peril, concede what the passenger claims or take all the responsibility of a trespasser if he refuses, etc. \* \* \* But we are all of the opinion that, if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car."

This case, upon a new trial, was again before the Supreme Court (64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859) upon plaintiff's appeal. The judgment was again reversed, Sherwood, J., saying:

"When the plaintiff told the conductor, on the train, that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures or other marks. All sorts of people travel upon the cars; and the regulation and management of the company's business and trains which would not protect the educated and uneducated, the wise and the ignorant alike, would be unreasonable indeed."

Without undertaking to reconcile the two opinions, we think that the language quoted is in accordance with sound reason, and, therefore, good law. In *Erie R. R. v. Winter*, 143 U. S. 60; 12 Sup. Ct. 356, 36 L. Ed. 71, the controversy grew out of the failure of the first conductor to whom the passenger presented his ticket to give him a "stop over" check at an intermediate station—the agent selling the ticket had informed the passenger that he could stop at such station by informing the conductor that he wished to do so. The conductor, upon being informed that the passenger wished to stop over, said he would "fix him all right" and punched his ticket, returning it to the passenger, who stopped over at the intermediate station and, upon boarding the train to complete his journey to the station for which the ticket called, presented it to the conductor who refused to accept it and demanded fare, which the passenger refused to pay and was ejected from the car. The contention was made that the ticket was the only and conclusive evidence of the contract of carriage. Mr. Justice Lamar said:

"While it may be admitted, as a general rule, that the contract between the passenger and the company is made up of the ticket which he pur-



phases and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket seller from whom he purchased his ticket is inadmissible, as going to make up the contract of carriage and forming a part of it"—citing *Hufford's Case*, *supra*.

It is further said:

"Under the circumstances of the case, as testified to by the plaintiff, the conductor of the first train was derelict in his duty in not providing the passenger with a stop-over check when the latter stated to him that he desired to stop off at Olean (as he had a right to do) if such check was necessary to enable the passenger to complete his journey to Salamanca."

We hold that the ticket, upon its face, afforded sufficient notice to the conductor that a mistake had been made by the agent selling it, to impose upon him the duty to make a reasonable effort to ascertain the truth before resorting to the harsh measure of removing the plaintiff from the car and leaving her, a stranger, in a large city without any care whatever for her safety and welfare. While he may not have so intended, he inflicted upon her, by his action, intense suffering, humiliation, physical pain, and mental anxiety. We hold that she was rightfully on the car and entitled to pursue her journey.

[2] We are further of the opinion that, if her right be measured by the rule in respect to the form of action contended for by defendant—that is, if by the negligence of the agent selling the ticket and without any fault on her part, she was induced to believe, and did believe, that he had, as was his duty, given her a valid ticket, whereas, in truth, the ticket was invalid—the conductor, in ejecting her from the car in the manner testified by him, was guilty of a tort, and defendant is liable for all such damages as proximately flowed therefrom. 6 Cyc. 565 (Note). In *P. C. C. Ry. Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. 712, 60 Am. St. Rep. 706, it is said:

"When, by the fault of an agent of the company a passenger takes the wrong train or is without a ticket, or (has) one imperfectly or erroneously stamped, or for any similar reason is ejected by the conductor of the train, in pursuance of the rules of the company, it is liable to him as for a tort."

So, after stating the rule contended for by defendant, it is said:

"The weight of authority in the courts, state and national, however, now is to the effect that the passenger has a right to rely upon the acts and statements of the ticket agent or conductor and that, if expelled from the train when he had acted in good faith and is without fault, the carrier will be liable in damages for such expulsion, whether the action is brought for a breach of the contract or solely for the tort of the conductor; that it is immaterial that the different acts were by different agents of the carrier; that its liability is the same, notwithstanding, for its own convenience, it has intrusted the management of its trains to different conductors. \* \* \* When a passenger has purchased a ticket from a railroad agent, purporting to entitle him to passage to a particular place, and has undertaken his journey therefor, and there is nothing on the face of the ticket and no prior knowledge or notice of the rules of the company, which would make such a ticket invalid, brought home to the purchaser, he is rightfully a passenger on the train, and the company is liable in an action to recover damages for his ejection." *Moore on Carriers*, 742, 743.

In *Northern Pac. R. R. Co. v. Pauson*, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730 (9th Cir.), Hawley, District Judge, after discussing the conflicting views of the courts and citing those cases which hold that, when the agent has made a mistake in giving the passenger a ticket he is entitled to sue for the ejection, said:

"These cases, as well as the others previously referred to, all proceed upon the broad ground that the passenger was wholly without fault; that he had done all that could reasonably be required of him to do; and that the railroad company, by the mistake or carelessness of its agents or conductor was itself at fault. This is the underlying principle of all the well considered cases upon this subject. This principle is fair to both parties. It is sound, reasonable and just."

In *Murdock v. Boston, etc., R. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, it is said:

"The plaintiff had a right to act upon the explanation given to him at the time when he bought his ticket. The mistake was that of the ticket seller, in supposing that the punched holes signified that the ticket had been used only to Chester, whereas in fact, according to the defendant's rules for the instruction and guidance of conductors, they signified that it had been used to Pittsfield, a station farther on. The offer of the conductor to give a receipt to the plaintiff for the additional fare which he demanded, stating the circumstances under which it was paid, so that the plaintiff might get back the money, if it should be found that his account of the purchase of the ticket is true, though showing good faith on the part of the conductor did not have the effect to make it the legal duty of the plaintiff to pay the additional fare."

The action was for the tort in the ejection of plaintiff from the car.

It is contended that, whatever may be the rule in other courts, state or federal, the Supreme Court of Virginia, the state in which the contract was made, has held that, in such cases, the passenger's cause of action is for breach of the contract and not in tort; that this court should be governed by this decision. In the view which we take of this record the case is distinguished from *Hill's Case*, *supra*, and that, therefore, no conflict between our conclusion and the conclusion of the court in that case is presented. We are further of the opinion that the rule of comity invoked and conceded does not apply.

[3] The character of plaintiff's legal right and defendant's liability is not one of local law or of practice and procedure, but is controlled by the general principles of substantive law, and, in such cases, the federal courts are not bound by the decision of the state court in which the contract is made or the cause of action accrues. Mr. Justice Field, in *Myrick v. Mich. Cent. Ry. Co.*, 107 U. S. 102, 109, 1 Sup. Ct. 425, 431, 27 L. Ed. 325, says:

"What constitutes a contract of carriage is not a question of local law upon which the decision of a state court must control. It is a matter of general law upon which this court will exercise its own judgment." *Chicago v. Robbins*, 67 U. S. 418, 17 L. Ed. 298.

No question is presented here respecting the validity of the contract or its construction—it is conceded that defendant entered into a valid contract to carry plaintiff from Newport News, Va., to Parkersburg, W. Va. The sole question is whether, upon failure of defendant's agent to deliver to the plaintiff, as was his duty, a proper token or evidence of such contract, the plaintiff for the injury which resulted

therefrom is confined to an action for breach of the contract or may sue in tort for the wrongful conduct of its conductor. No case is called to our attention in which the Supreme Court of Virginia has passed upon, or discussed, a case involving facts essentially similar to those presented in this record. The Hill Case, as we have pointed out, presents a very different state of facts. It is true that it was held in that case that if the ticket did not, by reason of a mistake of the agent, entitle the passenger to go to the station claimed by him, and upon his refusal to pay the fare was ejected from the car, he could not sue in tort. We entertain for the opinion of the Supreme Court of Virginia profound respect, and would hesitate to depart from a conclusion reached by that learned and careful court, upon the same or essentially similar facts as those presented to us. In the decision of this case we do not find it necessary to do so. However, in the light of the conflicting conclusions of courts of eminent respectability and learning treating the ticket as void or a "ticket to nowhere," we incline, very decidedly, to concur with those courts which hold that the company is liable for a breach of duty resulting in injury to a passenger by reason of the mistake or negligence of either of its agents with whom the passenger is required to deal in respect to the transaction in which the several agents are concerned.

[4] While, as conceded, a railroad company may make rules for the guidance of its several employes engaged in a common service, binding upon them, it may not thereby change the standard and measure of duty imposed by the law, which it owes to the public or the remedy for breach thereof. If, by the negligence of the agent, a passenger is given an invalid ticket, and without fault on his part is thereby led to believe, and does in fact believe, that a valid ticket had been given him and in good faith acts upon that belief, we fail to see how, if he sustain injury therefrom at the hands of some other agent of the company in the performance of the duty of carriage, his remedy or measure of recovery can be affected by some rule of the company, unknown to him, prescribing the respective duties of its agents. The passenger deals with the company, which owes him the duty, upon application to the proper agent and the payment of the prescribed fare, to furnish him a proper ticket and, in pursuance thereof, to carry him safely to his destination; he looks to the corporation—the common carrier and not to its employes—to protect his rights and redress his wrongs without regard to rules made for its internal management. Plaintiff's case, upon the uncontradicted testimony, is a striking illustration of the injustice of any other rule. Except in respect to the degree of consideration shown for the feelings of the plaintiff—rudeness of manner, etc.—the conductor does not, in any essential respect, contradict the plaintiff's testimony in regard to what passed between them on the car, the manner of her removal and what occurred thereafter, until he left her in the depot in Washington. In our opinion, without attributing to him any rudeness or a wanton disregard of plaintiff's rights and feelings, his conduct was grossly negligent and inconsiderate. In the aspect of the testimony, most favorable to the defendant, plaintiff has a good cause of action in tort for her wrongful ejection

from the car at Washington, and defendant is liable for all damages which proximately flowed therefrom. What we have said disposes of the demurrer.

[5] The third assignment of error is pointed to the refusal of the judge to permit defendant to use, on cross-examination, a written statement made by plaintiff, unless plaintiff was allowed to show that the statement was made as a part of negotiations for a compromise. We do not perceive any error in this ruling. The time, place, and circumstances under which a statement is made are always relevant as a part of the *res gestæ*.

[6] We find no error in the ruling of the judge limiting the extent of the cross-examination of the plaintiff. Full and ample latitude was afforded defendant to bring out, upon cross-examination of plaintiff, all of the material facts regarding her condition, cause and effect of her injuries. In his sound discretion, which we think was wisely exercised, the judge placed a reasonable restriction upon counsel in this respect. This was within his discretion and not reviewable unless abused. We have carefully examined the assignments of error in regard to the ruling of the court upon the admission of evidence and other incidents of the trial and find in them no prejudicial error. Defendant moved to strike out certain parts of the testimony and submitted prayers in regard to certain elements of damage to which plaintiff claimed she was entitled, which practically amounted to a demurrer to the evidence in that respect. They were so treated in the argument before us. We have carefully examined the testimony, and are of the opinion that there was both competent and sufficient evidence, in that respect, to be submitted to the jury to sustain her allegation as to the extent and character of the special injuries sustained by her. For reasons appearing upon the record, we do not deem it necessary or proper to discuss this testimony. No legal principle is involved. The court carefully instructed the jury in regard to the doctrine of proximate cause and its application to the testimony in this case. The questions involved were delicate in their character and of admitted scientific difficulty—the physicians introduced by both parties explained to the jury fully the conditions and probable consequences flowing from the situation in which plaintiff was placed by the conduct of the conductor. The jury had the benefit of their opinions based upon facts and physical conditions in regard to which there was but little contradiction. We concur with the learned and careful judge, who tried the case, in the opinion that the verdict should not be disturbed.

Upon an inspection of the entire record, with the aid of the enlightening arguments and briefs of counsel, we do not find any error entitling defendant to a new trial. The Merchants' & Miners' Transportation Company was eliminated from the record in the court below. The judgment must be affirmed.

## LEHIGH VALLEY R. CO. v. UNITED STATES.

PHILADELPHIA &amp; R. RY. CO. v. SAME.

BETHLEHEM STEEL CO. v. SAME.

(Circuit Court of Appeals, Third Circuit. June 13, 1911.)

Nos. 21, 22, 23.

## 1. CARRIERS (§ 30\*)—INTERSTATE COMMERCE ACT—SCHEDULES OF RATES—"TERMINAL CHARGE"—DEMURRAGE—"TRANSPORTATION."

Demurrage charged for the detention of cars in loading or unloading is a terminal charge, required to be shown by the schedules of rates filed and published by an interstate railroad company by the terms of the interstate commerce act of February 4, 1887, c. 104, §§ 1, 6, 24 Stat. 379, 380 (U. S. Comp. St. 1901, pp. 3154, 3156), as subsequently amended by Act June 29, 1906, c. 3591, §§ 1, 2, 34 Stat. 584, 586 (U. S. Comp. St. Supp. 1909, pp. 1150, 1153), which define transportation as including all the instrumentalities and facilities of shipment and all services in connection with the receipt, delivery, and handling of property transported, and require the filing and publishing of schedules showing all the rates, fares, and charges for transportation, stating separately all terminal charges.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7075-7076.]

## 2. CARRIERS (§ 38\*)—VIOLATION OF INTERSTATE COMMERCE ACT—DEMURRAGE CHARGES.

Any departure by an interstate railroad company from the demurrage charges fixed by its filed and published schedules constitutes a misdemeanor under the Elkins act of February 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1909, p. 1138).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.\*]

## 3. CARRIERS (§ 38\*)—PROSECUTION FOR GIVING CONCESSION IN VIOLATION OF INTERSTATE COMMERCE ACT—DEFENSES.

That demurrage charges fixed by the rate schedules of interstate railroad companies in a certain district were discriminatory as between a shipper located in such district and competitors placed in other districts and governed by different rates is no defense to a prosecution of a railroad company or the shipper for granting or receiving a concession by a cancellation of such charges, the only legal mode of correcting the discrimination being by a change in the schedules on proper notice or under authority from the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 38.\*

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to 94 C. C. A. 230.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Criminal prosecutions against the Lehigh Valley Railroad Company the Philadelphia & Reading Railway Company, and the Bethlehem Steel Company. From a judgment of conviction in each case, the defendants bring error. Affirmed.

For opinions below, see 184 Fed. 543, 546.

John G. Johnson, for plaintiffs in error.

J. W. Thompson, for the United States.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before LANNING, Circuit Judge, and YOUNG and McPHERSON, District Judges.

YOUNG, District Judge. All the defendants were indicted under the acts of Congress regulating commerce, as amended by the act of February 19, 1903, known as the "Elkins Act," and as amended by the act of June 29, 1906, known as the "Hepburn Act," in the following indictments:

The Lehigh Valley Railroad Company, hereinafter called the Lehigh, at No. 23 and No. 24, March sessions, 1910. At No. 23 in 97 counts for failure to observe the tariff in force from April 1, 1907, by canceling and remitting the demurrage charges upon 97 different cars delivered in interstate commerce by the Lehigh to the Bethlehem Steel Company, hereinafter called the Steel Company; and at No. 24 in 58 counts, in the 29 odd-numbered counts (from 1 to 57 thereof) in granting a concession of one day's free time in excess of the 48 hours' free time specified in the tariff filed and then in force, whereby the demurrage charge was reduced by \$1 on each car, with respect to 29 different cars delivered to the Steel Company between October 1, 1907, and November 12, 1907, and in the 29 even-numbered counts (from 2 to 58, inclusive) with failure to observe the tariff in force as to the cars set out in the odd-numbered counts.

The Philadelphia & Reading Railway Company, hereinafter called the "Reading," was indicted at No. 25 and No. 26, March sessions, 1910. At No. 25 in 63 counts for failure to observe the tariff then in force by canceling and remitting the demurrage charge on 63 different cars delivered to the Steel Company between April 1, 1907, and October 9, 1907; and at No. 26 in 24 counts, in the odd-numbered counts (from 1 to 23, inclusive), with granting a concession of one day's free time in excess of the 48 hours specified in the tariff, whereby the demurrage charge was reduced by \$1 on 12 different cars delivered to the Steel Company between October 9 and October 24, 1907, and in the 12 even-numbered counts (from 2 to 24, inclusive), with a failure to observe the tariff in force as to the cars set out in the odd-numbered counts.

The Bethlehem Steel Company was indicted at No. 33 and No. 34, March sessions, 1910. At No. 33, with soliciting and receiving the concessions from the Reading specified at No. 25; and at No. 34, with soliciting and receiving the concessions from the Lehigh specified at No. 23.

By agreement of counsel the six indictments were tried together, and the jury returned a general verdict of guilty upon each of the indictments, and the defendants were respectively sentenced by the court in the first count of each indictment to pay a fine of \$20,000; the Lehigh on the first counts of No. 23 and No. 24, the Reading on the first counts of No. 25 and No. 26, and the Steel Company on the first counts of No. 33 and No. 34. At the trial, as shown by the record, there was no dispute as to the cars, as to the amount of the demurrage on each car, or the time when it accrued, or the aggregate

amount charged as having accrued and been canceled and remitted. The record also shows the following facts as undisputed:

During the period covered by the indictments, the Lehigh and the Reading were members of the Northeastern Car Service Association, hereinafter called the "Association," composed of certain railroads engaged in interstate commerce, and operating within a certain territorial division of northeastern Pennsylvania. The Steel Company was also within this territory. The Association, through its Car Demurrage Bureau, hereinafter called the "Bureau," had charge of the business of supervising the application of the demurrage rules, auditing demurrage accounts, and adjusting claims for improper demurrage charges collected by the railroad companies within its territory. This was accomplished by the freight agents of the different railroads reporting to the manager of the Bureau the arrival, placing, and release of cars subject to demurrage rules. The freight agents also reported to the accounting departments of their respective companies, and under the supervising of the manager of the Bureau collected the earnings for the companies in accordance with the tariffs and rules on file with the Interstate Commerce Commission, and it was the duty of the manager of the Bureau to see that these tariffs and rules were observed and carried out. The Association adopted uniform rules for demurrage charges which applied to all the railroads within its territory. After the Hepburn act went into effect in August, 1906, the Association adopted car service rules, and on August 27, 1906, the Lehigh filed with the Interstate Commerce Commission these rules as its original tariff of charges for demurrage in the transportation of freight within the Association's territory, and on November 23, 1906, the Reading filed the same rules, and by those rules it was provided that a charge of \$1 per day should be made "for car service and use of track on all cars not unloaded within 48 hours after arrival, not including Sundays and legal holidays, the time to be computed from 7 a. m. of the following day on cars arriving after 7 a. m., and from 12 noon of the following day on cars arriving after 12 noon." While these rules were in effect, the Lehigh and Reading, the former on August 27, 1907, and the latter on August 26, 1907, filed new rules, marked, respectively, 2208 and 200, with the Interstate Commerce Commission, which were to take effect on October 21, 1907, and which, when effective, would cancel the rules then in force. The only material change was that the 48 hours' free time was to be computed in every case from 7 a. m. of the day following the arrival of the car instead of from 7 a. m. and 12 noon, respectively.

It appears the Association then adopted rules on October 9, 1907, by which the 48 hours' free time should not only be computed from 7 a. m. of the day following placement, but that industrial plants performing their own switching would have an additional allowance of 24 hours for switching. This rule, marked "Supplement No. 1 to Lehigh Tariff," was filed with the Interstate Commerce Commission by the Lehigh on October 10, 1907, to become effective November 12, 1907, and by the Reading on September 21, 1907, marked "Supplement No. 1 to the Reading Tariff," and to become effective on

October 24, 1907. On October 9, 1907, the first vice president of the Lehigh and the general manager of the Reading notified Thomason, the manager of the Association, and under his protest, that the rule allowing 24 hours' additional free time to those plants doing their own switching, and which would not become effective as to the Lehigh until November 12, 1907, and as to the Reading until October 24, 1907, would be put into effect October 9, 1907, thus giving 24 hours' additional free time to the Steel Company from October 9, 1907.

On April 15, 1908, the Car Service Association adopted what were known as the "National Car Service Rules," which by an order filed by the Reading as order 578 became effective May 15, 1908, and canceled the rules theretofore in effect. The same rules were put into effect June 15, 1908, by the Lehigh by a tariff marked "Supplement No. 2 to Tariff 2208," which superseded the previous rules.

The evidence shows that the outstanding demurrage bills from January, 1901, to August, 1906, owing by the Steel Company to the Lehigh, were \$26,539, and to the Reading, \$23,424. These amounts were canceled on the ground that they were incorrect and the records unreliable, but as they accrued before the Hepburn act they were not made the subject of indictment. From September, 1906, after the Hepburn act became effective, to June 1908, exclusive of the period from April 1, 1907, to October 9, 1907, demurrage charges had accrued from the Steel Company to the Lehigh amounting to \$44,125, and from the Steel Company to the Reading amounting to \$29,275.

On May 15, 1907, the Reading demurrage charges against the Steel Company were transferred from the Northeastern Association to the Philadelphia Association, and on June 15, 1907, the Lehigh demurrage charges were transferred from the Northeastern Association to the Philadelphia Association. It appears from the evidence that from time to time prior to July 24, 1908, the manager of the Bureau and the Lehigh and Reading had requested payment of the demurrage charges from the Steel Company, and finally on July 24, 1908, the manager of the Association wrote the Lehigh and the Reading that the demurrage charges had been reduced from \$73,400 to \$7,391; the Lehigh from \$44,125 to \$4,284, and the Reading from \$29,275 to \$3,107.

In August, 1908, the manager of the Association notified the Steel Company of the adoption of the car service rules and that the same had been made retroactive as to the Steel Company, and agreed under authority of the Lehigh and Reading to settle all demurrage bills against the Steel Company, reducing the Lehigh charges from \$44,125 to \$4,284, and the Reading from \$29,275 to \$3,107. On December 4, 1908, the Steel Company paid to the Lehigh the sum of \$4,284 by its check to the order of the Lehigh, and to the Reading \$3,107, by its check to the order of the Reading. It clearly appears from the evidence that there was included in this settlement all demurrage charges accrued from the Steel Company to the Lehigh and Reading from September, 1906, to June, 1908, except for the months of April, May, June, July, August, and September and to October 9, 1907.

An inspection of the indictments shows that the charges set out in indictment 24 against the Lehigh, and in indictment 26 against the



Reading, were for the cancellation of charges included in the settlement of December 4th. It was found that the charges for the period from April 1, to October 9, 1907, which were assumed to have been in the settlement of December 4th, were not included, and on December 10, 1908, the manager of the Association recommended to the Lehigh a cancellation of the Lehigh charges therein stated to be \$40,611, for the period from April 1 to October 9, 1907, to which the Lehigh answered 'December 23, 1908, approving such cancellation and on December 29, 1908, these charges were canceled. It also appears from the evidence that the demurrage charges due by the Steel Company to the Reading were \$15,635 for the period from April 1 to October 9, 1907, and that these were recommended for cancellation by Fraser, the inspector of the Association, in his letter to Challenger, included in which was his analysis showing the complete cancellation of the charges. The evidence also shows that no effort has since been made to collect these charges and that they were abandoned. An inspection of indictment No. 23 against the Lehigh and No. 25 against the Reading shows that they were based upon demurrage charges accruing from the Steel Company between April 1, 1907, and October 9, 1907, and which it is alleged were settled December 29, 1908. The two indictments, 33 and 34, against the Steel Company, were for receiving these cancellations from the Lehigh and the Reading respectively.

All the foregoing facts were either admitted during the trial or are abundantly proved by the evidence submitted by the government.

It thus appears that the Lehigh and Reading were engaged as common carriers in transporting property for the Steel Company in interstate commerce, and that certain rules had been adopted by the railroads governing the demurrage charges, and that these were filed with the Interstate Commerce Commission, and that they were well known to the Steel Company. It also appears that beginning in January, 1901, and up to June, 1908, charges in favor of the Lehigh had accrued from the Steel Company to the amount of \$113,360, and to the Reading to the amount of \$68,263, and although demand had been made from time to time upon the Steel Company for the payment of all of these charges, they had not been paid. During the summer of 1908, the Lehigh and Reading, through the manager of the Association, took up with the Steel Company the settlement of these charges and the evidence clearly shows that the Steel Company was soliciting the cancellation, and that the Lehigh and Reading were endeavoring to make a settlement satisfactory to the Steel Company. There cannot be a particle of doubt under the evidence that after these charges had accrued the railroads on the one hand and the Steel Company on the other were endeavoring to effect a settlement by which the charges would be canceled. With this end in view the railroads first canceled all the charges accruing before the passage of the Hepburn act and up to September, 1906. They then attempted to cancel all the charges from September, 1906, to June, 1908, and on December 4, 1908, they finally settled all the charges of which they had knowledge at that time, and this they accomplished, first, by assuming that the change in the rules, which they had attempted to make

on October 9, 1907, without the 30 days' notice required by the act, was legal and effective, and by making the rules subsequently adopted retroactive, and by making certain allowances for conditions about the railroads and Steel Company not in any sense provided for by the rules and tariffs in force.

Immediately after the settlement of December 4, 1908, certain accounts of demurrage for the period from April 1st to October, 1907, which had been overlooked, were discovered, and thereupon the Lehigh, upon December 29, 1908, canceled these charges for that period, and as to the Reading the inspector of the Association recommended to the manager of the Association that these charges for that period were caused by the fault of the Reading and should not have been charged. No effort was ever made by the Reading to collect these charges, and the jury had sufficient evidence upon which to find that the Steel Company had demanded their cancellation and that the Reading had made the cancellation.

The cases were tried upon the theory that the railroads and the Steel Company had the right to adjust the demurrage charges, and the defendants insisted that the demurrage charges had been entered up against the Steel Company wrongfully, and that the Steel Company had consistently and persistently refused to pay them, and that finally the railroads having investigated the charges found that they had wrongfully charged the Steel Company, and that the adjustment was finally agreed upon by the railroads and the Steel Company, which was satisfactory to both, and which resulted in the cancellation set out in the indictment. It was contended by the government that the charges were correct and in accordance with the tariffs filed by the railroads, and that the railroads in making the settlement were seeking to make concessions demanded by the Steel Company under the guise of a settlement of disputed charges.

The court submitted to the jury, as bearing upon the guilt of the defendants, the question of fact raised by the evidence in order to determine whether the settlement was an honest correction of mistakes in the charges, or a means of granting and receiving concessions. The jury evidently found that the settlement was the means of granting concessions, and not the correction of honest mistakes, for they found the defendants guilty.

These cases may be disposed of by considering the numerous assignments of error as raising the following questions: (a) Do the acts regulating commerce require rules, tariffs, and schedules relating to demurrage charges to be filed with the Interstate Commerce Commission? (b) Can there be a prosecution for the violation of such rules, tariffs, and schedules? (c) Was there any error in the charge of the court?

[1] (a) That the commerce act requires that every common carrier engaged in interstate commerce shall file with the Interstate Commerce Commission, and publish and keep open for public inspection, all rates, fares, and charges, stating separately all terminal charges, and that such terminal charges include demurrage charges, is established (1) by the words of the act; (2) by the decisions of the In-

terstate Commerce Commission; and (3) by the rulings of the federal courts.

(1) Section 1 of the act to regulate commerce of February 4, 1887, as amended by subsequent acts, defines transportation as including, "all the instrumentalities and facilities of shipment or carriage \* \* \* and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Section 6 of the act of 1887, as amended by the act of 1889 and by the act of 1906, provides:

"That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation."

The section further provides that the schedules "shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Thus we see that by the language of the act transportation is defined to include terminal charges. It must be conceded that demurrage, being a charge for the detention of a car because of the use of the car and track until unloaded, is a terminal charge.

(2) It has been uniformly held by the Interstate Commerce Commission that demurrage charges are part of transportation, and are required to be filed with the Commission. "Beyond all possibility of doubt, therefore, the duty of regulating terminal charges when related to interstate transportation has been lodged with the Interstate Commerce Commission, and federal courts have so held." *Wilson Produce Co. v. Pennsylvania R. R. Co.*, 14 Interst. Com. R. 170, 174. "It does not appear to be necessary to do more than refer to the decision of the Commission in *Wilson Produce Co. v. P. R. R. Co.*, 14 Interst. Com. R. 170, in which it was held that the duty of regulating terminal charges, when related to traffic between states, has been lodged with the Commission, and cases therein cited." *Peale, Peacock & Kerr v. C. R. R. of N. J.*, 18 Interst. Com. R. 25, 33.

(3) The federal courts have so held. In *Michie v. New York, N. H. & H. R. Co.* (C. C.) 151 Fed. 694, Judge Lowell said:

"The phrase of the statute 'delivering, storage or handling' is broad enough to include demurrage."

In *United States v. Standard Oil Company* (D. C.) 148 Fed. 719, 722, Judge Landis said:

"The law requires the published tariff to show everything in the way of terminal regulations which in any way affects the cost of the service rendered by the carrier, and such published terminal charge is no less binding on the parties than is the tariff specified for the transportation." In *Interstate Commerce Co. v. Detroit, etc., Ry. Co.*, 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306, Mr. Justice Shiras said on page 645 of 167 U. S., page 990 of 17 Sup. Ct.: "It may well be doubted whether cartage, when furnished without charge, comes within the meaning of the phrase 'terminal charges,' or can be regard-

ed as 'a rule or regulation,' which in any wise 'changes, affects, or determines' any part or the aggregate of the rates, fares, and charges."

And after discussing the opinion of Judge Cooley and the report of the Interstate Commerce Commission continues:

"However, in a matter of this kind, much should be left to the judgment of the Commission, and should it direct, by a general order, that railway companies should thereafter regard cartage when furnished free as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers."

To the same effect is *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, where the present Chief Justice held that the moving of goods from the platform to the freight warehouse was a part of interstate commerce transportation. *Bowman v. Chicago, etc., Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *McNeill v. Southern Railway Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142. The railroad companies, the defendants in these cases, so regarded them and filed them with the Commission. To hold otherwise than that demurrage is part of transportation and part of the terminal charges would be to open the door to a railroad company to allow favored patrons to occupy the tracks and the cars for such demurrage charges as they chose. Transportation includes the hiring of the vehicle and the hauling of it to its destination. The rates are based to some extent upon the time the car is used and out of service to the railroad company, because if not unloaded it is still in use. It is not a penalty. In the ordinary use of a car the time of the journey measured by miles is calculated and considered as well as the cost of moving it in fixing the charges. When the journey is finished of course the cost of moving ceases, but the use of the car remains. The aggregate of the rates is therefore affected and clearly comes within the Hepburn act.

[2] (b) The tariff having been filed and published not to observe it is a misdemeanor. In *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, Mr. Justice White said:

"Thus, by section 1 of the act approved February 19, 1903, commonly known as the 'Elkins Act,' which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish 'the tariffs or rates and charges,' as required by the act to regulate commerce and the acts amendatory thereof, 'or strictly to observe such tariffs until changed according to law,' was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of section 1 it was provided as follows: 'Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of the act.'"

If, therefore, the terminal charges are part of the transportation, and if demurrage charges are included in the term "terminal charges," then clearly the failure to observe these tariffs and the soliciting and

receiving of concessions are misdemeanors for which a prosecution will lie.

[3] (c) Was there error in the charge of the court? The whole case turns upon whether or not the settlement was an honest settlement or one made for the purpose of allowing the cancellation of demurrage. The division of territory by which the Steel Company was put in one district and its competitors in another, the demurrage charges for the Steel Company not being as favorable as for others, its competitors, and were therefore discriminatory, cannot affect the case. If the charges were discriminatory, that matter could be rectified by an appeal to the Interstate Commerce Commission, or by making changes in the rules in accordance with the laws giving 30 days' notice, or such other notice as was required by the Interstate Commerce Commission, the authority resting in that Commission alone to grant a change of rules on less than 30 days' notice.

It is to be observed that the charges of concessions made by the railroads to the Steel Company, and which are made the subject of indictment, had accrued before any change was made in the rules. No concession is set forth in the indictment of a later date as to the Lehigh than October 23d, and as to the Reading, than October 18th, and yet no offer was made to change the rules until October 9th. But it is argued by counsel for plaintiff in error that:

"There was no evidence as against the Steel Company to sustain the averment that from either railroad company it did unlawfully, knowingly, and willfully solicit and receive a concession or a certain sum upon the amount of a demurrage charge by it due and payable."

This turns upon the knowledge and intent of the Steel Company in soliciting and receiving. It must be conceded it demanded the reduction of the charges and received it. Its contention was based upon the knowledge of the demurrage charges, and its refusal was based upon many conditions as to railroad tracks being torn up and the Steel Company's tracks being in a bad condition. But no allowance could be made for these things unless they were allowed by the Commission. In *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, supra, Mr. Justice White said:

"Concluding, as we do, that a shipper seeking reparation predicated upon the reasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce."

To the same effect is *Baltimore & Ohio R. R. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292. The rates were fixed by the tariff filed and could not be departed from. The law did not intend that the railroad and shipper could alter these charges, because that would do away altogether with the purpose sought by the act. It was known by the Steel Company what the charges were, and the law was violated by reducing those charges by the settlement between the railroads and the Steel Company, thus allowing the carrier and

the shipper to determine in each case whether the tariff should be observed or not.

Again, it is argued that there was not any settlement at all of certain demurrage charges specified in the counts upon which sentence was imposed. Under the first indictment, No. 23, the charges were based upon different transactions, different cars as to the Lehigh. The same is true as to indictment No. 25 as to the Reading. Settlement for these transactions was made December 29, 1908. Bethlehem received by this settlement, which it had demanded through its correspondence, the concessions included in the settlement. It clearly appears from the evidence that this settlement of December 29, 1908, included all demurrage charges from April 1, 1907, to October 9, 1907, and this carries with it indictment 33, based on indictment 25 of the Reading, and indictment 34, based on 23 of the Lehigh. This was a distinct settlement from the settlement of December 4, 1908, which included all charges from September, 1906, to June, 1908, except those from April to October, 1907.

We find no error in the charge. The case, as has been said, was tried upon the theory that, if the settlement was an honest one, the defendants were not guilty, and the court submitted it to the jury fully and fairly upon this theory. This was a more favorable view of the case than defendants were entitled to have presented to the jury under the facts of this case. If the rates were discriminatory they could be changed, and changed alone by an application to the Interstate Commerce Commission. If the conditions were such as to make the charges unjust, proper application could have been made, and made only to the Interstate Commerce Commission for an adjustment of the charges, but the Lehigh and the Reading being a law unto themselves changed the rules which were in force and applied them without the notice required by the act as to a portion of the charges, and made them retroactive as to others.

Under all the evidence in this case, the railroads and the Steel Company have violated the law, and they are clearly proved to have been guilty under the law as charged in the several indictments.

The judgments are affirmed.

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### WELLS FARGO & CO. v. POTTER.

(Circuit Court of Appeals, Third Circuit. June 13, 1911.)

#### No. 2.

#### 1. CARRIERS (§ 230\*) — ACTION FOR INJURY TO LIVE STOCK — QUESTIONS FOR JURY.

In an action for an injury to plaintiff's horses while being transported by defendant, where there was evidence that after they were placed in the car plaintiff's superintendent called the attention of defendant's agent to the insufficiency of the partitions in the car and requested that they be strengthened, which was refused, and that the horses were injured by reason of the insufficiency of such partitions, although contradicted,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made a case requiring the submission of the question of defendant's negligence to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

**2. CARRIERS (§ 230\*)—ACTION FOR INJURY TO LIVE STOCK—QUESTIONS FOR JURY.**

Evidence that the horses became frightened while passing through a tunnel, and broke down the partitions, that plaintiff's servants assisted in placing them in the car and accompanied them, and that they had lanterns which they might have lighted when the tunnel was reached, was not sufficient to establish contributory negligence as matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

**3. CARRIERS (§§ 207, 230\*)—CARRIAGE OF LIVE STOCK—CONTRACT—LIMITATION OF LIABILITY.**

Evidence that plaintiff and defendant's superintendent made an oral agreement by which defendant was to furnish a car of a certain kind at a stated time and place for the transportation of a number of horses, the rate also being agreed on, was sufficient prima facie to establish a completed contract, and, where defendant's agent obtained the signature of plaintiff's agent in charge of the horses when loaded to a written contract which limited the defendant's liability, it was not error for the court to instruct the jury, in an action for injuries to the horses, that if they found that the oral contract was made as testified to without any agreement for limited liability, or for any further agreement, plaintiff would not be bound by the written contract unless he ratified it, or his agent had actual authority to make it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 207, 230.\*]

In Error to the Circuit Court of the United States for the District of New Jersey.

Action at law by Robert H. McCarter Potter against Wells Fargo & Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Collins & Corbin (Gilbert Collins, W. W. Green, George S. Hobart, of counsel), for plaintiff in error.

Joseph Coult, Jr., for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. The defendant in error, plaintiff below, brought an action in tort against the plaintiff in error, defendant below, to recover damages for alleged injuries to plaintiff's horses, which the defendant had undertaken to carry from Andover Junction, in the state of New Jersey, to Sheepshead Bay, in the state of New York. It appears from the record that the plaintiff, prior to August 29, 1904, arranged with Mr. Crowe, superintendent of defendant at Jersey City, for a car in which to ship a certain number of horses, and that during the negotiations the rates and place and time of shipment were fixed.

On August 29, 1904, the plaintiff delivered 20 horses to the defendant at Andover Junction, and the same were received by the defendant and placed in a car provided. It appears that the plaintiff was at the car when the loading began, but left before it was completed; he

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

taking a train for New York. After the horses were placed in the car, but before the train started on its journey, O'Neill, agent for the defendant, presented to Claxton, superintendent for plaintiff, a written contract which was signed by both, and which contained a clause limiting the liability of defendant in case of injury to \$75 for each horse carried, and also providing against liability in the event of the injury arising from the action of the animals themselves.

During the transportation of the horses from Andover Junction to Sheepshead Bay, two of the horses were injured, as claimed by plaintiff, by the negligence of defendant company's employes in not having provided proper and sufficient partitions between the horses injured, and, as claimed by defendant, by the contributory negligence of plaintiff's employes in not properly attending the horses while passing through a certain tunnel whereby the horses became frightened and broke down the partition provided. It was further asserted by defendant that the injury to the horses resulted from the actions of the animals themselves.

The case was submitted to the jury by the trial judge with instructions that the jury were to find whether or not the defendant had been guilty of negligence which was the proximate cause of the injury. He also submitted to the jury whether or not there was a complete oral contract made before the written contract was signed by Claxton. The jury was also instructed that, if there was not a complete oral contract arising out of the negotiations between plaintiff and Crowe prior to August 29th, then these negotiations were but preliminary to the making of a written contract, and Claxton, by virtue of being in charge of the horses for shipment, had apparent authority to sign the written contract, and it would be binding upon the plaintiff, and he could only recover for the injury to the amount stipulated in the written contract; but that, if there was a complete oral contract made by plaintiff, then the doctrine of apparent authority would not apply, but the jury must be satisfied by the evidence that either the plaintiff himself sanctioned the making of the new contract or authorized Claxton to do so for him. The jury found a verdict for plaintiff in the sum of \$3,500 and added that they based their verdict upon the oral contract.

Counsel for defendant filed numerous assignments of error based upon the admission and rejection of evidence. These it is not necessary to consider in detail, because none of them are well founded or would be sufficient to call for a reversal of the case. The other assignments of error may be considered under three propositions: First, did the court err in submitting the case to the jury upon the question of negligence? Second, did the court err in refusing to direct the jury to render a verdict for defendant because of contributory negligence on the part of plaintiff's servants? Third, did the court err in instructing the jury that, if there was a complete oral contract, the plaintiff was entitled to recover the amount of damage proved by him, unless they found that (a) either the plaintiff had sanctioned the written contract made by Claxton as his agent, or (b) that Claxton



was his agent and was authorized to make a new contract in writing differing from the oral contract.

[1] First, as to the negligence of the defendant: The evidence on the part of the plaintiff was that on the morning of August 29, 1904, the horses were taken by the plaintiff's servants to the car at Andover Junction and placed in the car, defendant's agent O'Neill and other employes of defendant being there at the time, and that the attention of O'Neill was called by Claxton, plaintiff's superintendent, to the fact that one of the horses, the Diamond Jubilee colt, was a most valuable horse, and that the arrangements for its safe carriage were insufficient, specifying wherein they were insufficient, and suggesting the remedy by the procuring of additional boards to place in the partition between the horses, but that O'Neill refused to wait for the boards and informed plaintiff's superintendent that he was in charge of the shipment and that he would guarantee their safety. This evidence was corroborated by other of plaintiff's servants. The defendant's witness O'Neill contradicted this evidence; but there was no corroboration of his testimony. The plaintiff then having offered to show that the injury to the horses was caused by the insufficiency of the partition to keep the horses separated, whereby they were cut and bruised when they became frightened in the tunnel through which the train passed, this evidence, together with the evidence as to the insufficiency of the partition, made out a case to go to the jury, and the court would have erred in not submitting it to them. The evidence of the plaintiff, if believed, shows a clear case of negligence on the part of the defendant and warranted the jury in so finding.

[2] Second, as to the contributory negligence of the plaintiff: The only evidence tending to show contributory negligence was that the horses were placed in the car by plaintiff's servants, that they accompanied them on their journey, and that they were provided with lanterns which they should have lighted and had in the car so that the horses in passing from the light of day into the tunnel would not be in the dark and frightened. It would have been plain error for the court to have directed a verdict for the defendant upon this evidence. It is true the plaintiff's servants placed the horses in the car; but the evidence clearly warrants the finding that O'Neill, the agent of the defendant, was supervising their placement, and that the proximate cause of the injury was not the manner in which they were placed in the car, but was the insufficiency of the means used to secure their separation in case of fright or otherwise, after the attention of O'Neill was called to the insufficiency of the means used. True it is, also, that the plaintiff's servants accompanied the horses and had lanterns; but there was no such conclusive evidence that the injury was caused by any negligence of the plaintiff's servants, either in their attendance or failure to use the lanterns, as to justify the court in directing a verdict for defendant.

There was scarcely more than a scintilla of evidence of the contributory negligence of plaintiff's servants, and it well may be doubted if a verdict for defendant could have been sustained upon that evidence.

[3] Third, as to the contracts: The evidence of the plaintiff, if believed by the jury, shows that, prior to the date of shipment, the plaintiff and Mr. Crowe, superintendent for the defendant, met, and that it was arranged between them that defendant was to provide a certain kind of car for the transportation of a certain number of horses, that the rates were fixed at a certain sum, and that the car was to be at a certain place at a certain time for the loading of the horses. Nothing remained to be done in the making of a contract so far as plaintiff was concerned and nothing so far as defendant was concerned, except to reduce it to writing and limit the liability. None of these things were necessary for an oral contract. It was just as binding as a written one, and the limitation of liability was a matter which, if defendant desired, it was its privilege to have mentioned. The evidence was conflicting whether or not the understanding was that the contract should be reduced to writing and whether or not the limited liability was mentioned. Crowe said not only was the contract not completed, but that it was only a preliminary talk as to rates and the time of shipment, and that he told plaintiff there would be a limited liability. Plaintiff denied this, and the evidence was clearly for the jury. There was sufficient evidence of a complete oral contract, and the court did not err in submitting it to the jury.

Neither did the court err in instructing the jury that, if the oral contract was not complete, then Claxton, who was plaintiff's superintendent and in charge of the horses about to be shipped, had apparent authority to make the written contract. This was as favorable a presentation of the case as the defendant was entitled to have.

Nor was there error in the trial judge's instructions that if there was a complete oral contract, yet if plaintiff sanctioned the making of a contract in writing thereafter which varied the oral contract, or if Claxton had authority to change the oral contract by the written one, then the plaintiff could not recover more than the limited liability therein mentioned. This presentation to the jury was quite as favorable as the defendant was entitled to have.

A careful reading of the charge convinces us that there was no error in it, and that the case was fairly left to the jury under careful and adequate instructions. The verdict was not excessive. The evidence as to the value of the horses and the extent of the injury might well have justified a much larger verdict.

The judgment is affirmed.

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SECOND POOL COAL CO. v. PEOPLE'S COAL CO.†  
(Circuit Court of Appeals, Third Circuit. June 23, 1911.)

No. 8.

**1. NAVIGABLE WATERS (§ 24\*)—OBSTRUCTION BY WRECK—LIABILITY FOR INJURY CAUSED TO OTHER VESSELS—"OWNER."**

Respondent, a coal company, having in its possession a loaded coal flat moored to its float in the Allegheny river in Pittsburgh, with the right to retain it until it was unloaded, cast it loose during a flood to avoid

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

injury to its float and other vessels, and it sank some distance below. The place was not marked, and some three weeks later libelant's vessel ran into it and was injured. *Held*, that respondent stood in the place of the owner within the meaning of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), requiring the owner of any vessel sunk in a navigable channel to immediately mark the place and maintain the marks until it is removed or abandoned, and, it appearing that there had been no abandonment, that respondent was liable to libelant for the injury to its vessel.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 66; Dec. Dig. § 24.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5134-5151; vol. 8, p. 7744.]

2. ADMIRALTY (§ 88\*)—PLEADING—VARIANCE.

The rule obtains in admiralty, as in other cases, that the proof cannot avail a party further than it corresponds with the allegations of the pleadings, and that the decree must conform to the pleadings.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 627; Dec. Dig. § 88.\*]

3. NOTICE (§ 14\*)—PROOF OF NOTICE—TELEPHONE COMMUNICATIONS.

To establish notice by a telephone communication, the party relying upon such notice has the burden of establishing the identity of the person receiving the communication, and that it reached the party sought to be charged.

[Ed. Note.—For other cases, see Notice, Dec. Dig. § 14.\*]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Suit in admiralty by the People's Coal Company against the Second Pool Coal Company. Decree for libelant (181 Fed. 609), and respondent appeals. Affirmed.

H. O. & B. H. Evans and Lowrie C. Barton, for appellant.  
Reed, Smith, Shaw & Beal, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. The respondent, now the appellant, was engaged in the retail coal business upon the Allegheny river, and had in its possession a loaded flat of coal which it cut adrift from its float at Thirty-First street during high water to save such float and other boats. After being separated by respondent, it drifted a short distance down the river, and finally, on March 15, 1907, sunk in the channel of the river at Twenty-Fifth street, thereby obstructing navigation. Upon April 4, 1907, the libelant's now the appellee, steamboat W. C. Jutte, while proceeding down the river, ran upon the sunken flat and was damaged. The court below entered a decree against the respondent for the damage, and from this decree the present appeal was taken.

We approach the discussion of this case de novo because such is the rule in admiralty. The assignments of error raise the following questions: First. Was the respondent negligent in not marking the sunken flat? Second. Was the libelant guilty of contributory negligence?

[1] The first question suggests two inquiries: (a) What was the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

obligation of the respondent as the person in possession of the flat?  
(b) What was respondent's obligation to navigators as to the flat?

(a) Respondent, as shown by the evidence, was engaged in the retail coal business, and as such was accustomed to purchase the coal in flats, and, after unloading, to deliver the empty flat to the owner thereof. On March 15, 1907, the respondent being in possession of the flat in question, which had not yet been unloaded, finding the retention of the flat in the place where it then was to be dangerous to its float and other boats, turned it loose. There can be no doubt under this evidence that the respondent because of its purchase of the coal in the flat coupled as it was with the right to retain the flat until unloaded became the bailee of the flat until redelivered to the bailor, and that the respondent therefore and thereby stood in the place of the owner so far as the duty of preventing the flat from becoming an obstruction to navigation was concerned.

(b) The respondent being then the bailee of the flat, and it being its duty to safely keep it, the inquiry first arises whether the cutting of it loose made the respondent liable for the damage subsequently caused to the libellant. After careful examination of the evidence which shows that the flat was cut loose at the time when its retention because of the high water made it dangerous, we are satisfied that the conclusion of the learned judge of the District Court was correct, and that there was no negligence or want of care in cutting the flat adrift which would make the respondent liable; but, the respondent being in possession of the flat and having turned it adrift, was bound to see that it did not become a menace to navigation. Section 15, Act March 3, 1899, c. 425, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), provides:

"That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft, or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede or endanger navigation. And whenever a vessel, raft or other craft is wrecked or sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft and subject the same to removal by the United States as herein-after provided for."

It clearly became the duty of the respondent under this statute until the sunken flat was removed or abandoned to properly mark the place where it was. But the respondent argues that it had abandoned the sunken flat. The evidence in this case clearly shows that the respondent had not abandoned the flat. In its answer filed the respondent alleged:

"That when respondent was informed that said flat boat was sunken in said river, it at once took all possible steps to designate its presence by a buoy

and have said obstruction removed, although it knew only by report that said obstruction was its flat boat; that it was impossible to remove said obstruction or designate its presence on account of said flood and high water; and that respondent used every effort so to do."

Under this allegation of the answer, evidence ought not to be received from respondent to contradict it. But the evidence submitted in the case very clearly shows that there never was any such abandonment by the defendant. We are clearly of the opinion that the respondent stood in the place of the owner as to the sunken flat, and was bound to either remove the obstruction or keep the same marked as required by the statute. The evidence also clearly shows that the injury to the libelant's boat was caused by the unmarked sunken flat, and this brings us to the consideration of the second question, viz., Was the libelant guilty of any negligence which contributed to the injury? This negligence is put by the respondent upon the following grounds: (a) The libelant's boat was not properly manned; (b) the sunken flat was known to the libelant; and (c) there were surface indications showing where the sunken flat was.

[2] (a) The evidence shows that Capt. Myers was at the wheel at the time of the accident, and it is now claimed that, because the evidence shows he was not at that time a licensed pilot for the Allegheny river, therefore the boat was not properly manned. The answer in this case did not raise any such defense. The rule obtains as well in admiralty as in other cases that the proof cannot avail a party further than it corresponds with the allegations of the pleadings. In *The Rhode Island*, 20 Fed. Cas. 648, No. 11,745, it was said:

"A cardinal principle in admiralty proceedings is that proofs cannot avail a party further than they are in correspondence with the allegations of his pleadings, and that the decree of the court must be in consonance with the pleadings and proofs. *Wood*, Civ. Law, 377; *The Hoppet v. U. S.*, 7 Cranch, 389 [3 L. Ed. 380]; *Treadwell v. Joseph*, Fed. Cas. No. 14,157; *Jenks v. Lewis*, Fed. Cas. No. 7,280; *The Wm. Harris*, Fed. Cas. No. 17,695. Whatever may be the case then upon the evidence on the one side or the other, the judgment of the court must be restrained and guided by the allegations in issue; and, if they are insufficient to maintain the right of either party as established by the proofs, or the two stand in conflict, an amendment must be obtained, or the court will be compelled to pronounce its decision *secundum allegata et probata*, disregarding all evidence not brought within the fair and reasonable scope of the pleadings."

But the evidence in this case did show that Capt. Thomas was in charge of the boat, and had only left the wheel a moment before to go to his cabin. The evidence does not show that Capt. Myers was not a skilled pilot. He was a licensed pilot on the Ohio and Monongahela rivers, and had an application then pending for the Allegheny river. He knew the Allegheny river, had made trips upon it, and was acquainted with its channel. The learned District Judge was right in finding the boat was properly manned.

[3] (b) The sunken flat, it is alleged, was known to libelant. The evidence to sustain this proposition is not at all convincing. It consists only of the evidence of the lockkeeper that he had called the People's Coal Company, the libelant, on the telephone, and some one in the office had answered, and to this person he had communicated

the fact of the flat having been sunk in the channel. It does not appear who the person was who answered the telephone. It does not appear that the telephone communication was delivered to any employé or officer of the libelant. The evidence therefore of knowledge was not at all sufficient, and was entitled to but little weight. The rule as announced in *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 63 L. R. A. 988, 99 Am. St. Rep. 942, as to telephone communications is sound. It is:

"To hold parties responsible for answers made by unidentified persons in response to a call at the telephone from their offices or places of business concerning their affairs opens the door for fraud and imposition and establishes a dangerous precedent which is not sanctioned by any rule of law or of ethics. A party relying on or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line."

(c) There were surface indications of the sunken flat. It clearly appears from the evidence that there were quite a number of swirls on the surface of the river in this part of the channel, the same being caused by holes made by the removal of sand from the bottom of the river. There is nothing in the evidence to show that these swirls caused by the sunken flat even if it existed on the surface of the river differed from the swirls made by the holes caused by the removal of the sand. Altogether the evidence on this branch of the case is most unsatisfactory.

We are clearly of the opinion that there was no error in the finding of the court, and that the judgment of the court and the decree should be sustained.

### TACONY IRON CO. v. SLOSS-SHEFFIELD STEEL & IRON CO.†

(Circuit Court of Appeals, Third Circuit. June 13, 1911.)

No. 20.

#### 1. PLEADING (§ 348\*)—JUDGMENT—ON SUMMARY PROCEEDING—JUDGMENT FOR PART OF DEMAND—PENNSYLVANIA PRACTICE.

Under the Pennsylvania practice act of July 15, 1897 (P. L. 276), the court on application to it may enter judgment for any part of plaintiff's claim as to which the affidavit of defense is insufficient, and, upon the entering of such judgment, the plaintiff may have execution, and thereafter proceed with the case for the remainder of his claim.

[Ed. Note.—For other cases, see Pleadings, Dec. Dig. § 348.\*]

#### 2. CORPORATIONS (§ 672\*)—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.

Where a contract sued on by a foreign corporation in Pennsylvania purports on its face to have been executed in the state of plaintiff's domicile, an affidavit of defense is insufficient to defeat the action on the ground that plaintiff was doing business in Pennsylvania without having registered as required by the state statute, where it consists only of general averments that plaintiff maintained an established office in a building in Philadelphia, with agents in charge, where it pursued its ordinary business and that the contract was procured through such agents;

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied June 28, 1911.

no facts being set out showing the nature of the business there transacted or of the agency.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 672.\*]

Foreign corporations "doing business" in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 622.]

3. CORPORATIONS (§ 672\*)—FOREIGN CORPORATIONS—RIGHT TO SUE.

Plaintiff sued for the price of iron alleged to have been delivered under a written contract. Defendant averred that such contract had been rescinded, and that the delivery was made under a new contract made in Pennsylvania where the suit was brought, and that, as plaintiff was a foreign corporation not registered in the state, it could not sue thereon. *Held*, that the affidavit of defense laid no foundation for such claim where it did not show any new contract except such as may have arisen by implication from the shipment of the iron from another state and its receipt in Pennsylvania.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 672.\*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action at law by the Sloss-Sheffield Steel & Iron Company against the Tacony Iron Company. Judgment for plaintiff (183 Fed. 645), for part of its claim, and defendant brings error. Affirmed.

Albert B. Weimer, for plaintiff in error.

C. W. Van Artsdalen and W. Howard Ramsay, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. The Tacony Iron Company, a Pennsylvania corporation, submitted through J. K. Dimmick & Co., as sales agent for the Sloss-Sheffield Steel & Iron Company, a corporation of New Jersey, whose furnaces were at Birmingham, in the state of Alabama, a proposition for the purchase of 2,000 tons of iron of a certain quality, at the rate of 500 tons monthly, beginning January 1, 1910, at the price of \$14 per ton f. o. b. cars furnaces Birmingham, Ala. The contract was marked:

"Accepted at Birmingham, Alabama, 1/3, 1910. Sloss-Sheffield Steel and Iron Company, per J. W. McQueen, Vice-President. Tacony Iron Company, per Johnson, Treas. Purchaser."

During the month of January the Sloss-Sheffield Company shipped 97 tons of iron to the Tacony Company, and a dispute having arisen between Dimmick & Co., through whom the contract had been submitted, and the Tacony Company, no more iron was shipped until April, when 700 tons of iron were shipped by the Sloss-Sheffield Company to the Tacony Company and delivered by that company. On May 12, 1910, after the 700 tons had been shipped (the last shipment having been on April 29th, although it does not appear when it was received by the Tacony Company), the Tacony Company by letter notified Dimmick & Co. that they would only pay current market prices for the iron shipped, and giving as a reason therefor that

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Tacony Company had notified Dimmick & Co. before the iron was delivered that they would only pay market prices because the Sloss-Sheffield Company had not delivered the iron during January, February, and March, as provided by the contract. Suit was brought by the Sloss-Sheffield Company, hereinafter called the plaintiff, against the Tacony Company, hereinafter called the defendant, to recover the contract price of the iron, together with interest at the rate of 8 per cent., as provided by the law of Alabama.

The defendant filed an affidavit of defense setting up the nonregistration of the plaintiff company, as required by the Pennsylvania statute, as a bar to the action. The defendant admitted in the affidavit of defense the receipt of 797 tons of iron sued for, but denied its liability for the same at the price sued for, alleging that, as to the 700 tons shipped in April, the same had been shipped after Dimmick & Co., agents of plaintiff, had stated to defendant that no more iron would be delivered under the contract, and after notice by the defendant to Dimmick & Co., as agents for plaintiff, that the iron then being shipped would be received only at market prices, and that the current prices were less than the contract price, and defendant, if liable at all, was only liable for the lower price and at a rate of interest of 6 per cent., as provided by the law of Pennsylvania, it being averred that the delivery of the said 700 tons and the receipt thereof constituted a new contract and one made in the state of Pennsylvania by a nonregistered foreign corporation, and one therefore not actionable in Pennsylvania. Plaintiff took a rule for judgment for want of a sufficient affidavit of defense, following the Pennsylvania practice act of July 15, 1897. After argument, the court entered judgment for the sum of \$9,568.52, the amount admitted by the affidavit of defense, the court adjudging that the action could be maintained because the contract was not made in Pennsylvania, but in the state of Alabama, but refusing judgment for the balance of the claim because it was sufficiently averred to go to a jury whether or not as to the 700 tons the market price was \$11.75 or the contract price of \$14. Was there error in thus entering judgment for part of the claim?

[1] It may be stated preliminary to the discussion of the vital questions in this case that it is established by both statute and decision that the court upon application to it may enter judgment for such part of the claim as to which the affidavit of defense may be insufficient, and, upon the entering of such judgment, the plaintiff may have execution and thereafter proceed with the case for the balance of the claim. Act July 15, 1897 (P. L. 276); *Moore v. Eyre*, 32 Pa. Super. Ct. 259; *Pierson v. Krause*, 208 Pa. 115, 57 Atl. 348.

The controlling questions, however, in this case, are: First. Was the action barred by reason of the nonregistration of the plaintiff company? Second. Was the delivery of the 700 tons in April a new contract, and was the same barred by the nonregistration of the plaintiff company?

[2] An inspection of the contract shows that it was submitted by defendant through J. K. Dimmick & Co., sales agents; that it was for iron to be delivered f. o. b. railroad cars at furnaces, Birmingham,



Ala.; that this "contract" was "not binding on seller till accepted by officer named on form below"; and that it is marked:

"Accepted at Birmingham, Alabama, 1/3, 1910. Sloss-Sheffield Steel and Iron Company, per J. W. McQueen, Vice-President. Tacony Iron Company, per Johnson, Treas. Purchaser."

Unless, then, the affidavit of defense contained averments sufficient, if proved, to overcome this, the writing itself was sufficient to establish that the contract was made in Alabama. The affidavit of defense avers the following:

"The defendant further avers that the plaintiff corporation maintains and did maintain at the time this contract in question was entered into by the defendant established offices in the Land Title Building in the city of Philadelphia. The defendant avers that the Messrs. J. K. Dimmick & Co. are the agents of the said plaintiff and are in charge of the said established offices as aforesaid. The defendant avers that the plaintiff is pursuing the ordinary business of the corporation in said established offices. The defendant further avers that the contract out of which this transaction arose was procured through Messrs. J. K. Dimmick & Co., agents of the plaintiff as aforesaid, and that the contract and all negotiations relating thereto took place in the offices of the said J. K. Dimmick & Co. as aforesaid. The defendant further avers that the plaintiff corporation is therefore doing business within the state of Pennsylvania. The defendant further avers that at the time this contract was entered into by the defendant as aforesaid the plaintiff corporation had not complied with the act of April 22, 1874 (P. L. 108), relating to the registration of foreign corporations in the Secretary of State's office in Harrisburg. The defendant further avers that the plaintiff corporation was not so registered at the time of the institution of this suit. The defendant further avers that by reason of the failure of the plaintiff corporation to comply with the requirements of the said act, the alleged contract was an illegal transaction upon which the plaintiff cannot maintain any action or suit in any of the courts of the state of Pennsylvania or in this court."

The rule by which this affidavit of defense is to be measured is laid down in *Hall's Safe Co. v. Walenk*, 42 Pa. Super. Ct. 576, in the following language by Judge Henderson:

"The first affidavit is defective in the failure to set forth the character of the business carried on by the plaintiff in Pennsylvania. The allegation is the opinion merely of the defendant, and not a statement of the facts from which the court could determine whether the plaintiff was violating the statute in respect to registration. In a sense every foreign corporation which through its agents is selling goods within the state is doing business therein. Many such corporations are largely engaged in business in that way, but this is not doing business within the meaning of the statute. Only such corporations as have established offices or transferred a portion of their capital to this state and have engaged in the prosecution of their ordinary business therein are subject to the obligations to register. Hence the importance of setting forth the character of the business transacted. Moreover, if there was a sufficient averment that the plaintiff was at some time engaged in the prosecution of business within the state in violation of the act, it is not alleged that the transaction out of which this litigation arises had any connection with that business. \* \* \* The burden is on the defendant to show that the conduct of its business in this state subjected it to the disability provided by the statute. This is not done by the general averment that the plaintiff had offices and places of business in the state 'several months prior to the time when the transactions between himself and the representative of the plaintiff company took place.' Where it had its places of business, what the business was and when it was transacted are not made to appear."

This decision is consistent with the former cases both in the Supreme and Superior Courts of Pennsylvania. *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 189; *Hovey's Estate*, In re, 198 Pa. 385, 48 Atl. 311; *Dannemiller v. Kirkpatrick*, 201 Pa. 218, 50 Atl. 928.

Measured, then, by the rule thus laid down, we find that the averments are not sufficient to prevent judgment. The affidavit consists of general averments and inferences therefrom. It does not set out in detail what business was transacted at the alleged offices in Philadelphia. It does not set out such facts as would warrant the conclusion that Dimmick & Co. were agents of the plaintiff. It does not allege that the contract in question was made with Dimmick & Co., but it does contain the averment "that the contract out of which the transactions arose was procured through Dimmick & Co." It does not allege what business the corporation was doing in Pennsylvania, but contains the conclusion, "the defendant avers that the plaintiff is therefore doing business within the state of Pennsylvania."

[3] Second. Was there a new contract as to the 700 tons and was that contract made in Pennsylvania? The affidavit of defense avers that "the plaintiff through its said agents rescinded the said contract and stated that no more iron would be delivered under it." It is now argued by defendant's counsel that, the written contract having been rescinded, the shipment of iron thereafter was a proposal to deliver iron under a new contract, and that that contract was only entered into by the receipt of the iron by defendant in Pennsylvania, and that this would constitute the making of a new contract in the state of Pennsylvania, and that no action could be maintained upon it by reason of the nonregistration of the plaintiff corporation. This is a very ingenious argument, and might have some force if there were sufficient averments in the affidavit of defense to support it. But the affidavit of defense only alleges the rescission as a reason for entitling it to a lower price than that of the contract. It does not allege a new contract. The averments of the affidavit upon this matter are:

"And the defendant avers that this iron shipped during the month of April constituted iron which under the contract should have been delivered during the months of January, February, and March. The defendant avers that plaintiff has demanded the contract price for this iron so shipped. The defendant avers that on April 7, 1910, 85 tons of iron were shipped by the plaintiff to the defendant, and thereafter shipments were made during the month of April of the tonnage and at the dates set forth in schedule B attached to plaintiff's statement of claim; that, as soon as defendant heard of the shipment on April 7th, it notified the plaintiff that in view of the rescission of the written contract of December 30, 1909, by plaintiff, it would not pay for the said iron or any future deliveries of iron by the plaintiff more than at the current market price. A copy of such notice is attached hereto marked 'Exhibit A,' and made a part of this affidavit of defense."

An examination of Exhibit A shows that the notice was that in view of the failure to ship as provided by the contract the current prices would be insisted on. Taking the whole affidavit of defense and giving every possible weight to it, it certainly does not aver the making of a new contract or the facts attending the making of this new contract so it could be determined where the contract was made and what its terms were.

The court below was clearly right in entering judgment for the amount it did, and, were it not for the alleged loss by defendant by reason of the failure to deliver, judgment might have been entered for the amount of the claim, with interest.

The judgment is affirmed.

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DELAWARE & H. CO. v. DIX.

(Circuit Court of Appeals, Third Circuit. June 23, 1911.)

No. 13.

1. RAILROADS (§ 282\*)—INJURIES TO LICENSEES—PRESUMPTION AND BURDEN OF PROOF—*RES IPSA LOQUITUR*.

Plaintiff's intestate was conductor of a freight train of another company which was using the tracks of defendant railroad company, and was killed while his train was passing a meeting train of defendant on a parallel track. Plaintiff offered evidence tending to show that at the time of the accident intestate was kneeling on a bench in the caboose, with his arms resting on the sill of a small window in the side of the caboose and facing it, and while in this position, occupied by him in the performance of his duty, a freight train of defendant company was passing in the opposite direction to that of his train and on an adjacent track; that one of the cars of defendant's train was a refrigerator car in which was a door; and which door had upon it an appliance consisting of a movable iron lever attached to bolt bars used for locking the car door; that this door was negligently allowed to be open, and by the movement of the train it was caused to swing outwardly at right angles to the car, and that the lever, also upon the car door, projected further, at right angles from the middle of the door, so as to reach over the space between the sides of the passing trains; that this projecting lever, while the car was passing the caboose, struck the side of the caboose, and as it passed along the side of the caboose, when it reached the window, struck the decedent on the left side of the neck, almost severing the head from the body, and pulling him violently from the window of the caboose, and thus instantly killing him. The lever was of sufficient length to reach the caboose and extend some distance into the window. Under ordinary conditions intestate's position was not one of danger from passing trains. *Held*, that such evidence was sufficient under the doctrine of *res ipsa loquitur* to create a presumption of negligence on the part of defendant which cast upon it the burden of proof and that the case was properly submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 912, 919; Dec. Dig. § 282.\*]

2. NEGLIGENCE (§ 121\*)—"RES IPSA LOQUITUR."

"*Res ipsa loquitur*," the thing speaks for itself, symbolizes that the occurrence of the injury raises a presumption of culpability on the part of the owner or manager of an apparatus.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6136-6139; vol. 8, p. 7787.]

In Error to the Circuit Court of the United States for the Middle District of Pennsylvania.

Action at law by Anna A. Dix against the Delaware & Hudson Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Welles & Torrey, for plaintiff in error.

M. S. Kaufman and R. L. Levy, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. Anna A. Dix, defendant in error, plaintiff below, brought this action against the Delaware & Hudson Company, plaintiff in error, defendant below, in her own behalf and that of her children, to recover damages for an injury caused by the alleged negligence of the defendant and resulting in the death of Walter Dix, her husband. The evidence in the case shows that Walter Dix, on January 4, 1908, at 10:40 p. m., was employed by the Erie Railroad as a conductor, and was riding in the caboose attached to a freight train of the Erie Company.

[1] The plaintiff offered evidence tending to show that at the time of the accident Walter Dix was kneeling on a bench in the caboose, with his arms resting on the sill of a small window in the side of the caboose and facing it, and that while in this position, occupied by him in the performance of his duty, a freight train of the defendant company was passing in the opposite direction to that of the Erie train on an adjacent track; that one of the cars of the defendant's train was a refrigerator car in which was a door; that this door had upon it an appliance consisting of a movable iron lever attached to bolt bars used for locking the car door; that this door was negligently allowed to be open, and that by the movement of the train it was caused to swing outwardly at right angles to the car, and that the lever also upon the car door projected still further at right angles from the middle of the door, so as to reach over the space between the sides of the passing trains; that this projecting lever upon the door, while the car was passing the caboose, struck the side of the caboose, and as it passed along the side of the caboose, when it reached the window, struck the decedent on the left side of the neck, almost severing the head from the body, and pulling him violently from the window of the caboose, and thus instantly killing him.

The Erie train upon which the deceased was riding consisted of two engines and a caboose, and was running south on tracks of the defendant company. The freight train of the defendant company was running in the opposite direction upon tracks of the defendant company adjacent to the tracks upon which the Erie train was running, and this train consisted of an engine and some 12 or 15 cars. The caboose was a car having built on the top of it what is known as a "cupola." On the side of the caboose, and a few feet from the floor, a bench ran along the side of the caboose just below an open window. In the cupola of the caboose were two seats, one on the left-hand side of the caboose and the other on the right. Scheusenack, a brakeman in the crew of the Erie train, sat in the cupola on the right-hand side, and Plath, also a brakeman in the crew of the Erie train, sat on the

left side in the cupola. Dix was kneeling upon the bench with his arms resting on the sill of the window on the right-hand side of the caboose, and at the side where the defendant's train was passing. There was a light in the caboose which shone over the back of Dix and through the window. Mr. Scheusenack was the principal witness of the accident, and he testified:

"I heard the sound of that door strike the front end of the caboose. \* \* \* After I heard the noise of the car strike the front end of the caboose, it called my attention to the car, and I saw what it was; and just as I looked down I saw Mr. Dix going out of the window and right by his back I saw the refrigerator door pass by. \* \* \* It was open. \* \* \* Q. Will you please describe to the jury what marks there were upon the body, if any? A. Mr. Dix had a great big mark from here on, a way down here (indicating). Q. On which side of the head? A. On the left side. Q. What sort of a mark was it? A. It was a great big cut, just jerked right out. Q. How deep was that cut, if you know? A. It was quite deep. The head was almost tore off. Q. Was the left side of the face battered any at all? A. Yes; it was scratched. \* \* \* Q. What other marks were on his head? A. There was a mark on the head where he struck the frame of the caboose, on the right side, and there was a mark on the left side here (indicating), and the middle of his head. Q. What was the condition of his face? A. The face was scratched. Q. On which side? A. On the right side. \* \* \* Q. You only judge from the appearance of the door that it was a refrigerator car? A. I don't judge. I seen it."

Charles J. Plath, a brakeman, who was in the cupola of the caboose, thus described the occurrence:

"Q. What kind of a noise was that you heard? A. A kind of dumb noise, a kind of a bang. Q. When you heard that bang, what happened? A. I twisted right around and seen Mr. Dix was going out of the window, looked like that, and he was gone."

It appears from the evidence that, if the refrigerator door were open and the lever were projecting from it, it would have a reach of 36 inches. As the evidence shows the distance between the sides of the trains in passing was  $33\frac{1}{4}$  inches and as the lever upon the door would reach 36 inches, it would allow the lever to project within the car window a distance of  $2\frac{1}{4}$  inches. It thus appears from the plaintiff's evidence that the brakeman, Scheusenack, heard the noise of something striking the side of the car, saw Dix go out at the window, and saw the swinging door of the refrigerator car. From the noise of something striking the side of the car while the train was passing, from the evidence that there was a swinging car door, that refrigerator car doors are so constructed with bar and lever that, when open, the lever will fly out straight at right angles to the car, that, if such lever was out, it would reach within the side of the caboose or into the window; and that the man disappeared through the window, that he was pulled out, and that he went so violently as to strike his heels against the top of the window—it is to be reasonably inferred that he was pulled from the train by the projecting lever of the car door on the passing train, as there is no evidence, or any pretense, that there was any obstruction or fixed obstacle between the tracks at this point. The evidence that he was pulled out by something outside is strengthened by the evidence of the deep cut on the left side of the neck almost severing the head and the marks of the blood and flesh extending from the window through which he was drawn.

Unless, then, the plaintiff was required to go further and show that the defendant knew, or ought to have known, that the car door was loose, then the motion for a nonsuit was properly refused, as also the motion for judgment non obstante veredicto. Under the doctrine, therefore, of *res ipsa loquitur*, was the plaintiff required to prove more? That doctrine is clearly stated by Wigmore in his work on Evidence (volume 4, § 2509), as follows:

"With the vast increase in modern times of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed 'accident' by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. '*Res ipsa loquitur*' is the phrase appealed to as symbolizing the argument for such a presumption. In England, a rule of that sort has for a generation been conceded to exist, for some classes of cases at least. In the United States, the presumption has spread rapidly, although with much looseness of phrase and indefiniteness of scope. As against a common carrier, the presumption against a bailee (*ante*, section 2508) has perhaps helped to confirm the rule where injury to goods or passengers is involved. What its final accepted shape will be can hardly be predicted. But the following considerations ought to limit it: (1) That apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection or user. (2) Both inspection and user must have been at the time of the injury in the control of the party charged. (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him, but inaccessible to the injured person."

Let us apply these limitations to the case at bar. The first of these requires that:

"The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user."

This applies directly to the case at bar. No injurious operation was to be expected by one a passenger or lawfully upon the Erie train from the passing freight or from any car or appliance attached to the car.

Second:

"Both inspection and user must have been at the time of the injury in the control of the party charged."

This applies directly. The train and its cars and defective door and apparatus were in the absolute control of the defendant.

Third:

"The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured."

This applied directly, because the accident happened to Mr. Dix, irrespective of any voluntary action of his. He was occupying a position he had a right to occupy as conductor of the train. Even if his body projected somewhat from the car, it was not negligence, as his business as a trainman might require him to see out to look ahead,

and, as was said by the learned trial judge, it was not the same as though he were a passenger.

So regarding the doctrine by this construction, the doctrine would apply. But we must consider the doctrine to determine whether or not the plaintiff proved sufficient to raise the presumption of negligence on the part of the defendant and thereby require defendant to explain the injury.

[2] "*Res ipsa loquitur*," the thing speaks for itself, symbolizes that the occurrence of the injury raises a presumption of culpability on the part of the owner or manager of the apparatus, because in cases where it applies powerful and dangerous agencies in the control of one will do harm unless properly constructed or managed, and also because the evidence of the cause of the injury, whether innocent or blameworthy, is in the possession of, or accessible to, the person constructing or operating, and not accessible to the other party. Erle, C. J., in *Scott v. London & St. K. Docks Co.*, 3 H. & C. 596 (injury to a passer-by from the falling of goods from a train), said:

"There must be reasonable evidence of negligence, but, when the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen when those who have the management use proper care, it affords evidence in the absence of explanation by the defendant that the accident came through want of care."

How completely this applies to the case at bar. Such an accident would not happen in the ordinary use of a refrigerator car, unless the defendant was negligent in permitting it to have its door open with an extending lever. It had in its possession the evidence by which it might be explained.

Not only is this the doctrine of the English cases, but of many of the states and of the federal courts. *Cincinnati R. R. Co. v. South Fork*, 139 Fed. 533, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; *Kansas Railroad Co. v. Stoner*, 49 Fed. 209, 1 C. C. A. 231. Wallace, J., in *Rose v. Stephens & C. Trans. Co.*, 20 Blatch. 411, 11 Fed. 438, says:

"The presumption originates from the nature of the act, not from the nature of the relations between the parties. It is indulged as a legitimate inference whenever the occurrence is such as in the ordinary course of things does not take place when proper care is exercised, and is one for which the defendant is responsible." *Holbrook v. Railway Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Inland, etc., v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270.

There can be no doubt the doctrine applies properly in this case. Nor can it be doubted, as is shown by the evidence and the reasonable inferences from it, the plaintiff raised the presumption of negligence, and the burden was then shifted to the defendant to explain the occurrence of the injury. This it attempted to do, but the whole case was for the jury, and was carefully submitted with very clear instructions by the court. The verdict for the plaintiff results. The charge of the court was fair, and, if any error was made by the court, it was in favor of the defendant.

The court was right in submitting the case to the jury, and in refusing to enter judgment for defendant *non obstante veredicto*, and the case is therefore affirmed.

CITY OF DES MOINES, IOWA, v. WELSBACH STREET LIGHTING CO.  
OF DELAWARE.

(Circuit Court of Appeals, Eighth Circuit. May 20, 1911.)

No. 3,407.

1. MUNICIPAL CORPORATIONS (§ 248\*)—CONTRACTS—ESTOPPEL.

In respect to its business powers, a city is subject to the application of the doctrine of estoppel the same as an individual or private corporation, and a business contract, which is within the scope of the powers of the city to make, but illegal because entered into in an irregular manner, when it has been fully executed by the other party, and the city has received and accepted the full benefit of it, and cannot restore what it has received, is enforceable; the city being estopped to set up its irregular execution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 684-686; Dec. Dig. § 248.\*]

2. GAS (§ 12\*)—SUPPLY TO MUNICIPALITY—CONTRACTS—VALIDITY.

An ordinance fixing the price per year to be paid by the city for street lamps, which was amended so as to apply only to a contract between the city and a gas company and reserving the right to the city to contract for street lighting with others, did not impose any limitation upon the city in respect to the price it might pay under such a future contract.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 4; Dec. Dig. § 12.\*]

3. GAS (§ 12\*)—CONTRACT BY A CITY FOR STREET LIGHTING—"FRANCHISE."

A contract by which a company agreed to erect and maintain lamp posts and fixtures to light the streets of a city for a term of 10 years was not the grant of a franchise by the city.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 4; Dec. Dig. § 12.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2929-2942; vol. 8, p. 7666.]

In Error to the Circuit Court of the United States for the Southern District of Iowa.

Action at law by the Welsbach Street Lighting Company of Delaware against the City of Des Moines of the state of Iowa. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert O. Brennan (J. M. Parsons, on the brief), for plaintiff in error.

N. T. Guernsey (Alonzo C. Parker and William E. Miller, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. On the 2d day of April, 1904, the city of Des Moines and the Welsbach Street Lighting Company entered into a written contract, by the terms of which said Welsbach Street Lighting Company agreed to furnish to the city of Des Moines improved Welsbach street lights according to specifications stated for the term of 10 years from and after the 1st day of May, 1904. The Welsbach Street Lighting Company was to furnish and erect at its own cost and expense first-class iron posts and boulevard lanterns and keep the same in good repair, and to place the neon

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



its improved attachments for the Welsbach system of street lighting, and to furnish at its own cost and expense all mantels, aluminum material, and labor to be used in lighting, extinguishing, cleaning, and repairing said lamps and fixtures. The lamps were to be placed and maintained in such locations along the lines of the gas mains in the street and thoroughfares of the city of Des Moines as should be directed by the board of public works of said city, and should be not less than 800 in number and as many more as should be ordered by said party of the first part. In consideration of which the city agreed to pay to said lighting company \$22 per lamp per year, payable monthly as the service was performed. The Welsbach Street Lighting Company fully performed the contract upon its part, installed and maintained such lamps in addition to the 800 as were directed by the board of public works until on January 1, 1908, there were so installed and maintained 1,117 and on January 1, 1909, 1,133. The city made payments according to the terms of the contract until the 1st day of May, 1908, when it ceased to make payments, and the lighting company brought this action in the Circuit Court to recover the monthly payments for the months of May, June, July, August, and September, 1908.

The city defended the action upon three grounds: (1) That the contract was invalid for the reason that it was entered into without first advertising for bids; (2) that it was invalid as there was in existence, at the time that the contract was entered into, an ordinance of the city of Des Moines, fixing rates which the city should pay for street lighting at a less sum than that agreed upon in the contract; and (3) that the contract in question was the grant of a franchise to the Lighting Company which the city was not authorized to grant excepting upon a vote by the people.

A jury was waived and the cause tried to the court upon an agreed statement of facts and judgment rendered for plaintiff, from which judgment the city prosecutes error.

The several provisions of the statute (Code of 1897) claimed as applicable to a consideration of this case are the following:

"Sec. 867. Bids. It shall advertise for bids and make all contracts on behalf of the city for all work, and for material and work for public improvements in excess of two hundred dollars, whenever the same shall be ordered by the council or voted for at any election. Proposals for bids shall be published once each week for two weeks in two of the daily newspapers therein, which shall be completed at least two weeks before the making of any contract, which proposals shall state the amount and kinds of material to be furnished, the kind of improvement, and the time and conditions upon which bids will be received, all of which may be rejected. All contracts shall be made with the lowest responsible bidder, but it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. All contracts made by said board shall be subject to the approval of the council."

"Sec. 869. Superintend lighting. It shall advertise for bids and make contracts for the lighting of the streets, alleys, public grounds and buildings, and shall have entire control, management and direction of the lamps, lights, lighting material and persons charged with the care thereof."

Manifestly the contract in question was not one of those contemplated in section 867 (City of Vincennes v. Citizens' Gas Light Co.,

132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485), but is controlled entirely by section 869.

[1] As the contract was entered into without previous advertising for bids, the first question presented for consideration is, Was the contract, by reason thereof, ultra vires in the sense that it had no vitality? It must be conceded as a correct proposition of law that contracts entered into by a municipality, which are beyond and outside of the scope of the city's authority, are ultra vires and non-enforceable. To enter into a contract for lighting the streets, alleys, public grounds, and buildings of the city was a power expressly granted to the city by section 869. In entering into such contract the city was exercising its business powers as distinguished from governmental. In respect to its business powers a municipality is subject to the same application of the doctrine of estoppel as an individual or private corporation. *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. The complaint made of the contract in question is not that it was one beyond the scope and power of the city to enter into, but that it was not entered into in the manner prescribed by law. A business contract, which is within the scope of the powers of the city to make but illegal because entered into in an irregular manner, when fully executed by one party and the city has received and accepted the full benefit of the contract and cannot restore what it has received, is enforceable, the city being estopped to assert the irregular execution when the ends of justice would thereby be defeated. *Westbrook v. Middlecoff*, 99 Ill. App. 327; *Drainage Commissioners v. Lewis*, 101 Ill. App. 150; *Rogers v. Omaha*, 76 Neb. 187, 107 N. W. 214; *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621; *Moore v. Ramsey County*, 104 Minn. 30, 115 N. W. 750; *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 811; *City of Kansas City v. Wyandotte Gas Co.* 9 Kan. App. 325, 61 Pac. 317; *Illinois Trust & Savings Bank v. City of Arkansas City*, supra.

[2] It appears from the agreed statement of facts that the city council of Des Moines, in May, 1895, passed an ordinance entitled:

"An ordinance to fix the price of illuminating gas and to prescribe the conditions under which persons and corporations dealing in illuminating gas can occupy and use the streets and alleys of the city of Des Moines."

The first section of the ordinance fixed the price of gas furnished to the inhabitants of the city. The second section fixed the price for street lamps at \$17 per year. This ordinance was amended in February, 1896, so as to constitute a contract with the Capital City Gaslight Company, and fixed the price which such company should charge to the inhabitants of the city, and also fixed the price for street lamps at \$18 per year until the total number reached five hundred. After the total number reached 500, \$17 per lamp per year. Section 6 of this amended ordinance contained this provision:

"This amendment shall not be construed as conferring upon the Capital City Gaslight Company an exclusive right for any period of time to furnish gas to said city or to private consumers, nor to limit or restrain the city or such private consumers from purchasing gas from any other gas company upon such terms as may be agreed upon or may be fixed by legal authority;

nor to limit the city of Des Moines from purchasing from any other company, person or persons, or from at any time constructing gas, electric light or any other works that may be adapted to the purpose, either in its own name or through the instrumentality of trustees, or in any other manner, for the purpose of lighting its streets and of supplying the city and its citizens with light, fuel or power."

While the original ordinance was general in its terms, by the amendment it was made to apply to its contract arrangement with the Capital City Gaslight Company, and expressly reserved to itself the right to contract in the future with other parties upon such terms as it could agree upon for the lighting of its streets. Hence such ordinance fixing the price at which the Capital City Gaslight Company should charge for street lamps has no application to the contract under consideration. The city did not thereby disarm itself from subsequently entering into a new contract with other parties upon other and different terms.

[3] The contract in question clearly was not the grant of a franchise. *McPhee & McGinnity Co. v. U. P. R. Co.*, 158 Fed. 5, 16, 17, 18, 87 C. C. A. 619.

The judgment is affirmed.

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OCEANIC STEAM NAVIGATION CO., Limited, v. WATKINS.

(Circuit Court of Appeals, Second Circuit. May 23, 1911. On Motion for Reargument, June 19, 1911.)

COURTS (§ 406\*)—CIRCUIT COURTS OF APPEAL—ISSUANCE OF REMEDIAL WRIT.

Where the mandate has gone to the Circuit Court, an application for a stay to allow plaintiff in error to apply for certiorari should be made there, and not to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 406.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by one Watkins against the Oceanic Steam Navigation Company, Limited. Judgment for plaintiff, and defendant brings error. Judgment affirmed.

Burlingham, Montgomery & Beecher, for plaintiff in error.

Paris S. Russell, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Judgment affirmed.

On Motion for Reargument.

PER CURIAM. The motion for reargument is denied. Inasmuch as the mandate has gone to the Circuit Court, application for a stay to allow plaintiff in error to apply for certiorari should be made there.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## STAR CO. v. MADDEN.

(Circuit Court of Appeals, Second Circuit. June 6, 1911.)

No. 287.

## 1. APPEAL AND ERROR (§ 501\*)—RECORD—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTIONS TO INSTRUCTIONS.

Under the established rule of the federal courts, assignments of error to the giving or refusal of instructions cannot be considered on a writ of error by an appellate court, unless it appears by the transcript that exceptions were reserved while the jury were at the bar.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.\*]

## 2. APPEAL AND ERROR (§ 501\*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTIONS TO REFUSAL TO CHARGE.

Where the bill of exceptions in a cause showed requests to charge made by defendant, but they were not marked to show what action was taken thereon, although a comparison with the charge showed that certain of them were not given, nor covered thereby, a statement reciting that after the jury retired the judge stated that he understood that defendants' counsel were entitled to "every exception which belongs to them by reason of requests handed up to the court in advance and either refused or modified" was not sufficient to make it appear that exceptions were taken by defendant before the jury retired to the failure to charge such requests.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.\*]

## 3. APPEAL AND ERROR (§§ 260, 263\*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTIONS.

An assignment of error to the overruling of a motion to strike out, or to instruct the jury to disregard, testimony cannot be considered by the appellate court, unless based on an exception taken at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1532; Dec. Dig. §§ 260, 263.\*]

## 4. LIBEL AND SLANDER (§ 107\*)—DAMAGES—EVIDENCE.

In an action for libel, it is not error to permit the plaintiff to testify as to his feelings on reading the libelous article; his mental suffering being an element of the damages recoverable.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 107.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Edwin C. Madden against the Star Company. Judgment for plaintiff; and defendant brings error. Affirmed.

This cause comes here upon writ of error to review a judgment of the Circuit Court in favor of defendant in error, who was plaintiff below. The action was for libel, and the judgment was entered upon verdict of the jury. The appeal has been twice argued. At the conclusion of the first argument, question having arisen as to the reserving of certain alleged exceptions, and a certificate of the trial judge being presented, the court, upon motion of plaintiff in error directed that "the record should be sent back to the Circuit Court, in order that the trial judge may, if the facts warrant such action, amend the bill of exceptions by inserting therein any exceptions to refusal to charge defendant's requests, which exceptions were actually taken and allowed during the trial and while the jury were at the bar." This was done, but no amendment was allowed by the Circuit Court. The bill of exceptions remains as

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it was when the cause was first brought to this court. Thereupon the cause was reargued upon several assignments of error which had not been discussed on the first argument.

Clarence J. Shearn, for plaintiff in error.

James D. Fessenden, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] The first group of assignments of error which may be considered are those which deal with defendant's requests to instruct the jury in certain particulars. These assignments are numbered 1, 2, 7, 8, and 9, and are correct in form; but they cannot be considered, unless the record discloses the fact that exceptions to the court's refusal to charge such requests were properly reserved. What must be done to reserve an exception to instructions given or refused at the trial is prescribed by the Supreme Court in *Phelps v. Mayer*, 15 How, 161, 14 L. Ed. 643, in the following language:

"It has been repeatedly decided by this court that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster II, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and, if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice."

It is difficult to conceive of language more specific and positive than this. It sets forth the rule of practice for all federal courts, has been announced and reannounced many times, and has been repeatedly applied in this circuit. *Park Bros. v. Bushnell*, 60 Fed. 583, 9 C. C. A. 140; *Commercial Travelers' Accident Co. v. Fulton*, 79 Fed. 423, 24 C. C. A. 654; *Berwind-White Coal Co. v. Firment*, 170 Fed. 151, 95 C. C. A. 1; *Mann v. Dempster*, 179 Fed. 837, 103 C. C. A. 325. See, also, opinion of Circuit Court of Appeals, Ninth Circuit, in *Western Union Tel. Co. v. Baker*, 85 Fed. 690, 29 C. C. A. 392, and cases there cited.

[2] Before these five assignments of error can be considered, therefore, it must appear by the certificate of the trial judge that the five exceptions to refusals to charge were reserved while the jury were at the bar. The only authentication of the trial judge is to the bill of exceptions. Referring to that document, there is found, after the testimony was closed, a document entitled "Defendant's Requests to Charge," consisting of 16 separate propositions, separately numbered. There is nothing on the face of this document to indicate which requests were charged and which were refused. It is quite common for the trial judge to note on the margin of each request what disposition he makes of it, but it is not essential that he should do so. Such annotation is useful, because it enables the appellate court to ascertain quickly what was done with the requests, without having to collate

them with the charge and by a careful comparison determine how much was refused. Such an examination shows that some of the 16 requests were substantially charged in different language, but none of the 5 covered by the assignments of error were charged, nor did the court give any specific instructions one way or the other touching the subject-matter of these 5 requests.

Near the conclusion of his charge the trial judge stated that in preparing it he had carefully read and attempted, as well as he could, to digest and understand the requests for charges made by both sides. He then added:

"I am not conscious that I have failed to take up any substantial branch of the discussion which it is my duty to refer to. If counsel will call my attention to an omission to discuss any particular specific subject, I shall be very glad to do it now. So far as a general criticism of my charge is concerned, I would prefer that the jury should retire and enter upon a consideration of the evidence, and I will be willing to take the responsibility for permitting you to enter upon the record your general criticisms of my charge after they have gone. If I have omitted a subject which you think I should charge, I will be very glad to consider it."

Thereupon counsel for defendant, who was not the counsel who has argued this appeal, said:

"May I ask your honor to charge something that is not contained in our requests. It was overlooked."

The court acceded, and the new request was stated and substantially charged. Defendant's counsel thereupon asked the court to charge that in libel suits the defendant was not allowed to prove facts, unless alleged in the answer. This also was charged, whereupon counsel stated: "I have not anything further." Counsel for plaintiff thereupon called attention to his seventh request, asking the court if it had not been overlooked. Thereupon this request, with a modification suggested by defendant's counsel was charged. The record concludes as follows:

"The jury then retired.

"The Court: I understand that the counsel for the defendant, from remarks made during the delivery of the charge, are entitled to every exception which belongs to them by reason of requests handed up to the court in advance and either refused in whole or modified in some respects."

Is this a certification by the trial judge that exceptions to these five refusals to charge were taken while the jury was at the bar? We think not. It merely states that the court understands that counsel for defendant are entitled to every exception which belongs to them, but in no way indicates what exceptions "belong to them." For those reference must be had to the record, and the record is silent. From what has been quoted supra it appears that what the trial judge undertook to reserve until after the jury had gone were "general criticisms of the charge." If general criticisms meant exceptions, and we can give it no other meaning, this was incorrect practice under *Phelps v. Mayer*, supra, and no exceptions which might then for the first time have been noted could be considered. A refusal to receive exceptions to the charge while the jury was at the bar would be reversible error, if an exception to such disposition of the case brought it before this

court. *Mann v. Dempster*, 179 Fed. 837, 103 C. C. A. 325. But no one, at any time before or after the jury left the box, offered any criticism, general or specific, of the charge itself.

Manifestly the trial judge did not undertake to postpone taking action with regard to requests until after the jury had retired. He listened to requests and charged them. He took up and disposed of plaintiff's seventh request, when asked if he had not overlooked it. There is nothing to show that, if at that time defendant's counsel had called attention to the five requests, asking if they also had not been overlooked, the trial judge would not have disposed of them, either by charging or refusing, and to a refusal of any request exception could then have been taken. As to what took place at the trial we can be informed only by the record, and that does not disclose an exception to any refusal to charge as requested. Whatever ambiguity there may have been in the statement of the trial judge, made after the jury had retired and which is quoted *supra*, has now been removed. Since he did not amend the bill of exceptions in the manner asked for by plaintiff in error, we must assume that the facts did not warrant any such amendment. The assignments of error above enumerated cannot, therefore, be considered.

[3] The next assignment of error relied upon is the fourteenth, which asserts that the court erred in overruling the objection to a certain question, in permitting it to be answered, and in refusing to instruct the jury to disregard it. The plaintiff was asked by his counsel whether prior to the publication he, as Third Assistant Postmaster General, had taken any action which interfered with the use of the mails by defendant. Before objection was interposed the witness answered in the affirmative. Discussion ensued, and plaintiff's counsel stated the testimony was offered on the question of actual malice, personal malice; but, upon being pressed by the court, he admitted that he could not connect this evidence, whereupon the court told him he had better stop. Defendant's counsel thereupon asked the court to instruct the jury to disregard the witness' answer, to which the court replied that he did not think it necessary to do that, for the expressed reason that he thought the jury understood there was no connection in fact. From the discussion as it is set forth in the record, we also think that the jury understood the answer was of no importance, and apparently defendant's trial counsel was of the same opinion, since he reserved no exception to the refusal of his request, asked for no further instructions, and made no motion to strike out the answer. This assignment of error is based on no exception, and cannot be considered here.

Other objections to the admission and exclusion of evidence do not call for any extended discussion. The witness William Loeb, Jr., was asked what conversation he heard between Postmaster General Cortelyou and the President relative to plaintiff's removal from office; it being disputed between the parties whether the Postmaster General demanded Madden's resignation because of official reports which the latter had made in a particular case, or because of "revelations of rottenness in his department." The answer of the witness tended to con-

tradict Mr. Cortelyou's statement as to the cause. There is some uncertainty about the dates, but we think there was sufficient to justify the admission of the testimony as part of the *res gestæ*.

It is contended that the court erred in sustaining an objection to the following question asked during the re-direct examination of the witness George Miller:

"With regard to the general speech of people, what was her [Mrs. Sevilla Miller's] reputation at that time?"

The question presented by this assignment of error is academic, because the same witness elsewhere testified in reference to Mrs. Miller:

"I did not think that my repeating that about her would injure her reputation, because, as I say, rumor and gossip had it that her relations at that time and previous to that time were improper."

[4] Exception was reserved to a question put to plaintiff on his direct examination, as follows: "How did you feel when you read it [meaning the libelous article]?" That is disposed of by our decision in *S. S. McClure Co. v. Phillipp*, 170 Fed. 910, 96 C. C. A. 86. We find no error in allowing plaintiff to testify that his resignation was not due to any of the things mentioned in the libelous article.

The judgment is affirmed.

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#### HEIDE v. PANOULIAS.

(Circuit Court of Appeals, Second Circuit. June 12, 1911.)

No. 250.

#### 1. PATENTS (§ 278\*)—MATTERS REVIEWABLE—ISSUES NOT PRESENTED TO LOWER COURT.

On writ of error to review a judgment awarding damages for infringement of a patent, the court will not consider an objection to the validity of the patent which was not pleaded nor relied on below, and which, if it had been, might have been met by evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 436; Dec. Dig. § 278.\*]

#### 2. PATENTS (§ 276\*)—ACTIONS AT LAW FOR INFRINGEMENT—QUESTIONS FOR JURY.

In an action at law to recover damages for infringement of a patent, where the evidence is conflicting on the questions of invention disclosed by plaintiff's patent and of infringement, such questions are of fact for the jury.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 432-434; Dec. Dig. § 276.\*]

#### 3. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

The refusal of requests for instructions in an action for infringement of a patent *held* not error, in view of the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 4. APPEAL AND ERROR (§ 1001\*)—ACTION AT LAW FOR INFRINGEMENT—CONCLUSIVENESS OF VERDICT.

In an action at law for infringement of a patent, where the jury has decided the questions of invention and infringement in one way, and no

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



error is found in the conduct of the trial, the appellate court will not set aside their verdict merely because it might have reached a different conclusion on the same record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3934; Dec. Dig. § 1001.\*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Panayiotis Panoulis against Henry Heide. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, *Panoulis v. Hawley*, 178 Fed. 101.

Hunt, Hill & Betts (Geo. Whitefield Betts, Jr., and Francis H. Kinnicutt, of counsel), for plaintiff in error.

F. E. M. Bullova, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The patent is No. 663,359, issued December 4, 1900, to plaintiff for "dipping-frame for coating candies." The specification states that:

"This invention relates to dipping-frames for coating candies and more particularly chocolates; and the object thereof is to provide an improved dipping-frame of this class in which the candies or cores thereof are immersed in liquid chocolate or other material and are thus coated. A particular object of the present invention is to provide a dipping-frame of the class described with devices whereby the coated candies are marked to simulate the conformation of hand-dipped candies. The dipping-frame is adapted for either manual or mechanical operation. The invention consists in the novel construction and arrangement of parts hereinafter set forth."

Then follows a description of the apparatus, its parts, and mode of operation with references to the drawings. This description need not be here repeated. It concludes with the sentence:

"The ridges 13b and 13c simulate the ridges formed upon the coated candies by the drip of the mobile coating when the same are manually dipped and then suspended for hardening with the crown in the lowermost position."

The patentee adds:

"I do not limit myself to the specific construction and arrangement of parts herein described, but reserve the right to vary the same within the scope of my invention."

The second claim, which is the only one relied on, reads:

"2. A dipping-frame of the class described, provided with means for supporting the candy cores and with relatively-movable means for rearranging a portion of the coating thereof, whereby the complete candies are marked to simulate a drip formation of the coating thereof, substantially as shown and described."

[1] Upon the argument the court called attention to the statement that the object of the invention was apparently solely to simulate candies coated by hand, and thus to deceive the purchaser; reference being made to our former decision in *Rickard v. Du Bon*, 103 Fed. 868, 43 C. C. A. 360. In that case we had before us a patent for discoloring tobacco leaves in spots, so as to induce a belief that the leaves were

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

naturally spotted. We held that the patent statutes were not intended to extend protection to those who confer no other benefit upon the public than the opportunity of profiting by deception and that to warrant a patent the invention must be capable of some beneficial use as distinguished from a pernicious use. In the case at bar, however, no such defense was raised, nor was the utility of the invention disputed. Defendant's counsel now asks that he be allowed to reargue on this point, and to contend that the "court may take judicial notice that the patent is invalid for the reason stated." This should not be done. Plaintiff has had no opportunity to litigate that point, nor to put in evidence which might have avoided it. This judgment based on the verdict must stand or fall upon the record which was before the court and jury.

The main argument of defendant is directed to support the exceptions to the refusals of the trial judge to dismiss the complaint and to direct a verdict in favor of defendant on the grounds: (1) That the evidence showed that the plaintiff's patent was anticipated by prior patents and the prior art; and (2) that there was no evidence of infringement.

[2] Ordinarily the presence or absence of "invention" and "infringement" are questions of fact. When disposed of by the trier of the facts in an equity suit, his decision may be reviewed on appeal. When disposed of by the verdict of a jury, properly instructed, its decisions on those points are not reviewable on appeal. Defendant, however, relies upon *Singer Co. v. Cramer*, 192 U. S. 275, 24 Sup. Ct. 291, 48 L. Ed. 437, and other cases, which hold that, where these questions can be determined from a mere comparison of two or more patents, they should be decided by the trial judge, and the jury instructed accordingly. Thus:

"If it appears from the face of the instruments that intrinsic evidence is not needed to explain terms of art or to apply the descriptions to the subject-matter, so that the court is able to say from such mere comparison that the inventions are not the same, but different, then the question of identity is one of pure construction, and not of evidence, and consequently is matter of law for the court." *Heald v. Rice*, 104 U. S. 737, 26 L. Ed. 910.

But we do not find in these citations anything which disturbs the rulings heretofore announced by the Supreme Court, when the situation presented is the one ordinarily presented on the trial of a patent cause, with much more in the record than a few certified copies of issued patents. In *Bischoff v. Wethered*, 76 U. S. 812, 19 L. Ed. 829, the court said:

"It is undoubtedly the common practice of the United States Circuit Courts, in actions at law, on questions of priority of invention, where a patent under consideration is attempted to be invalidated by a prior patent, to take the evidence of experts as to the nature of the various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them, and to submit all the evidence to the jury under general instructions as to the rules by which they are to consider the evidence. A case may sometimes be so clear that the court may feel no need of an expert to explain the terms of the art or the descriptions contained in the respective patents, and may therefore feel authorized to leave the question of identity to the jury under such general instruction as the nature of the docu-

ments seems to require. But in all such cases the question would still be treated as a question of fact for the jury and not as a question of law for the court. Such we think has been the prevailing rule in this country, and we see no sufficient reason for changing it."

The court points out that the practice is the same in England. It adds:

"The specifications of patents for inventions are documents of a peculiar kind. They profess to describe mechanisms and complicated machinery, chemical compositions, and other manufactured products, which have their existence in pairs, outside of the documents themselves, and which are commonly described by terms of the art or mystery to which they respectively belong; and these descriptions and terms of art often require peculiar knowledge and education to understand them aright, and slight verbal variations, scarcely noticeable to a common reader, would be detected by an expert in the art as indicating an important variation in an invention. Indeed, the whole subject-matter of a patent is an embodied conception outside of the patent itself, which, to the eyes of those expert in the art, stands out in clear, distinct relief, while it is often unperceived or but dimly perceived, by the uninitiated. This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence in pairs."

In *Keyes v. Grant*, 118 U. S. 25, 6 Sup. Ct. 950, 30 L. Ed. 54, defendant set up a prior publication of a machine, and there appeared obvious differences between the two machines; experts differing upon the question whether those differences were material to the result. Verdict was directed for the defendant. The Supreme Court reversed, saying:

"Clearly it was not a matter of law that the specifications of the plaintiff's patent and the publication of Karsten, taken in connection with the drawings, described the same thing. It was a question of fact properly to be left for determination by the jury, under suitable instructions."

In *Royer v. Schultz Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833, 34 L. Ed. 214, the court held that it was a question for the jury to pass upon whether the patented invention was of a primary character and the patent a "pioneer patent," and that it was also a question for them whether defendant's machine infringed its claims. In *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263, the court approved the statement quoted from *Robinson on Patents*:

"Where the defense denies that the invention used by defendant is identical with that included in the plaintiff's patent, the court defines the patented invention as indicated by the language of the claims. The jury judge whether the invention so defined covers the art or article employed by the defendant."

In the case at bar there was conflicting testimony as to both invention and infringement. The experts disputed as to how prior patents worked and as to whether they were practical. They disputed vigorously as to the meaning of the phrase "dipping-frame," used in the claim, whether it would convey to one skilled in the art the idea both of a pin-bar and of a wire mesh basket. They disputed as to whether a machine made under the patent in suit would or would not work. We are satisfied that under the authorities cited the trial judge would have committed error, had he decided these questions of validity and infringement, instead of sending them to the jury.

The court charged the jury at great length, going in detail over all the disputed points, calling their attention to all the separate defenses, referring to the prior patents, quoting from and explaining the patent, and laying down for them the general rules which are to be applied in determining the questions of invention and infringement. It is significant that to the charge no exception was taken. It must be therefore assumed that both sides were satisfied that, so far as it instructed the jury, it instructed them correctly. Defendant's assignments of error on this branch of the case deal only with refusals to charge some of his requests.

Before the summing up defendant submitted 36 separate written requests. These, as usual, were prepared to cover the entire controversy, and the court, in summing up, embodied many of them textually or substantially in the charge. The requests were not separately marked in the margin as "Charged" or "Refused," which is always a convenience for the appellate court. See our opinion in *Star Co. v. Madden*, 188 Fed. 910, filed this month. At the close of the charge the court, referring to the requests, said:

"I have endeavored to pass upon all the points which are referred to in them, and, if there is any point which I have not referred to at all, counsel will please call it to my attention, and I will charge it. I am not prepared to charge anything in any particular language, and I decline to charge as requested in the requests, other than as I have already charged in this case."

Counsel for defendant thereupon undertook to read each separate request and to ask for a ruling upon it. This the court refused to permit, but allowed counsel to note an exception to his refusal to charge each separate request. This was quite sufficient. It would have been a waste of time to read them all over again.

[3] The assignments of error do not include all the requests, and the argument here does not cover all the refusals which were assigned as error. It will be sufficient to refer only to those which were made the subject of argument.

Request No. I:

"The evidence shows that Smith machines, used at defendant's factory, contained the devices shown in the Smith patents numbered 901,749 and 905,472, and are in accordance with the drawings and specifications set forth therein."

Defendant was not entitled to this request as phrased, because there was some evidence to show that the entire device shown in the two Smith patents was not found in the machine used in the Heide factory.

Request No. II:

"The issuance of patents numbered 901,749 and 905,472 to Myron A. Smith, creates a prima facie presumption of patentable difference between the device shown in the plaintiff's patent in suit and the Smith machines used in the defendant's factory."

This request is dependent on No. I, and falls with it.

Request No. IV:

"The plaintiff's patent in suit must be construed in reference to the prior art, and in this case is limited to the construction shown and set forth in the drawings and specifications of the patent."

## Request No. V:

"Claim 2 of the patent in suit is limited to a construction showing a basket with pockets and a finger which constitutes two sides of said pockets and the relatively movable means for rearranging coating, substantially the same as the flipper or finger shown in the drawings and specifications in the patent in suit, and operating substantially in the same manner as is explained by the specification of the patent in suit."

The fifth is but an amplification of the fourth request. The court charged the jury in general terms:

"That claim No. 2 of the patent must be construed with reference to the language preceding it in the specifications and with reference as to the drawings and is limited by the drawings and specifications."

This was all, possibly more than, defendant was entitled to. Certainly the evidence as to the meaning of words used in the art was too conflicting to warrant a charge that the claim of the patent covered only the particular form of meshed basket dipping-frame which the drawings showed.

The sixth request referred to a device known as Exhibit D, which will be discussed later.

The seventh request asked an instruction that plaintiff could not have a claim against defendant under a later patent issued to him, which was not in suit. The charge most clearly told the jury that they were concerned only with an alleged infringement of claim 2 of the patent in suit. It was not error to refuse this additional instruction.

The eighth and ninth requests called for specific instructions as to practical commercial results of operating various machines, as to which the jury had been sufficiently instructed in the general charge.

It is not necessary to go over the remaining requests in detail, because they were evidently so constructed as to dispose of the entire controversy by direction of the court, while apparently submitting it to the jury. The careful and exhaustive charge, which told them what the questions were and where they should look to find answers to them, was quite sufficient. Precise instructions on minute points would have taken away from their consideration the very questions which in a common-law case should be submitted to them.

Request No. 16, as to commercial use of a prior patent, was substantially covered by the charge; and the same is true of requests Nos. 33 and 34.

At the outset of the trial plaintiff offered in evidence a device which he said was made under his patent, and which he used in coating candies. Its appearance differed from the drawings of the patent and rather resembled that of defendant's device. It was admitted, over exception, as Exhibit D. We think that at the time it was offered it had not been sufficiently proved to be an embodiment of the device of the patent; but the question whether it was or was not covered by the patent was eventually left to the jury, and they found that it was so covered. This gave them the burden of determining whether two different machines, viz., Exhibit D and defendant's machine, both infringed the patent, when they should have been troubled only with the question whether or not defendant's machine infringed. But we do not

think it was error to allow them thus to classify Exhibit D, and, since it has been found to embody the device of the patent, any error in originally admitting it is cured. The sixth request asked an instruction that the device of Exhibit D is not shown in the patent in suit. Such an instruction was not justified by the testimony, which was in conflict as to the scope of the patent.

There are a number of exceptions to the admission of testimony; but we do not find any instance of reversible error.

[4] We have, then, a patent suit on the common-law side of the court, where there is much conflicting testimony, and where the case has been given to the jury with sufficiently full and proper instructions. The Supreme Court said in *Tucker v. Spalding*, 13 Wall. 455, 20 L. Ed. 515:

"Whatever may be our personal opinions as to the fitness of a jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments, it cannot be questioned that when the plaintiff, in the exercise of the option which the law gives him, brings his suit in the law in preference to the equity side of the court, that question must be submitted to the jury, if there is so much resemblance as raises the question at all."

In such a case, where the jury has decided the questions of invention and infringement in one way, and no error is found in the conduct of the trial, it is not for us to set aside their verdict merely because, if the same questions were submitted to us as triers of the facts upon the same record, we might have reached a different conclusion.

As to the question of damages, the jury were instructed that plaintiff could recover only such damages as he might prove as a consequence of failure to sell machines of his own to defendant through the intrusion on the market of infringing machines. He testified to the price at which he sold complete machines with the patented feature included, and that he did not sell the patented feature separately, except to persons who had already purchased a complete machine. He testified what it cost to make the patented feature and the complete machine. The jury were told that they could not give more than nominal damages, unless they were satisfied that defendant, if he had not bought the infringing Smith machine, could have bought plaintiff's machines. There was evidence from which they might fairly have reached such a conclusion, and the verdict does not exceed the amount which would naturally result from such a conclusion. We find no error in the charge on this branch of the case.

The judgment is affirmed.

## DIXIE COTTON PICKER CO. v. BULLOCK et al.

(Circuit Court, N. D. Illinois, E. D. August 4, 1911.)

No. 30,271.

**1. CANCELLATION OF INSTRUMENTS (§ 15\*)—EQUITY—IRREPARABLE INJURY.**

Where the injury caused by a breach of contract is irreparable, and damages are wholly inadequate, equity has power to decree a rescission.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 14, 21; Dec. Dig. § 15.\*]

**2. CANCELLATION OF INSTRUMENTS (§ 15\*)—BREACH OF CONTRACT—REMEDY BY RECOVERY OF DAMAGES.**

That defendants had refused to comply with any of the terms of a contract is not sufficient to sustain a decree for cancellation, in the absence of a showing that the recovery of damages at law would be inadequate.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 14, 21; Dec. Dig. § 15.\*]

**3. PATENTS (§ 216\*)—CONTRACTS—MANUFACTURE AND SALE.**

Where a contract for the manufacture of patented machinery provided certain conditions precedent to defendants' obligation to pay royalties, for failure to do which the contract was subject to cancellation, a failure to pay such royalties was not ground for cancellation, in the absence of a showing that complainant had performed the conditions.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.\*]

**4. PATENTS (§ 216\*)—MANUFACTURE AND SALE—BREACH OF CONTRACT.**

Where a contract for the manufacture and sale of certain patented machinery provided that defendants were granted the privilege of manufacturing, but the contract contained no covenant obligating them to do so, or to attempt to sell, complainant relying on the chance that defendants would take advantage of their privilege to manufacture, rather than on their covenant to do so, the contract was not subject to cancellation for defendants' refusal to manufacture, or to attempt to sell machines properly constructed under the patents.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 216.\*]

**5. PATENTS (§ 216\*) — CONTRACTS — CONSTRUCTION — PATENTED MACHINERY — MANUFACTURE.**

Where the contract for the manufacture and sale of certain patented machinery provided that defendant agreed to be diligent in supplying the market with sufficient machines to supply the demand of the market therefor, defendant was not bound by such agreement to create a market or to try to sell the machines.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.\*]

**6. PATENTS (§ 216\*)—CONTRACTS—BREACH—REMEDY.**

Where a contract for the manufacture and sale of patented machinery provided that if complainants were dissatisfied with the diligence used by defendant, its remedy should be as follows, and then contained a provision that complainant should send to defendants bona fide orders for machines by solvent responsible parties to be paid in cash, there being no allegation that orders had been so sent, and that defendants had refused to fill them, defendants were not subject to a suit for cancellation of the contract on the ground that they had failed to diligently manufacture and sell the machines.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 216.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**7. PATENTS (§ 216\*)—CONTRACTS—MANUFACTURE AND SALE.**

Where there was nothing in a contract for the manufacture and sale of certain machinery obligating defendants to comply with the suggestions of complainant's mechanical expert, nor to refrain from spying on the work of such expert, nor to refrain from taking out patents on devices embodying the ideas of the expert, nor to refrain from trying to purchase the stock of complainant company, nor to terminate the contract, the fact that defendants had committed all such acts was not ground for cancellation of the contract in equity.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 216.\*]

**8. PATENTS (§ 216\*)—CONTRACTS—BREACH.**

Where a contract for the manufacture and sale of certain patented machinery contained a covenant obligating defendants not to manufacture other similar machinery, but the contract did not provide that a breach of such covenant should give complainant a right to rescind, a breach thereof was not ground for cancellation in equity, in the absence of a showing that complainant would be irreparably injured if such relief was denied.

[Ed. Note.—For other cases, see Patents, Dec. Dig. 216.\*]

In Equity. Bill by the Dixie Cotton Picker Company against H. E. and J. E. Bullock and others. On demurrer to bill. Sustained.

Herbert D. Crocker (Americus B. Melville, of counsel), for complainant.

Judah, Willard, Wolf & Reichmann, for defendants.

KOHLSAAT, Circuit Judge. This cause is before the court on demurrer. The principal relief prayed by the bill is the cancellation of a certain contract, the substance of which is as follows: Complainant, as the owner of certain patents on cotton picking machinery, grants to defendants the sole and exclusive right to manufacture, sell, and use machines and devices made in accordance therewith. In consideration whereof, defendants agree, among other things, to be "diligent in supplying the market with sufficient machines to meet the demand of the market therefor," and not to engage in the manufacture of other cotton picking machinery.

Complainant charges that defendants have (1) refused to comply with any of the terms of said contract; (2) refused to manufacture or to try to sell any machines properly constructed under said patents; (3) refused to comply with the suggestions of the mechanical expert employed by complainant; (4) devoted their attention to the manufacture of other cotton picking machines of entirely different types; (5) have spied upon the work and inventions of complainant's expert, and have taken out patents upon devices embodying the ideas thereby acquired from complainant's expert; (6) tried to buy up the stock of the Dixie Cotton Picker Company with intent to get control of the same; (7) refused to terminate the contract.

Cancellation of the contract, accounting, and damages are prayed. Defendants urge, among other things, as grounds of demurrer that there is a failure upon the part of complainant to aver a compliance with certain conditions precedent, and that the bill shows that complainant has a plain, adequate, and complete remedy at law.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



[1] While it is true that, unless expressly stipulated therein, the mere breach of a contract will not ordinarily constitute a ground for the equitable remedy of cancellation, yet where a case is stated which clearly shows that the injury caused by such breach is irreparable, and that damages are wholly inadequate, equity has undoubted power to decree a rescission. 24 Am. & Eng. Ency. of Law (2d Ed.) p. 619, and cases cited. The principal question before the court, therefore, is: Has complainant stated a case which shows that the remedy at law is inadequate?

[2] The charge of the bill that defendants have refused to comply with any of the terms of the contract is not sufficient to sustain a decree of cancellation, for, even if it should be admitted that there has been a breach of each and every covenant to be performed by defendants, it does not follow that damages at law would be inadequate.

[3] Nonpayment of royalties, it is true, is expressly made ground for revocation of the contract by the Dixie Company, and possibly might be a sufficient basis for a decree of cancellation were it not for the fact that under the terms of the agreement such revocation can only be effective upon the compliance by the Dixie Company with certain conditions precedent. The bill does not support its general allegation of breach as to all of the covenants by any allegation of compliance with such conditions precedent. Failure to pay royalties seems to be the only ground expressly made by the contract ground for rescission by first party.

[4] Complainant charges that defendants refuse to manufacture or to try to sell any machines properly constructed under said patents. A sufficient answer to the breach assigned is that the contract contains no undertaking on the part of defendants to do either of these things. There can be no doubt that the parties contemplated that party of the second part should enter upon the manufacture of machines. The Dixie Company granted the "privilege" of manufacturing, and while on page 2 of the contract the "obligation of party of the second part to manufacture" is spoken of, the court looks in vain through the contract for any covenant obligating them either to manufacture or to try to sell. At the time the contract was entered into it doubtless appeared very much to the interest of second parties to push the manufacture and sale, and the possibility of their refusing to do so probably did not enter into the calculations of first party. The Dixie Company chose to rely upon the chance that defendants would take advantage of their privilege to manufacture, rather than their covenant to do so. Reformation of the contract is not asked; neither fraud nor mistake are alleged. It would seem hardly necessary to say that the court cannot, under the circumstances, remake the contract for the parties by the insertion of covenants which they have seen fit to omit.

[5] True it is that party of the second part agreed "to be diligent in supplying the market with sufficient machines to supply the demand of the market therefor." This, however, cannot be construed as an obligation to manufacture. Party of the second part did not agree to *create* a market or to try to sell machines. If for want of proper advertising or for any other cause, there was no market to be supplied,

certainly the covenant to be diligent in supplying the market should not obligate party of the second part to put in a stock of machines on the chance that purchasers might be found in the future.

[6] While breach of the covenant to be diligent in supplying the market is charged, complainant has not averred performance of conditions necessary under the terms of the contract to be performed by first party before it can take advantage of such breach. The contract provides that if party of the first part is dissatisfied with the diligence used by party of the second part "its remedy shall be as follows:" Then follows a number of conditions, principal among which is that party of the first part shall send in "bona fide orders for machines by solvent responsible parties who will pay in cash. \* \* \*" There being no allegation in the bill that orders have been sent in, and that defendants have refused to fill such orders, the court cannot say that there has been a breach of the covenant to be diligent in supplying the market.

[7] There seems to be nothing in the contract obligating second party to comply with the suggestions of the mechanical expert employed by complainant; nor to refrain from spying upon the work of complainant's expert; nor to refrain from taking out patents on devices embodying the ideas of complainant's expert; nor to refrain from trying to buy stock of the Dixie Cotton Picker Company; nor to terminate the contract. Surely, therefore, none of these acts can be ground for cancellation of the contract.

[8] It is true that party of the second part have obligated themselves not to engage in the manufacture of other cotton picking machines or cotton picking machinery, and that the bill charges a breach of this covenant. It is not provided in the contract, however, that such acts shall give to first party a right to rescission, and nothing is stated from which the court would be justified in concluding that complainant is irreparably injured thereby or that damages at law would not be adequate. Indeed, it is difficult to see how the experimental manufacture of other machines could injure complainant.

So far as the allegations of the bill show, there is not the slightest ground for an accounting, and it is very clear that equity cannot take jurisdiction to decree damages alone.

The allegations of the bill are inadequate to justify the court in departing from the general rule that, in the absence of some provision of the contract for its cancellation, a court of equity will not interfere, except for fraud in securing its execution, or for irreparable injury growing out of the breach of its terms.

The demurrer is sustained.

**THOMAS A. EDISON, Inc., v. IRA M. SMITH MERCANTILE CO.**

(Circuit Court, W. D. Michigan, S. D. July 25, 1911.)

**1. PATENTS (§ 216\*)—RIGHTS OF PATENTEE—PRICE OF SALE.**

A patentee may, by appropriate contract, reserve to himself control over the price or other conditions attending the public enjoyment of the patented article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.\*]

**2. PATENTS (§ 216\*)—PATENTED ARTICLE—SALE—RESTRICTIONS.**

Where price restrictions and other conditions are imposed by contract on the sale of a patented article, such restrictions will or will not be considered as running with the article, depending in each case on the transaction by which the patentee offered the article to the public for use; the right of use and resale being such only as might be normally appropriate to the article and implied from the circumstances of the original sale.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.\*]

**3. PATENTS (§ 216\*)—SALE OF PATENTED ARTICLE—PRICE RESTRICTIONS—INJUNCTION.**

Patented phonograph records were manufactured and sold under contracts authorizing jobbers and dealers to resell the same, provided that such resale should not be made except for a specified price, and that on any breach of the condition the license to use and vend the record implied from the purchase for resale immediately terminated. The stock of an authorized dealer in such records having been damaged by fire, it was abandoned to an insurance company which sold the stock to a salvage company by which it was sold to defendant; some of the records being in the original cartons and others having been replaced in blank cartons. *Held*, that defendant having offered such records for sale at cut prices with knowledge of the restrictions under which they were originally sold was subject to an injunction restraining a resale at less than the contract prices.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 216.\*]

**4. PATENTS (§ 216\*)—SALE OF PATENTED ARTICLE—PRICE RESTRICTIONS.**

The right of a patentee to impose a price restriction on resale of a patented article extends to a licensee to whom has been granted the exclusive right to make, use, and sell the patented invention throughout the United States.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 216.\*]

**5. PATENTS (§ 216\*)—SALE IN VIOLATION OF RESTRICTIONS—INJUNCTION—ADJUDICATION OF PATENT.**

Where there was nothing to rebut the presumption of validity of a patent, and there was a certain public acquiescence, it was no objection to the issuance of a temporary injunction to restrain defendant's sale of the patented article in violation of price restrictions that the patent had never been adjudicated.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 216.\*]

In Equity. Bill by Thomas A. Edison, Incorporated, against the Ira M. Smith Mercantile Company. On motion for preliminary injunction. Granted.

Offield, Towle, Graves & Offield and Butterfield & Keeney, for complainant.

James H. Campbell and Wilson, Wilson & Rice, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DENISON, District Judge. [1] As to the underlying question presented by this motion, I cannot hesitate to accept, as the now prevailing and general rule established by many familiar cases, the position that a patentee may, by appropriate contract, reserve to himself a control over the price or other conditions attending the public enjoyment of the patented article. Several courts have recognized a tendency to go too far in sanctioning such conditions, and some recent decisions in the Second Circuit, as well as the opinions of the Supreme Court in the Bobbs-Merrill Case, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, and the Dr. Miles Case, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. —, and the granting of the pending certiorari in the Dick Case,<sup>1</sup> have tended to indicate that some limits will be placed upon the now customary practice.

[2] As the result of all the decisions on this subject, and in the absence of any pronouncement by the Supreme Court, I think it must be taken as the existing rule that the force of these restrictions, as running with the patented article, depends, in each case, upon the transaction by which the patentee embarked the article upon its voyage. Such transaction is not necessarily unconditional and absolute, because it is denominated a "sale"; nor is it necessarily any less than a complete sale because denominated a "conditional sale" or "license." Its dominant characteristic is a question of construction in each case. Some analogy may be found in the case of a shipment and delivery of an unpatented article where, afterwards, the vendor claims the title was reserved, and that he may retake the article. There are cases such that even where title and right of reclamation were, in terms, reserved, yet, if the vendee had the right to sell and convey a perfect title and to become merely a debtor to the vendor for the proceeds, the characteristics of a complete sale dominated those of a conditional sale or bailment, and the attempted reservation of title was inefficient.

Applying the above criterion to this case, it would seem that the patentees have rightly apprehended the exact nature of the patent monopoly to make, use, and sell. A sale by the patentee of the patented article which he has manufactured, does not, according to the letter of the statute, exhaust the patentee's monopoly with reference thereto. The purchaser does not, in so many words, acquire a right to use the article or to sell it again; but such right of use, and such right of resale as may be normally appropriate to the article, are implied from the fact of the original sale. This implication may be more or less extensive. It involves the right to repair, but not the right to reconstruct. Accordingly, in this case, the patentees, while they speak, in their jobbers' contracts and dealers' contracts and in their notices on the cartons, of a "sale," go on expressly to say that it is a condition of such sale that the article shall not be resold, except for the specified price, and that "upon any breach of said condition, the license to use and vend this record, implied from such sale, immediately terminates."

[3] The proper construction of this contract, it seems to me, is that it is not an absolute sale or entitled to be spoken of without limitation as a sale, so that there is no attempt to accompany what is

<sup>1</sup> For decision on merits, see *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 646.

really a perfect sale, by conditions which are repugnant and therefore inoperative. Whether, on the other hand, it is called a sale upon condition subsequent, or a terminable license, is not important for the purpose of this inquiry. If called by either name, it is clear that the patentee has not parted with the dominion over his property and put it into unrestricted circulation. The language used in the contract and in the notice in this case seems fully as effective for complainant's purpose as the language used upon the plates or machines in *Heaton-Peninsular Co. v. Eureka Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728.

In this case, it appears that the stock of a presumably authorized dealer in such records had been damaged by fire; that some of the cartons were smoked and blackened and others more seriously injured; that the stock was abandoned to an insurance company which took it over; that the insurance company sold the stock to a salvage company; and that this latter company sold to defendant the records in question. Some of them were then in the original cartons and some had been replaced in blank cartons. The defendant does not deny having full knowledge of the general system pursued by complainant; and, indeed, in its advertisement offering the records at cut prices, it expressly stated that the prices were restricted by contract, "as every owner of a talking machine knows." The case, therefore, does not present any question as to the rights of one who purchased in ignorance of the price restriction; and if it is, as I think, the true theory that such a condition as this is a license condition attaching to the article and not merely a personal covenant by the first purchaser, it makes no difference that the defendant never had any direct dealings with complainant. There is, nevertheless, in a proper sense, privity between them, as to this condition. Whether the language in question effectively operates in this way after the article has once reached the ultimate user and has been used is a question not presented by this record, and which may not be, in all material respects, the same question as the present one.

The importance, to the patentee, of maintaining the fixed prices, is apparent, and I do not see that any controlling question of public interest or public policy is involved. Under this system, the patentee sells at such a price that the retail dealer can afford to sell the ordinary record for thirty-five cents. Except for the fact that there is a continuing volume of sales maintained at that price, and if it was compelled to compete with last season's records at any price, the patentee might find his current sales greatly reduced and be obliged to double his prices in order to realize the same profit. This may or may not be the situation, but the fact that this may be true shows that there is no inherent impropriety in the system.

[4] It is urged that the sales were made and the licensed conditions inaugurated, not by the patentee, but by a licensee. The bill alleges that the complainant, as licensee, held under a grant of exclusive right to make, use, and sell the patented invention throughout the United States. Under such a grant, there is no difference, so far as this question is concerned, between patentee and licensee. The opinion in

*Ingersoll v. Snellenberg* (C. C.) 147 Fed. 522, holding that such restrictions are not valid when imposed by a licensee, seems to rest upon the idea that the license there in question was not shown to be exclusive so as to supersede the rights of the patentee.

[5] Defendant also urges that the patent in suit, No. 880,707, does not appear to have been adjudicated, and is a recent patent upon which preliminary injunction should not rest. If this point could be maintained regarding an article created under the patent, the question is not sufficiently raised by the record. Defendant, by its answer, formally questions the validity of the patent, but makes no showing whatever which has a tendency to dispute the legal presumption of validity. Under such circumstances, that legal presumption, with so much of public acquiescence as appears by the bill, is sufficient.

A more serious question is presented by the fact that apparently some of the records in question were manufactured before the issue of the patent in suit. Complainant urges that these license conditions may properly be applied to articles manufactured and put out while the patent application is pending and may be indirectly enforced in an infringement suit based upon the patent later issued; but, upon the argument, complainant proposed to file an amended bill or a further bill, based also upon another patent, issued before these articles were manufactured. The filing of such a bill would apparently obviate this question.

The restraining order will be continued for one week, and, upon the filing of such amended bill (unless the defendant shall wish further hearing on the new allegations thereof), a preliminary injunction will issue as prayed.

ATCHISON, T. & S. F. RY. CO. et al. v. INTERSTATE COMMERCE  
COMMISSION et al.

No. 2.

(Commerce Court. July 31, 1911.)

For majority opinion, see 188 Fed. 229, 241.

MACK, Judge (dissenting). In my opinion the finding of the Commission, that the industry track service in the city of Los Angeles is substantially the same as the team track and depot service, is binding upon this court. I agree that this court should not be concluded by a finding of the Commission, based upon admitted facts which in no wise tend to sustain the conclusion reached; but in my judgment the facts in this case, as related by the Commission in its report, fully justify its conclusions. The Commission finds as follows:

"Each of the carriers here involved has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for six or seven miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in car loads is delivered at team tracks, at freight sheds, or at industry spurs. \* \* \*

"These industry spurs are not private, in that the carrier may use them for purposes of its own—as for storage of cars, as leads to other industries, and sometimes for public delivery. They are often laid upon public streets and over private property, are operated exclusively by the railroad with its own engines, and furnish means of interindustry conveyance by rail, for which the carrier properly imposes a switching charge. \* \* \*

"We are fully convinced that the complainant's view of the nature of these tracks is correct, and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers. \* \* \*

"Again, it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards, which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated, they are taken to the tracks to which they are ordered—some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops, or to freight sheds, or to the stockyards. \* \* \* After a most exhaustive inquiry, we cannot find, taking this service as a whole, in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team track delivery."

If, then, these industry tracks are, as the Commission in my judgment correctly finds them to be, terminal facilities of the railroad, and if, as the Commission further finds, the service for which the charge in question is made is substantially the same service as that which is performed by the carrier in delivering freight on its team tracks, the

Commission was justified in prohibiting, as an unreasonable practice, the additional so-called switching charge made for the delivery at the industry tracks.

While under the American practice, as distinguished from the English practice, the transportation rate has always included the charge for the use of the ordinary terminal facilities—that is, the use of depots or tracks for the purpose of delivery—it may well be that the Commission has the right, in regulating the practices of the carriers, to require a separation of the transportation rate into its elements. It may well be that the dangers of undue preferences and unjust discriminations in favor of large industries, which can afford to have industry tracks, may not only justify, but in the future require, the Commission so to act, and that, too, despite the common-law principle enunciated in *Covington Stockyards v. Keith*, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73, and conceded in complainant's brief in the following language:

"Of course, it may rightfully be assumed that the charge established by the carrier for carrying goods to and from the given cities *does necessarily* embrace the use of instrumentalities which the carrier must furnish to accomplish the carriage, such as engines, cars, the railroad, and the depots and delivering yards, where goods of the public in general may be received and delivered. In other words, a double charge may not be imposed for the same thing."

If such action should be taken, shippers located on industry tracks, whose cars go directly from the breaking-up yards to these tracks, could not be compelled to pay for the use of the team track terminal facilities; but, on the other hand, they could be compelled to pay for the use of terminal facilities on the industry tracks. We need not now determine whether, in that event, a higher rate for industry than for team track delivery could be permitted or compelled, if the cost of each delivery to the carrier were the same, in order to prevent the large shipper, located on an industry track, from gaining such advantage as would naturally accrue to him from his location.

The Commission, however, has not yet attempted to exercise this possible power. It has acted on the basis of the long-established American practice, which it was justified in assuming would be continued. Under that practice the shippers on industry tracks pay a delivery charge in the regular transportation rate. Nothing in the order sought to be enjoined compels the railroads to continue to maintain the industry tracks or to make delivery thereon. If, however, they voluntarily make delivery thereon, instead of on their other tracks, they are prohibited from exacting additional compensation for a service found to be substantially the same as that for which payment has already been made.

Moreover, nothing in the order prevents the railroads from making different transportation charges to the various depots or tracks in the city. A difference of seven miles in the length of the haul might, under some circumstances, justify a difference in the transportation rate. That rate, however, is not in question on this record. Moreover, this extreme difference in the length of some of the hauls does



not, in my judgment, justify the court in holding as untenable the finding of the Commission, based on a careful consideration of all the physical and economic conditions, that industry and team track delivery in these cities are practically identical.

The conclusion of the Commission is, in substance, that inasmuch as, under the American practice, no separate charge is made for team track delivery, but only a single charge for transportation, including delivery, a separate charge for the similar, no more costly, and voluntarily substituted spur track delivery is an unreasonable practice. An order prohibiting the charge is, in my judgment, within the powers granted to it under section 15 of the act to regulate commerce.

JESSUP et al. v. CHICAGO & N. W. RY. CO.

(Circuit Court, S. D. New York. April 24, 1911.)

1. CORPORATIONS (§ 133\*)—COMPELLING TRANSFER OF STOCK—REMEDY.

The remedy of a stockholder having the right to compel a transfer of his stock is in equity, and a suit in equity in the United States Circuit Court to compel a transfer is sustainable as against the objection of complainant's adequacy of remedy at law, since the United States Circuit Court has no original jurisdiction to issue mandamus.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 513-520; Dec. Dig. § 133.\*]

2. CORPORATIONS (§ 133\*)—COMPELLING TRANSFER OF STOCK—PARTIES.

An executor suing a Wisconsin corporation to compel it to transfer stock standing in testator's name, and to pay the difference between the market value of the stock on the day transfer was demanded and its highest market value between that day and judgment, need not make the state of Wisconsin, or its proper officer, a party, though the stock is property within Wisconsin and under Sanborn's St. Supp. Wis. 1906, § 1087, subject to an inheritance tax which remains a lien on the property until paid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 133.\*]

3. COURTS (§ 328\*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

A bill in a federal court to compel a corporation to transfer corporate stock of the market value of \$33,600 and to pay the difference between the market value of the stock on the day transfer was demanded and its highest market value between that day and judgment, which alleges that the corporation refused to make the transfer of the stock which was property within the state of Wisconsin, and subject to an inheritance tax under the laws of Wisconsin, of less than \$2,000 until a waiver or consent to the transfer from the state was produced, was demurrable on the ground that the amount in controversy was not over \$2,000; the corporation not claiming the stock nor any right to control it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.\*]

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennant-Stribling Shoe Co. v. Roper, 36 C. C. A. 459; O. J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.]

In Equity. Suit by one Jessup and others, executors of Horace B. Stillman, deceased, against the Chicago & Northwestern Railway

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company for a mandatory injunction. Demurrer to bill sustained, with leave to amend.

Daniel D. Sherman, for complainants.  
Pierpont Davis, for defendant.

WARD, Circuit Judge. The complainants, citizens of the state of New York, as executors of the last will and testament of Horace B. Stillman, deceased, who was a resident of the state of New York at the time of his death, bring this bill against the Chicago & Northwestern Railway Company for a mandatory injunction compelling it to transfer at its transfer office in the city of New York into their names as executors shares of its capital stock standing on the books of the company in the name of their decedent of the market value of \$33,600, and also to pay to them the difference between the market value of the stock on the day transfer was demanded and its highest market value between that day and judgment.

The bill alleges that the defendant is incorporated under the laws of the states of Illinois, Wisconsin, and Michigan, and that it has refused to make the transfer until the executors shall produce and file with it a waiver or consent to the transfer from the state of Wisconsin.

The defendant demurs on the grounds that:

- (1) This court has no jurisdiction of the cause of action in equity.
- (2) That the bill is without equity.
- (3) That the complainants have a full, adequate, and complete remedy at law.
- (4) That the amount in controversy is not over the sum of \$2,000 without interest and costs.
- (5) That the state of Wisconsin or the proper officers thereof are necessary parties.

It is conceded, or I think must be conceded, that the stock in question is property within the state of Wisconsin subject to transfer tax. Matter of Palmer, 183 N. Y. 238, 76 N. E. 16. Section 1087 of the Inheritance Tax Wisconsin Statutes Supplement, pp. 438 to 450, subd. 2, provides that the following property of a nonresident within the state shall be subject to the tax:

"(2) When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death."

Section 11, subd. 1, provides:

"(1) If a foreign executor, administrator, or trustee shall assign or transfer any stock or obligations in this state standing in the name of a decedent or in trust for a decedent, liable to any such tax, the tax shall be paid to the treasurer of the proper county or the \* \* \* State Treasurer on the transfer thereof."

The defendant rests its right to refuse a transfer on subdivision 2 of the same section:

"(2) No safe deposit company, bank, or other institution, person, or persons holding securities or assets of a nonresident decedent, shall deliver or trans-

fer the same to the executors, administrators, or legal representatives of said decedent, or upon their order or request unless notice of the time and place of such intended transfer be served upon the \* \* \* Attorney General at least ten days prior to the said transfer; nor shall any such safe deposit company, bank or other institution, person or persons deliver or transfer any securities or assets of the estate of a nonresident decedent without retaining a sufficient portion or amount thereof to pay any tax which may thereafter be assessed on account of the transfer of such securities or assets under the provisions of this act unless the \* \* \* Attorney General or public administrator consents thereto in writing; and it shall be lawful for the Attorney General or public administrator, \* \* \* personally or by representative, to examine said securities or assets at the time of such delivery or transfer. Failure to serve such notice or to allow such examination or to retain a sufficient portion or amount to pay such tax as herein provided, shall render said safe deposit company, trust company, bank, or other institution, person or persons, liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of this act."

[1] I think the first three grounds of demurrer bad. This court has no original jurisdiction to issue a writ of mandamus (Fuller v. Ayiesworth, 75 Fed. 694, 699, 21 C. C. A. 505), and stockholders have a right to compel the transfer of stock in proceedings in equity (Cook on Corporations, §§ 389-391).

[2] The fifth ground of demurrer also seems to me bad. The bill asks no relief against the state of Wisconsin, and the state's lien upon the stock (if any) for any transfer tax due will not be affected by the issue of a new certificate. Section 1087 of the Wisconsin Statutes, subd. 5(1), provides:

"(5) Every such tax shall be and remain, a lien upon the property transferred until paid and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred, shall be personally liable for such tax until its payment."

[3] But the fourth ground of demurrer must be sustained. If the tax said to be due the state of Wisconsin can be regarded as the amount in controversy, it is not sufficient to give the court jurisdiction because it is less than the sum of \$2,000.

Although the bill describes the defendant's refusal to transfer as a conversion of the stock valued at \$33,600, it does not ask for relief on that ground. On the contrary, it asks for the transfer of the stock and incidentally for the difference between its market value on the day transfer was demanded and its highest market value between that day and judgment. The amount of this difference is not, and in the nature of things cannot be, stated.

The fact that the controversy is about a thing worth \$33,600 does not necessarily show that this sum is the amount in controversy. The defendant does not claim the stock nor any right to control it, nor does it impugn the complainants' title in any way. The certificate is only evidence of the ownership of the stock, and, while the defendant's refusal to issue a new one to them may prevent the complainants from making a good stock exchange delivery in case they sell the stock, it does not affect their title as owners at all. It would be as impossible to fix the value of this right of transfer on the books of the corporation as it is to fix the value of the right to register a trade-mark.

South Carolina v. Seymour, 153 U. S. 353, 14 Sup. Ct. 871, 38 L. Ed. 742. At all events, no attempt to do so is made in the bill.

The demurrer is sustained, with leave to the complainants to amend on payment of costs within 20 days after service of notice of entry of order hereon. Otherwise the bill to be dismissed.

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McCLELLAN et al. v. BLACKMAN (STATE OF SOUTH DAKOTA,  
Intervener.).

(Circuit Court, D. South Dakota. July 17, 1911.)

COURTS (§ 99\*)—LAW OF THE CASE—FORMER DECISION.

Where the right of the state to intervene in proceedings to recover property belonging to a decedent's estate had been sustained by the Circuit Court of Appeals, and the sufficiency of the petition in intervention had been considered on a motion to strike it from the files, a demurrer thereto must be overruled.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 99.\*]

Action by John C. McClellan and others against George T. Blackman, special administrator of the estate of John C. McClellan, deceased, in which the state of South Dakota intervened. On complainants' demurrer to the bill in intervention. Overruled.

Grigsby & Grigsby, for complainants.

U. S. G. Cherry, Sp. Counsel, and S. W. Clarke, Atty. Gen., for state of South Dakota.

ELLIOTT, District Judge. This case was before this court upon motion in behalf of the state of South Dakota for leave to intervene and such motion was denied and further order made in the premises in reference to a stay of proceedings and the opinion of the court filed herein December 24, 1908. Whereupon the complainants presented to the United States Circuit Court of Appeals a petition for a writ of mandamus, commanding the United States District Judge of South Dakota to vacate his order staying the prosecution of this suit, and that court duly dismissed said petition, and the Supreme Court of the United States thereafter duly reversed such dismissal. *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762. The United States Circuit Court of Appeals thereupon issued an alternative writ of mandamus to the District Judge of the district of South Dakota and in answer to such alternative writ, the Honorable John E. Carland, District Judge, returned to the said Court of Appeals a transcript of all the files and records before him when the orders staying the suit were made, and the question then was, should the District Judge vacate said orders staying the suit and proceed to hear and decide the issues, presented by such bill in intervention. The United States Circuit Court of Appeals, Eighth Circuit, after an examination of such record, determined that the District Judge "should vacate said orders staying this suit and should proceed to hear and decide the issues it

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

presents." *McClellan v. Carland*, 187 Fed. 915. Opinion filed April 27, 1911. Thereupon the Honorable John E. Carland, Judge of the District Court for the district of South Dakota, upon all the proceedings theretofore had in said cause and "on consideration of the judgment of the Circuit Court of Appeals," ordered that the motion of the said state of South Dakota for leave to intervene in this action, be, and the same was, thereby granted, and an order was also entered vacating the order staying the proceedings in this action. Whereupon on the 19th day of December, A. D. 1910, the said state of South Dakota duly filed in this cause a bill in intervention as referred to in the foregoing orders; which bill in intervention was substantially the same and prayed for substantially the same relief as the former bill in intervention theretofore denied, as above set forth, on the 4th day of January, 1909. That thereafter, on, to wit, the 16th day of February, 1911, the Honorable Charles A. Willard, then District Judge for the district of South Dakota, upon a showing made by the complainants, required said intervenor to show cause before the court at Sioux Falls, S. D., on the 1st day of March, A. D. 1911, why the orders of this court theretofore made, filed and entered in this cause, reciting therein the orders above set forth, should not be vacated, set aside, and held for naught, and why the said bill in intervention, filed herein on December 19, 1910, by the said state of South Dakota, should not be ordered stricken from the files and records in this cause for the reasons stated in the affidavits presented to the court and filed with such order. That said order to show cause was duly brought on for hearing before the court, Hon. Charles A. Willard, judge of said court, at the city of Sioux Falls, S. D., on March 16, A. D. 1911, and thereupon, on that date, an order was duly entered in the minutes of the court in all things denying the motion of the complainants to vacate, set aside, and hold for naught the said bill in intervention and denying the motion to strike said bill in intervention from the files and records of this cause. Whereupon, within the time granted by said order, the complainants duly filed and served a demurrer to said bill in intervention for the several reasons set forth therein; which demurrer is in form sufficient to raise the question of the sufficiency of said bill in form and substance as well as the jurisdiction of this court. This cause was thereupon duly noticed for trial and brought on for hearing upon said demurrer on the 27th day of June, A. D. 1911.

This action is one in equity brought by the complainants for the recovery of certain property alleged to be in the possession of the defendant, George T. Blackman, as special administrator of the estate of John C. McClellan, deceased. The bill in intervention on behalf of the said state of South Dakota, in the form of a sworn petition above referred to, sets forth that the property in question is the property of the state by reason of the fact that John C. McClellan died intestate, without heirs, and that this property, being the residue of his estate, escheated to the state. An examination of the record before the United States Court of Appeals, Eighth Circuit, discloses the fact that the bill in intervention, then under consideration by that court, is in all respects substantially the same as the bill that was thereafter

filed herein and to which this demurrer is interposed. Upon that record said court determined that the District Judge should not only vacate his order staying said suit and proceed to hear the issues presented therein, but also determined:

"It is possible that the state will again apply to that court for leave to intervene, and, if it does, its application should, in our opinion, be granted." *McClellan v. Carland*, 187 Fed. 915. Opinion filed April 27, 1911.

That this decision of the United States Circuit Court of Appeals, Eighth Circuit, which, as shown by the record in this cause, was made and rendered at a regular term of said court at St. Louis, and affidavits as to the substance of the oral decision then rendered were furnished the then judge of the district court of South Dakota, and that he was influenced thereby, and that such decision, in his judgment, made it his duty to grant the motion of the state of South Dakota for leave to intervene herein—is evidenced by the language of the order thereafter entered by the Honorable John E. Carland, judge of the United States District Court for the district of South Dakota, dated December 9, 1910, and filed herein, in which he specifically refers to the judgment of the Circuit Court of Appeals, from which the above quotation, relative to the leave of the state to intervene, is taken.

After granting leave to file said bill in intervention, such proceedings were had that a motion was made by the complainants to vacate, set aside, and hold for naught said bill in intervention, filed pursuant to said order of this court on the 19th day of December, 1910, and a motion to strike from the files and records of this cause said bill in intervention, and the same was brought on for hearing upon an order to show cause, before the Honorable Charles A. Willard, then acting United States District Judge for the district of South Dakota, and after a full hearing upon said motion, an order was made and entered in the minutes of the court in all things denying said motion. This order overruling the motion of the complainants to strike out this petition in intervention was equivalent to granting leave to file the bill in intervention. *Ringen S. Co. v. Bowers*, 109 Iowa, 175, 80 N. W. 318. In view of this record showing an order permitting the state of South Dakota to file its bill in intervention and the subsequent order of this court overruling the motion of the complainants to strike out said bill in intervention, it becomes important in the determination of the issues raised by this demurrer to note what issues were presented and were proper for the consideration of the court upon the making of the above-named orders.

In our judgment every issue presented by this demurrer was presented to the court, and was before it for determination at the time each of the above-named orders were made. It is our judgment that when it was determined by the court to permit the filing of the petition in intervention, the sufficiency of the allegations of the bill in intervention to give this court jurisdiction thereof was passed upon by the court. Upon making and entering the order denying complainants' motion to strike this bill in intervention from the files, the suffi-

ciency of said bill, both as to stating a cause for intervention and showing the jurisdiction of this court, was again passed upon.

It therefore appearing from the record that the right to intervene and this petition in intervention were favorably considered by the United States Circuit Court of Appeals, Eighth Circuit; that such opinion was interpreted by this court and an order granting the filing of the bill in intervention was made; that the motion to strike said bill in intervention was thereafter denied by this court; that all of the objections urged upon this demurrer were duly considered by this court in the making of the above and foregoing orders, and that such issues were resolved against the complainants herein—this court will now act upon the interpretation that must have necessarily been placed upon said petition in intervention in both instances and overrule the demurrer.

The order is that the demurrer of the complainants to the bill in intervention be overruled, and that this cause proceed as equity and justice may require.

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BOWLES v. H. J. HEINZ CO. et al.

(Circuit Court, S. D. New York. June 27, 1911.)

**1. REMOVAL OF CAUSES (§ 82\*)—JOINT DEFENDANTS—PETITION TO REMAND—JOINDER.**

Where an action is brought against joint defendants and there is no separate controversy, one of them cannot remove the cause without joinder of the other.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 163; Dec. Dig. § 82.\*]

Separable controversy as ground for removal of cause, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155; Pollitz v. Wabash R. Co., 100 C. C. A. 4.]

**2. REMOVAL OF CAUSES (§ 82\*)—JOINT DEFENDANTS—FAILURE TO SERVE ONE.**

Where plaintiff, a resident of New York, sued defendants, residents of Pennsylvania, for malicious prosecution, but only served the corporation defendant, it was no objection to the corporation's right to remove, that the individual defendant not served did not join in the petition.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 163; Dec. Dig. § 82.\*]

At Law. Action by Dwight W. Bowles against H. J. Heinz Company and another. The case having been remanded to the circuit court, plaintiff moves to remand. Denied.

House, Grossman & Vorhaus, for plaintiff.

Janes, Schell & Elkus, for defendants.

LACOMBE, Circuit Judge. Plaintiff is a resident of New York, defendants are residents of Pittsburgh, Pa., and nonresidents here. The action is for malicious prosecution, and the defendant corporation only has been served. Within the statutory time it removed the cause

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into this court. Plaintiff moves to remand, contending that the removal was improper because both defendants did not unite in it.

[1] There is no separate controversy, and there is abundant authority for the general proposition that in such a case one of several defendants cannot remove the cause. I concur, however, with Judge Hanford (*Tremper v. Schwabacher* [C. C.] 84 Fed. 413) in the conclusion that such rule does not apply where one only of two defendants has been served.

[2] Adherence to the rule in such cases would put it in the power of plaintiff to defeat the right of removal which the statute gives to nonresidents. He could neglect to serve one of them until the time for removal by the one served had elapsed. Then he might serve the other and resist removal by him on the ground that the one first served did not join in application to remove, which, of course, he could not do since his right to make such application was barred by lapse of time.

The motion to remand is denied.

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#### HIGGINS v. EATON.

(Circuit Court, N. D. New York. August 3, 1911.)

#### 1. WILLS (§ 184\*)—CONDITIONS—REVOCATION.

A testator imposing a condition on a gift may by codicil expressly or impliedly remove the condition and leave the gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 462-467; Dec. Dig. § 184.\*]

#### 2. WILLS (§ 184\*)—LEGACIES—REVOCATION—SUBSTITUTION.

A legacy may be revoked by substituting another gift in its place, either by express words or by plain implication.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 462-467; Dec. Dig. § 184.\*]

#### 3. WILLS (§ 476\*)—WILL AND CODICIL—CONSTRUCTION.

A will and codicil must be construed together as parts of one instrument, and the dispositions of the will must not be disturbed further than is necessary to give effect to the codicil.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997; Dec. Dig. § 476.\*]

#### 4. WILLS (§ 184\*)—REVOCATION OF WILL BY CODICIL—CONSTRUCTION.

A testatrix gave to her sister A. for life \$100 a month, "provided and on condition that" she made a home for a mute brother, and provided that, if A. died before the brother, the executor should pay a sister B. \$50 a month for caring for the brother for life. A codicil stated that it was testatrix's wish that her sister C. and her husband should care for her brother, and that they should receive \$75 per month compensation, and declared that, in the event of his death before that of A. or C., they should share with the other heirs in the final distribution of the estate. *Held*, that the will and codicil when read together gave to A. \$100 per month, though C. and her husband cared for the brother; A. not having refused to care for the brother.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 462-467; Dec. Dig. § 184.\*]



**5. JUDGMENT (§ 828\*)—JUDGMENT OF STATE COURT—EFFECT IN FEDERAL COURT—COLLATERAL ATTACK—GROUNDS.**

A federal court will not correct errors of a state probate court admitting to probate or rejecting a will of one dying domiciled within the territorial limits of the probate court, and one complaining of the decree of the probate court may only show that it acted without jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.\*]

**6. WILLS (§ 2\*)—DISTRIBUTION OF PERSONAL PROPERTY—WHAT LAW GOVERNS.**

The provisions of a will of personal property may be valid in the state of testator's domicile while contrary to the laws of the state where the personalty is situated, and in that case the courts of the latter state will transfer the property to the state of testator's domicile for distribution in accordance with the will, and the will as established by the law of testator's domicile controls the distribution of the estate.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 2.\*]

**7. DESCENT AND DISTRIBUTION (§ 5\*)—WHAT LAW GOVERNS.**

Where a resident and citizen of one state dies intestate in another state leaving personal property therein, the courts of the latter state may issue letters and administer the estate, but the distribution must be made according to the laws of the state of the domicile.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 19-22; Dec. Dig. § 5.\*]

**8. WILLS (§ 22\*)—TESTAMENTARY CAPACITY—WHAT LAW GOVERNS.**

Where a testator domiciled in one state dies in another state while temporarily therein, and most of his personal property is in the latter state, the courts of testator's domicile alone have jurisdiction to determine testamentary capacity, and their judgments are conclusive on the courts of the other state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 50; Dec. Dig. § 22.\*]

**9. APPEAL AND ERROR (§ 1097\*)—SUBSEQUENT APPEALS—LAW OF THE CASE.**

The decision of the Circuit Court of Appeals rendered on appeal from a judgment sustaining a demurrer to the bill in a suit by a legatee against the executor to establish and enforce rights under the will is the law of the case on a subsequent trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.\*]

**10. WILLS (§ 222\*)—CONTEST—NATURE OF PROCEEDINGS.**

The contest of a will on the ground of testamentary incapacity is not an ordinary suit or action or proceeding between the parties, even where the contestants are interested and appear personally and raise the issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544; Dec. Dig. § 222.\*]

**11. EXECUTORS AND ADMINISTRATORS (§ 2\*)—WHAT LAW GOVERNS.**

The controlling place of administration of a will of personal property and distribution under it is in the state of testator's domicile.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2, 562; Dec. Dig. § 2.\*]

**12. WILLS (§ 22\*)—TESTAMENTARY CAPACITY—WHAT LAW GOVERNS.**

A testatrix died domiciled in Michigan leaving personal property in the hands of an agent in New York, who had in his hands the will and codicil. He applied to a surrogate of New York for the probate of the will and codicil, and three of the persons interested in the estate appeared and contested the codicil on the ground of testamentary incapacity. The will was executed in New York, while the codicil was executed in Michigan according to its laws. The surrogate admitted both will and codicil to

probate. Subsequently the probate court in Michigan admitted the will to probate, but rejected the codicil for testamentary incapacity. *Held* that, in view of the law of New York that testamentary capacity to make a will is governed by testator's domicile, the decision of the surrogate was not binding, but the estate must be administered according to the will admitted to probate in Michigan without reference to the rejected codicil.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 22.\*]

**13. WILLS (§ 70\*)—WILL OF REAL ESTATE—CONSTRUCTION.**

A will of real estate must be executed in accordance with the law of the state where the real estate is situated, and must be valid under the laws of such state, and it is not enough that it is valid in the state of testator's domicile.

[Ed. Note.—For other cases, see Wills, Cent. Dig. 184-186; Dec. Dig. § 70.\*]

**14. JUDGMENT (§ 822\*)—FOREIGN JUDGMENTS—CONCLUSIVENESS.**

The full faith and credit clauses of the acts of Congress and of the federal Constitution (article 4, § 1) do not require that any more force shall be given to the judgment of a state court than the law or custom of the state where pronounced gives it or demands.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1496-1500; Dec. Dig. § 822.\*]

Giving full faith and credit, jurisdiction of federal courts, see note to *Bailey v. Mosher*, 11 C. C. A. 318.]

**15. WILLS (§ 434\*)—PERSONAL PROPERTY—ADMISSION TO PROBATE—JURISDICTION.**

The probate or rejection of a will of personal property by the courts of a state other than that of the domicile of the testator has no effect on distribution as against a decree of the court of testator's domicile, where the distribution must be made according to the law of the domicile.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 937-945; Dec. Dig. § 434.\*]

**16. WILLS (§ 211\*)—PROBATE—PRODUCTION OF WILL—JURISDICTION.**

Under the statutes of Michigan requiring that a will sought to be probated shall be produced or its loss or destruction proved, the production of a will sought to be probated is not jurisdictional.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 518; Dec. Dig. § 211.\*]

**17. WILLS (§ 211\*)—PROBATE—PRODUCTION OF WILL—JURISDICTION.**

Where, in proceedings in Michigan to probate a will, under the statute requiring the production of a will or proof of its loss or destruction, the probate court provided for the taking of proofs by depositions, and proofs were taken and the will was produced before the person empowered to take depositions, the will was sufficiently produced in court to authorize the court to admit it to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 518; Dec. Dig. § 211.]

**18. WILLS (§ 243\*)—PROBATE—FOREIGN WILLS.**

Comp. Laws Mich. §§ 9282, 9283, providing that a will admitted to probate in the place of testator's domicile may be admitted to probate and recorded in the state, and the will so admitted shall have the same effect as if originally proved in the state, do not provide for the recognition or record of the will of a person domiciled in Michigan and proved outside the state, but recognizes the rights of the courts of the domicile of testator to conclusively determine the validity of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 573-576; Dec. Dig. § 243.\*]

In Equity. Suit by Susan C. Higgins against Hervey E. Eaton, as executor of the estate of Elizabeth S. Eaton. Decree for complainant. See, also, 183 Fed. 388, 105 C. C. A. 608.

This is an action tried before the court and brought by the plaintiff, Susan C. Higgins, to recover or have it determined that she is entitled to recover and receive from the estate of Elizabeth S. Eaton, deceased, the sum of \$100 per month for and during the term of her natural life, provided, etc., as a legacy or bequest given her by the last will and testament of said Elizabeth S. Eaton, and to which she claims she is entitled. The defendant denies that she is entitled to such legacy or to any part of same. The essential facts will be stated in the opinion.

A. F. & F. M. Freeman (B. M. Thompson, of counsel), for complainant.

Carlos J. Coleman and Edwin H. Risley, for defendant.

RAY, District Judge (after stating the facts as above). Elizabeth S. Eaton, the testatrix, died at Ann Arbor, Washtenaw county, state of Michigan, of which state she was a resident and a citizen both at the time of the making of her last will and testament and alleged codicil thereto, and at the time of her death on the 17th day of May, 1906. She left her surviving two brothers, Edward Storms and George Albert Storms, and four sisters, Susan C. Higgins, the complainant, Genevieve S. Jacobs, Leah S. Kersey, and Pamela S. Dickinson, and also a niece Lizzie Lusher, the only child of a predeceased sister. Said testatrix left a small amount of personal property at the place of her said residence and domicile, Ann Arbor, Mich., but something like \$50,000 in personal property in the hands of Hervey E. Eaton, her friend, agent, and business man who resided at Eaton, Madison county, N. Y. He also had the possession and custody of her papers, or some of them, including her last will and testament and an alleged codicil thereto. On the 29th day of May, 1906, said Hervey E. Eaton executed a petition according to the laws of the state of New York for the proof of the last will and testament of said Elizabeth S. Eaton and of the two codicils thereto, the will being dated October 31, 1901, and the codicils March 19, and March 31, 1906, respectively. This petition alleged that the said testatrix "was at and immediately previous to her death a resident of the county of Washtenaw and state of Michigan, and that said last will and testament relates to personal property only." This petition was filed in the Surrogate's Court of the county of Madison, N. Y., on the 28th day of May, 1906, and a citation in due form was issued for service on all the heirs at law and next of kin to said deceased, returnable July 16, 1906. The will itself, dated October 31, 1901, was executed at Eaton, Madison county, N. Y., and witnessed by said Hervey E. Eaton and Olivia C. Eaton, his wife. The codicil of March 31, 1906, in question here, was executed at Ann Arbor, Mich., according to the laws of that state and was witnessed by Thomas W. Young and Sarah L. Ptolemy who also witnessed a

"memorandum" in the nature of a codicil dated March 12, 1906. By the will proper she gave to the Young Men's Christian Association \$300, to said Hervey E. Eaton three family portraits in oil, to certain nieces, five in number, and to James Harry Lusher, \$500 each, or in all \$3,000. She also authorized her executor to place a memorial window in the Central Baptist Church at Syracuse, N. Y., at a cost of not to exceed \$300. The will then contained these provisions:

"Sixth. I give and bequeath to my sister Susan C. Storms, during the term of her natural life, from the income of my estate, one hundred dollars per month, provided and on condition that she cares for and makes a home for my mute brother George Albert Storms during his life time.

"Seventh. Should my sister Susan C. Storms die before my brother George Albert Storms, then and in that case I hereby direct and empower my said executor to pay to my sister Leah Catherine Kersey, from the income of my estate the sum of fifty dollars per month for caring for and making a home for my said brother George Albert Storms during his life time, and in case said George Albert Storms should survive both Susan C. Storms and Leah Catherine Kersey then my said executor is hereby authorized and directed to make other suitable and sufficient arrangements for such care and home and to pay for the same."

Susan C. Storms thereafter married, and her name became Higgins. The will proper then after the death of Susan C. Storms and George Albert Storms gave to Rachel P. Dickinson \$1,000, the legacy to lapse in case she did not survive Susan C. and George A. Also after the death of Susan C. and George A. she gave \$1,300 to the treasurer of the Baptist Church of Ann Arbor for the Baptist Home Missionary Society and the Baptist Foreign Missionary Society. Also after the death of Susan C. and George A. and the payment of such legacies, she directed her residuary estate to be divided as follows: "Equally to my sisters Leah Catherine Kersey and Genevieve Jacobs and my brother Edwin J. Storms subject to" the conditions that, should Leah Kersey die before final distribution, her share should be paid to her daughter Margaret E. and from the share of Edwin J. \$300 was to be deducted and from that of Genevieve \$1,000.

The codicil of March 31, 1906, provided as follows:

"Whereas, my brother George A. Storms is unable to care for himself through physical defects and infirmities, it is my wish that my sister Genevieve S. Jacobs and her husband Nathaniel P. Jacobs do so care for him and make his home with them during the term of his natural life and that they shall receive the sum of seventy-five dollars (\$75) per month compensation during that time. In the event of his death before that of Genevieve S. Jacobs or Susan S. Higgins I direct that they shall share alike with the other heirs, in the general and final distribution of my estate.

"Also that any and all property not mentioned in my will is to go to Genevieve S. Jacobs subject to the memorandum annexed to this document."

The "memorandum" is not material to this controversy.

One claim of the complainant is that the codicil, if valid, does not revoke the sixth clause of the will, and that therefore she is entitled to the \$100 per month in any event. The other claim is that the codicil is invalid and has not been proved or probated in Michigan, but refused probate there, and that the judicial action of the probate court in Michigan, the place of the actual residence and domicile of the testatrix, determines what her will was and is and controls

in the distribution of the estate. I will dispose of the question of revocation first. The gift of \$100 per month from the income of the estate to Susan C. Storms, now Higgins, is on the express proviso and condition that she cares for and makes a home for her mute brother George Albert Storms during his lifetime. Prima facie this is intended to be by way of compensation for such care, etc., of said brother. It will be noticed that, while there are gifts to nieces, there is no gift to either brother or to either sister until after the death of Susan C. and George A. by the will proper when after satisfying certain legacies to nieces the residuary estate is to be divided between the brother Edwin J. and the sisters Leah and Genevieve. By the seventh clause, if Susan C. dies before the death of George Albert, Leah Catherine was to care for said George A. and receive \$50 per month for so doing. These provisions together indicate plainly that the \$100 per month during life to Susan C. was not as compensation to her only for caring for George A., but as a gift in addition.

[1] It was competent and within the province of the testatrix to revoke or remove the condition on which Susan C. was to receive the \$100 per month for life and leave the gift. This could have been done by express words in which case no doubt would exist, and the gift would stand notwithstanding the provisions of the codicil. But there are no express words to this effect. Clearly the codicil removes the condition to an extent as the codicil makes express provision for the care of George A. otherwise.

[2] A gift or legacy given in a will may be revoked by substitution; that is, by substituting another gift in place of it. When this is done by express words, there is no doubt, and the original provision making the gift is revoked by the substitution. It may be done by plain implication when that result and no other is shown by the will and codicil read together to be the plain and unquestionable intent or purpose of the testatrix. By the codicil, after providing that Genevieve S. Jacobs and her husband, Nathaniel P. Jacobs, are to care for said George A. during his natural life and receive \$75 per month compensation for so doing during the said time, the testatrix continues:

"In the event of his (George A. Storms) death before that of Genevieve S. Jacobs or Susan S. Higgins, I direct that they shall share alike with the other heirs in the general and final distribution of my estate."

The testatrix evidently referred to the eleventh clause of the will which gives the residuary estate to Leah, Genevieve, and Edwin J. The codicil makes no provision whatever for the care of George A. Storms and the furnishing him a home in case he survives Genevieve S. Jacobs and Nathaniel P. Jacobs. The seventh clause provided for the contingency of the death of Susan C. before that of George A. I think we would do violence to the intent of the testatrix to conclude that she intended to release Susan C. Storms, now Higgins, from the obligation to care for George A. Storms, and give him a home in case he survived Genevieve S. Jacobs and Nathaniel P. Jacobs, or in case they should refuse to care for him and give him a home for the \$75 per month.

In the seventh clause of the will it is provided that, in case George A. should survive both Susan S. and Leah C., the executor should make suitable provision for him elsewhere, but we find no such provision in the codicil. Again, the codicil expressly provides that, in case George A. dies before the death of either Genevieve S. or Susan C., they are to share in the general and final distribution, indicating that then, in that event, both will be relieved from further care and obligation in the matter of caring for George A., and not before. The main objection to this construction is that it gives Susan C. \$100 per month for life and also a share in the residuary estate. The provision of the codicil is inconsistent with the provisions of the eleventh clause of the will in a way. By the said eleventh clause the final and general distribution of the estate is to be made after the death of both Susan C. and George A., and by the codicil in case Susan C. survives George A. she, not her descendants, etc., are to share in the final and general distribution. She could not share as she would be dead. I am impressed with the idea that the testatrix intended by the codicil to impose on Mrs. and Mr. Jacobs the care of George A. during his life in case they or either of them survived him, and to remove the burden from Susan C. while they so cared for him, but did not intend to revoke the gift of \$100 per month to Susan C. as the codicil does not so state in terms or by necessary implication, and it seems plain, too, that the testatrix did not intend to release Susan C. from such obligation absolutely—that is, absolutely remove the condition—but intended that in case Mr. and Mrs. Jacobs refused or failed to care for George A., or died before his death, to leave the condition of the gift of \$100 per month to Susan C. in full force. On this question, assuming the validity of the codicil, it is the duty of the court to read the two instruments together giving preference to the later expressions of the testatrix and force thereto, and rejecting former provisions found in the will when plainly inconsistent with the later provisions. After the making of the will, but prior to the execution of the codicil, Susan C. Storms married a widower with three children. There is no evidence that this in any way estranged the testatrix or affected her feelings towards Susan C. It did as matter of course change the situation in life of Susan C. and the testatrix may have thought it would be unpleasant for Susan C. to have George A. in the family, or she may have thought it would be unpleasant to George A. to be in a family with children. We may speculate as to her thoughts on this subject, but it is mere speculation. The surmises and speculations of a court do not, or should not, revoke wills or definite provisions contained therein. If the testatrix intended to revoke clause 6 of her will, why did she not do so in terms?

In *Schouler on Wills*, §§ 409 (page 418), 437 (page 447), 438 (page 448), the law on this subject is thus stated:

"Sec. 409. *Inclination against Revocation; Use of a Codicil.* The courts incline to so construe doubtful cases as to preserve, wholly or in part, the contents of the prior will rather than pronounce for a total revocation by inference. Where, for instance, the later will only disposes of a portion of

the estate, they avoid the ill consequence of partial intestacy; and where the later paper is styled a codicil, they take this to mean that the intent was to amend and not repeal; and in either case the former will is treated as no more than pro tanto revoked. In other cases, perhaps, the context may justify a similar construction. But if the later will does not profess to be a codicil at all, and disposes moreover of the whole estate inconsistently with the earlier, a court would violate its duty not to hold that the earlier will was wholly revoked, unless the context supplied good reason for supposing that the testator otherwise intended.

"The intention to revoke may be collected from informal expressions, though not from ambiguous ones. And in case of doubt, provisions by a later will appear to be presumed additional and cumulative, rather than intended as a substitute and by way of revocation. \* \* \*

"Sec. 437. Codicil Does Not Revoke Will Except so Far as Necessary. Many testamentary causes arise where the effect of one or more codicils upon a prior will has to be considered; and it is a fundamental maxim that no codicil shall revoke a prior will more than is absolutely necessary at all events to give its own provisions effect; unless it contains an express clause of full revocation. The decisions which turn upon this principle are very numerous and need not be stated at length; being quite prolix for the most part and involving the construction of language as variable as the details of mental intention.

"Even though the codicil should profess to make a different disposition of the whole estate, the principle above stated is the natural and controlling one. And words and expressions contained in the codicil may by construction restrict its operation. Thus, it is held that a declared purpose therein to alter the will in one or more stated respects, implies that it is not altered in other respects. And that a specific gift in a will is not revoked by a general gift in the codicil. And that a general expression in the codicil must be confined to its meaning in the will. And that a clear gift in the will is not revoked by doubtful expressions in the codicil. But all artificial rules like these should bend to the real intention of the testator, as gathered from the whole face of the paper, aided in doubtful cases by proof aliunde. \* \* \*

"438. Later Provisions, Whether by Way of Substitution or Addition. Whether provisions under a later will or codicil are intended for substitution, or as something additional and cumulative to the gift by the earlier one, must be determined by comparing the instruments to discover their true intent. But in case of doubt an additional gift is presumed rather than revocation; unless, indeed, resort may be had to parol evidence outside the instruments for assisting the conclusion.

"In general, the different parts of a will, or of a will and codicil, should be reconciled if possible and receive a fair and consistent interpretation."

It is said that the gift of \$100 per month to Susan C. Higgins during her life is made only provided and on the condition that she furnishes a home and cares for said George A. Storms, and that as she cannot comply with the condition, that having been removed and other provision made for his home and care, the gift fails necessarily. If the gift of \$100 per month had been made as compensation for such care and home furnished George A., and so expressed, there would be great and irresistible force in the suggestion. But it is quite plain, as before stated, that the gift of \$100 per month was not so intended. It is not so expressed. The seventh clause is differently worded, viz.:

"Should my sister Susan C. Storms die before my brother George Albert Storms, then and in that case I hereby direct and empower my said executor to pay to my sister Leah Catherine Kersey from the income of my estate the sum of fifty dollars per month for caring for and making a home for my said brother George Albert Storms during his life time, and in case," etc. .

Her compensation for the care and home is to be \$50 per month, and we are hardly justified in assuming that it was regarded as worth \$100 per month for Susan C. to furnish care and a home to George A. and only \$50 per month for Leah Catherine to do the same thing. Then in the codicil the sum of \$75 per month to Mrs. and Mr. Jacobs is fixed by the testatrix as "compensation" for caring for and furnishing a home to said George A. Storms. The conclusion is irresistible that the \$100 per month to Susan C. was not compensation alone. As stated, the condition could be removed, released, and the gift left. The codicil does remove the condition in case Mrs. and Mr. Jacobs see fit to accept the care and responsibility of caring for and furnishing a home to said George A. Storms at the "compensation" named. I think the fair inference and conclusion much more reasonable and probable that it was the intent and purpose of the testatrix to leave the gift to Susan C. Storms unaffected, but release or remove the condition in case Mrs. and Mr. Jacobs accepted the trust and compensation of caring for George A. and so long as they did so, but no longer. I do not think the testatrix intended to take the care of George A. Storms and the responsibility and duty of furnishing him a home from Susan C. Storms (Higgins) and cast it on or intrust it to a stranger or strangers in either of three events, all possible, viz., the refusal of Mrs. and Mr. Jacobs to accept and perform the trust and duty, or their death before that of George A. Storms, or their inability or consequent neglect by reason of infirmity or otherwise to discharge the trust. I do not think it was the purpose of the testatrix to discharge Susan C. from the trust or obligation to care for and furnish a home to George A. Storms in the event that for any reason Mrs. and Mr. Jacobs failed so to do. The codicil, if valid, simply qualifies the condition or proviso of the sixth clause of the will that Susan C. is to care for and furnish a home to George A. Storms. "The intention to revoke may be collected from informal expressions, though not from ambiguous ones. And in case of doubt provisions by a later will appear to be presumed additional and cumulative, rather than intended as a substitute and by way of revocation." Schouler on Wills, § 409 (page 419); 1 Williams' Executors, 167; Gordon v. Hoffman, 7 Sim. 29; Pilcher v. Hole, 7 Sim. 208; 1 Jarwin on Wills, 182.

[3] "A will and codicil must be taken and construed together as parts of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil." *Hard et al. v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Crozier v. Bray*, 120 N. Y. 366, 375, 24 N. E. 712; *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193; *Newcomb v. Webster*, 113 N. Y. 191, 196, 21 N. E. 77; *Westcott v. Cady*, 5 Johns. Ch. (N.Y.) 334, 9 Am. Dec. 306; *Nelson v. McGiffert*, 3 Barb. Ch. (N.Y.) 158, 49 Am. Dec. 170. This rule has been declared in most of the states, and there is no authority to the contrary.

In *Newcomb v. Webster*, supra, at page 196 of 113 N. Y., at page 78 of 21 N. E., the court said:



"It may be taken as a well-settled general rule that a will and codicil are to be construed together as parts of one and the same instrument, and that a codicil is no revocation of a will further than it is so expressed"—citing *Westcott v. Cady*, *supra*.

Also:

"But if, regarded as one instrument, it is found to contain repugnant bequests in separate clauses, one or the other, or both, must fail, and therefore the rule is that of the two the bequest contained in the later clause shall stand. The same principle applies with greater force where there are two distinct instruments relating to the same subject-matter. In such a case an inconsistent devise or bequest in the second or last instrument is a complete revocation of the former. But, if part is inconsistent and part is consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made. *Nelson v. McGiffert*, 3 Barb. Ch. [N. Y.] 158 [49 Am. Dec. 170]."

In *Hard v. Ashley*, *supra*, the court held:

"A will and codicil must be taken and construed together as parts of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil.

In *Austin v. Oakes*, *supra*, the court held:

"The doctrine that an earlier provision of a will is revoked by a later one or by a codicil repugnant thereto operates only so far as it is necessary to give the later provision effect; and so does not apply where it (the codicil or later provision) is absolutely void."

And in *Crozier v. Bray*, *supra*, the court said (page 375 of 120 N. Y., page 714 of 24 N. E.):

"If a will and codicil are plainly inconsistent, the latter must control to the extent necessary to give it full effect as the presumption in such a case is much stronger than in the case of a later clause in the same instrument. While a clear gift cannot be cut down by a doubtful expression still when a predominant purpose is apparent, but a doubt arises as to the method devised to effect that purpose, such a doubt should be so resolved as to accomplish the object of the testator by presuming that he intended a legal, and not an illegal, method."

[4] Applying these principles here, we find no words of revocation in the codicil, and nothing in the codicil inconsistent with the will itself except that as the gift of \$100 per month to Susan C. Storms (now Higgins) is provided, and on condition that she "cares for and makes a home for my mute brother George Albert Storms during his lifetime," and the codicil says, "Whereas my brother George A. Storms is unable to care for himself through physical defects and infirmities, it is my wish that my sister Genevieve S. Jacobs and her husband Nathaniel P. Jacobs do so care for him and make his home with them during the term of his natural life and that they shall receive the sum of \$75. per month compensation during that time"—we may guess or surmise that the testatrix intended to substitute a provision for the care, etc., of George A. Storms and by the clause following directing that, in the case of his death before that of Genevieve or Susan C., they should share in the estate, etc., substitute that gift in place of the \$100 per month. And the testatrix immediately adds, as if conscious that this takes the care of George

A. from Susan C. and that perhaps it does away with the gift of \$100 per month to her:

"In the event of his death before that of Genevieve S. Jacobs or Susan C. Higgins, I direct that they shall share alike with the other heirs in the general and final distribution of my estate."

That is, if he dies before either of them, they share in the distribution of the residuary estate which by the eleventh clause of the will is to be made after the death of both George A. and Susan C. Was this provision intended to accelerate the general and final distribution? The codicil does not so state. But, if the codicil revokes the \$100 per month payment to Susan C. during her life, there would be no objection to such distribution, as no longer would there be any object in deferring final distribution. So again we are led to inquire was the provision by which Susan C. on the death of George A. was to share in the general distribution by way of substitution for the legacy or provision of \$100 per month to Susan C.? We at once enter the field of surmise and conjecture. The intent is doubtful and the provisions are ambiguous so far as they are claimed to affect a revocation of the gift of \$100 per month to Susan C. Here we have a gift based on a condition to be performed by the legatee. Later, by the codicil, the condition is changed as the duty and obligation imposed thereby is transferred to others provided those others see fit to assume it for a compensation, but not otherwise. The transference of the duty is expressed in the form of a wish, and its performance is not made obligatory. If not assumed by the party later named or they die before the duty is fully performed, the duty rests on the one first named, Susan C. Higgins, as otherwise the care of this brother incapable of caring for himself would pass to strangers. It is evident, I think, that the provisions of the codicil can be fully met and carried into effect without disturbing in any way the gift of \$100 per month to the complainant, Susan C. Higgins. The testatrix had the right to let that provision stand in her will and add the provision that Susan C. should share in the general and final distribution of the estate. This, if effective (the final division being postponed until after her death), would give her more than the other sisters, but this the testatrix had the power and right to do. I am of the opinion that the final clause of the first subdivision of the codicil was intended as though it read, "In the event of his death before that of either Genevieve S. Jacobs or Susan C. Higgins, I direct that she shall share alike with the other heirs (brother and sisters named in the eleventh clause of the will) in the general and final distribution of my estate," although Genevieve was already named as one to share and the codicil is a mere duplication as to her so far as final distribution is concerned. If the codicil had not been made and George A. Storms had died before the death of the testatrix, the gift of \$100 per month to Susan C. would have stood valid and effective. If the codicil had not been made and George A. had survived the testatrix one day, the same result would have followed. And the validity of that gift depended in no way on the action or election of George A. Storms. It was and is entirely immaterial so far as the validity of that bequest is concerned

whether George A. Storms elected to go with Susan C. or with Genevieve S. My conclusion is therefore that the will and codicil together, read together, and both conceded to be valid, give to Susan C. Higgins \$100 per month even if Mrs. and Mr. Jacobs care for George A. Storms and thus relieve the complainant from that duty; she not having refused to care for him and provide him a home. This is contrary to my impressions on first reading the will and codicil and before giving them a careful analysis and examining the authorities applicable.

#### Validity of the Codicil.

On the return of the citation in the Surrogate's Court of Madison county, N. Y., Susan C. Higgins, the complainant, Mrs. Kersey, and Mrs. Dickinson appeared in person or by attorney, not having been personally served in the state of New York, and filed objections to the proof and probate of the codicil on the ground of the mental incompetency of Elizabeth S. Eaton to make same. The issue thus framed was tried in said court, and on the 12th day of November, 1906, the surrogate of that county made his decision finding that the testatrix was competent to make and execute the codicil, and the will, codicil, and memorandum were admitted to proof and probate as the last will and testament of said Elizabeth S. Eaton, and a decree was entered accordingly and letters testamentary duly issued to Hervey E. Eaton, the executor therein named, who duly qualified and has acted as such in the state of New York ever since. As the testatrix left personal property in Madison county, N. Y., the surrogate and Surrogate's Court of that county, so far as the state of New York is concerned, had power and jurisdiction to take proof of such will and codicil and make a decree admitting it or them to probate and issue letters testamentary thereon by virtue of the statutes of the state of New York.

But that surrogate and court had no power or jurisdiction to take proof of such will and codicil, or of either, for the courts of Michigan, or which would bind them in any way or affect the rights of legatees or determine so far as the courts of Michigan are concerned the validity of either paper or whether executed by a person possessing the necessary mental capacity to make a will. This is not only elementary law but the fixed rule established and as held by the courts of New York, Michigan, most if not all the states of the United States, and by the Supreme Court of the United States. There is no controversy over this proposition. While the petition for the probate of this will was pending in the Surrogate's Court of Madison county, N. Y., with such objections on file and before any proof was taken, and on the 23d day of July, 1906, Susan C. Higgins, the complainant and Pamela S. Dickinson and Leah C. Kersey, filed a petition in the probate court of Washtenaw county, Mich., for the proof and probate of the last will and testament of said Elizabeth S. Eaton. This was the place of her actual residence and domicile at the time of and for years prior to her death. The will itself with the codicil was in the hands of Eaton in New York state, and they were not taken to or produced in court in Michigan. A citation was issued

returnable August 15, 1906, and published as required by the laws of Michigan and served by mailing copies on all necessary parties. There is no record of an adjournment, and that proceeding was pending in the courts of Michigan, not dismissed. July 23, 1906, a petition was filed by Susan C. Higgins in the probate court of Washtenaw county for the appointment of a special administrator of the estate of Elizabeth S. Eaton, and letters were issued August 2, 1906, to one Clarkson. August 22, 1906, an inventory was filed in the same court by him. October 23, 1908, a petition was filed for the revival and continuance of the proceedings for the probate of the will of said Elizabeth S. Eaton in the probate court of Washtenaw county. November 9, 1908, that court made an order for the taking of depositions and depositions were taken. December 1, 1908, the probate court of said Washtenaw county, Mich., made an order or decree on such proofs admitting the will proper to probate, but rejecting and disallowing the codicil and memorandum on the ground of mental incompetency. That order or decree has not been opened, set aside, or reversed and the decree of the Surrogate's Court of Madison county, N. Y., was not appealed from. In the meantime and on the 18th day of January, 1907, some one who is uncertain filed an exemplified copy of the will, codicil, memorandum, and proceedings had in the Surrogate's Court of Madison county, N. Y., in the office of the probate judge, probate court, of Washtenaw county, Mich. No order or decree was made or entered by said court or the judge thereof admitting the will or codicil to probate at that time or in that connection, and no order or decree was ever made admitting the codicil to probate in that court. On the 6th or 8th day of April, 1907, the said probate court of Washtenaw county issued letters of administration on the estate of said Elizabeth S. Eaton to Willis L. Watkins, and he gave a bond as such administrator. It is well to mention here that the will in question is signed "Elizabeth S. Eaton, her true and correct name." The codicil is signed "Lizabeth Storms." Storms was her maiden name. The memorandum is signed, "Mrs. J. H. Eaton."

April 8, 1907, Willis L. Watkins as principal with S. W. Clarkson, who was such special administrator, and A. F. Freeman, executed a bond in the sum of \$5,000, which was filed the same day in said probate court, which recites:

"Whereas the above bounden Willis L. Watkins has been appointed by the probate court of said county [county of Washtenaw] administrator with the will annexed of the estate of Elizabeth S. Eaton late of said county deceased, now," etc.

I find no evidence that this complainant had anything to do with this, or that the codicil or even the will had been proved or admitted to probate, and there is no order of that court to that purport or effect. At that time, however, an exemplified copy of the will, codicil, and memorandum and the other proceedings had in the Madison county, N. Y., Surrogate's Court had been placed on file by some one. No copy of any will or codicil was annexed to the letters. The petition of Susan C. Higgins for the proof of the will of Elizabeth S. Eaton in which Mrs. Dickinson and Mrs. Kersey

joined and which was executed July 21, 1906, and filed July 23d, as stated, set forth the making of the will of Elizabeth S. Eaton, dated October 31, 1901, but repudiated the codicil and memorandum by the following allegation in said petition contained, viz.:

"Your petitioner further represents that the said Elizabeth S. Eaton was not of sound and disposing mind at the time she signed and executed the papers attached to said will purporting to be a codicil and memorandum affecting the same," and also "and was of sound mind and under no restraint or undue influence whatever, as I am informed and believe except as to the making of said codicil and memorandum."

This repudiation of the codicil and memorandum has never been retracted or withdrawn by said Susan C. Higgins. No petition was substituted, and, when the proceedings were finally revived and continued, they were based on and proceeded on this petition and resulted in the proof of the will in Washtenaw county, Mich., and the rejection of the codicil and memorandum. The petition referred to a copy of the will as filed with the petition and to the codicil and memorandum attached. As the will and codicil had been propounded for probate in Madison county, N. Y., it cannot be doubted that copies were filed with the petition, although not found with the files. This petition with its allegations was on file at all times, and whatever action was taken subsequently by the probate court of Washtenaw county, Mich., was with reference to it. I find no evidence in this record that Susan C. Higgins ever assented to the codicil or memorandum as a part of the last will and testament of Elizabeth S. Eaton, or as valid instruments. It is not shown that she filed the transcripts from the Surrogate's Court of Madison county, N. Y., or assented thereto or took any action thereon or directed it to be done. No action was taken thereon by the probate court of Washtenaw county, and, if the grant of letters with will annexed can be construed as an adoption of all these instruments, it was not sanctioned by the complainant here, and was repudiated and canceled by that court itself which later admitted the will to probate, and rejected the codicil and memorandum. It must be presumed that court had jurisdiction and power to do what it did do and to make the decrees it actually made, and, if attacked, it must be by a direct proceeding in that court.

[5] This court cannot assume to correct its action if it has erred, inasmuch as the jurisdiction of the probate court of the county of Washtenaw, Mich., to prove the will of Mrs. Eaton and decide what paper or papers made up or constituted her will must be conceded and cannot be doubted. Its decrees were subject to such review as the statute of that state provides for, but jurisdiction in the matter being proved and conceded, the proceeding having been founded on a written petition with appropriate allegations and followed by process and notice and the taking of proofs and the entry of a decree, the record imparts absolute verity so far as this court, or any other court, except the appellate courts of Michigan, is concerned. The defendant here may show that the probate court of Washtenaw county acted without jurisdiction, but he cannot in this action establish a defense by showing it acted erroneously. We

come then directly to the question whether the decree of the Surrogate's Court of the county of Madison, N. Y., or that of the probate court of the county of Washtenaw, Mich., controls here in determining what the will of Elizabeth S. Eaton is, and what the rights of this complainant, Susan C. Higgins, are under it. On this question I am foreclosed, not only by my own decision in this matter (*Watkins v. Eaton* [C. C.] 173 Fed. 133, 138-147, affirmed by the Circuit Court of Appeals, *Watkins v. Eaton*, 183 Fed. 384, 105 C. C. A. 604), but by the decision of the Circuit Court of Appeals in this very case (*Higgins v. Eaton*, 183 Fed. 388, 105 C. C. A. 608, reversing Judge Hand in 178 Fed. [C. C.] 153).

It is, to my mind, intolerable to suppose that a testatrix may have two valid wills differing from each other—one good and controlling at the place of her residence and domicile at the time of and immediately preceding the date of her death, and the other, inconsistent therewith and contrary thereto, valid and controlling in the state where her personal property happened to be at the time of her death. Such a contention is contrary to reason and all settled authority.

[6] It is true that certain provisions of the will of a testator relating to personal property may be valid in the state of the domicile, but in some other state according to the law of that state invalid, or rather such as the courts of such other state will not enforce because contrary to some statute of the state, or some rule of public policy in regard to which it is tenacious, in which case the courts of such state will transfer the property to the state of the testator's domicile for distribution in accordance with the will, in most other cases the transfer being usually discretionary. *Despard v. Churchill*, 53 N. Y. 192. However, the will of the testator as established by the law of the testator's residence or domicile always controls the distribution of the estate. No state which has reached the degree of modern civilization assumes to dictate what is the will of a testator residing and domiciled in another state as against the courts of that state having jurisdiction, except so far as to protect creditors residing within its own jurisdiction, or to dictate the distribution of the personal property of such testator contrary to the terms of the will of such testator as established by the courts of the state of his actual residence and domicile on the ground that having the possession of the property it has the power to administer it and distribute it and therefore it will determine for itself the mental competency of the testator, the validity of the will, and who shall take the property under it. As to a will of real estate situate in a state other than that of the testator's domicile, the rule is different, but even then the court of the state where the property is situated does not assume to determine the question of the mental competency of the testator as against the courts of the state of his domicile.

[7] When a resident and citizen of another state dies intestate in New York, leaving personal property there, the courts of that state have power to issue letters and administer same, but not to distribute according to the laws of the state of New York. The laws of the state of the domicile in such matters govern and control the courts of such state.

[8] If a testator domiciled in Michigan, having a will executed there, dies in New York while temporarily there, and it so happens that most of his personal property is in New York at the time, it would seem contrary to a sense of justice for the New York courts to proceed to determine and adjudge that the testator was insane when the will was executed, and therefore void, and that he died intestate, and then proceed to distribute his personal property in accordance with the statutes of distribution of the state of New York, the courts of Michigan determining in the meantime that the testator was sane and competent to make the will, and that it is valid, and its statutes of distribution differing from ours. This would be determining with a vengeance that "He is right who has the might and he shall rule who can," a rule that prevailed in England centuries ago when the rule of physical power, and not "the rule of reason," prevailed.

In *Watkins v. Eaton* (C. C.) 173 Fed. 133, while the question was whether or not this court had power and jurisdiction to compel the executor Eaton, appointed by the courts of New York, to transmit and deliver the personal assets to Watkins, the administrator with the will annexed of the estate of Mrs. Eaton appointed by the probate court of Washtenaw county, Mich., this court, foreseeing what might arise, took occasion to point out (1) that in regard to the disposition of personal property wherever situated the will of the testatrix as established by the probate court of Michigan controls, and that the said court had power to determine what her last will and testament is; (2) that the will as there established and as by that court and the courts of Michigan interpreted must control the executor Eaton and the courts of New York in distribution, and the rights of Susan C. Higgins, this complainant, under it, unless she by coming to New York and contesting the codicil and not appealing from the adverse decision of the Madison County Surrogate's Court on the question of the validity of the codicil has become bound by the said decision and decree notwithstanding the adjudication by the probate court of Michigan to the contrary; (3) that the decision of the probate court of Michigan on the question of the mental competency of Mrs. Eaton to execute the codicil and memorandum controls.

Many of the leading and controlling authorities on these subjects were cited and quoted from. See pages 138 to 145, inclusive. It is unnecessary to repeat them here. Indeed, these decisions have been summarized and condensed and put in the form of a statute by the Legislature of the state of New York. Article 7, tit. 3, § 2694, Code Civ. Proc. This court, while dismissing the bill on the ground that application must be made to the Surrogate's Court of Madison county, and that the transfer of the assets to Michigan was discretionary (subject to review) with that court, also held, following the Supreme Court of the United States in numerous cases, that Susan C. Higgins or any other nonresident of the state with over \$2,000 in question could come into this court and have her right determined. That case was appealed and affirmed. *Watkins v. Eaton*, 183 Fed. 384, 105 C. C. A. 604. Susan C. Higgins then brought this action to

have her rights under the will of Elizabeth S. Eaton as probated by the courts of Michigan determined. Demurrer was interposed and sustained by Judge Hand, that learned judge taking exactly the opposite view, without citing any authority, held by this court. *Higgins v. Eaton* (C. C.) 178 Fed. 153. That holding was reversed by the Circuit Court of Appeals (Second Circuit)—*Higgins v. Eaton*, 183 Fed. 388, 105 C. C. A. 608—and that court referred to the opinion of this court in *Watkins v. Eaton* (C. C.) 173 Fed. 133, on these subjects and approved same and declared the law to be as already stated.

[9] That decision of the Circuit Court of Appeals is the law of this case, and controls on all the above questions. However, the question of the effect of the voluntary personal appearance of Mrs. Higgins in the Surrogate's Court of Madison county, N. Y., and the contest over the codicil, has not been passed upon. Hervey E. Eaton has no right, generally speaking, to voluntarily distribute the personal estate according to the decision of the Surrogate's Court of Madison county, N. Y., so far as in conflict with the decision of the probate court of Washtenaw county, Mich. He is well informed of that decision, and is presumed to know that the will as established by that probate court governs and controls him. The Circuit Court of Appeals in this action where he is a party has so decided.

The defendant, Hervey E. Eaton, as executor of the last will and testament of Elizabeth S. Eaton, deceased, contends, however, that the decree of the Surrogate's Court of the county of Madison, N. Y., has become and is *res adjudicata*, final, and conclusive between him and the complainant, Susan C. Higgins, and between Susan C. Higgins and Genevieve S. Jacobs and Nathaniel P. Jacobs, that the codicil and memorandum are valid and to be taken as a part of the last will and testament of said Elizabeth S. Eaton, and that, notwithstanding the decree of the probate court in Michigan, Susan C. Higgins is estopped from claiming that she is entitled to the \$100 per month for her life, assuming that the codicil works a revocation of the said gift. In that proceeding in the Madison County Surrogate's Court, Hervey E. Eaton represented himself, one whose right and duty it was to present the will for probate and maintain it if he could. He also represented all the legatees and beneficiaries named in the will and codicil. However, when objections were filed, Hervey E. Eaton and the contestants became adverse or opposing parties. The issue was what papers or written instruments compose or constitute the last will and testament of Elizabeth S. Eaton, deceased, and this involved the question of the mental competency of Mrs. Eaton to execute the codicil; that is, whether or not she possessed the necessary testamentary capacity at the time of its execution in Michigan. If the application had been for letters of administration, the mere fact of assets in Madison county would have been the issue. But here the existence of assets in Madison county gave jurisdiction to proceed with the probate of the alleged will of Elizabeth S. Eaton and the probate of her will at all by that court necessarily involved, under the issue framed, the trial and determination of the question of the due execution by and the testamentary capacity of Elizabeth S. Eaton to exe-



cute the will and codicil. If either of these questions was determined adversely, it was the duty of the Madison County Surrogate's Court to reject the codicil. The determination of this question would determine in New York what the will was, but did not affect the question of the right to letters testamentary, as Eaton was named executor by the will proper, and not by the codicil. As seen, the determination of that question as to the validity of the codicil by the Madison County Surrogate's Court did not (in the absence of Susan C. Higgins or mere service by publication) in any way affect her rights under the will, or, as to the Michigan probate court, in any way make the codicil a part of the will as against a decree by that court that it was not a part of the will, and, as a consequence, as the personal estate, according to the statute of New York referred to and the decisions of the Court of Appeals of the state of New York referred to, is to be distributed, if distributed in New York and by its executor under and according to the will as probated in Michigan, the Surrogate's Court of Madison county in decreeing distribution must follow the will as probated in Michigan, unless Susan C. Higgins is estopped to say that the codicil is not a part of the will.

[10] The contest of a will, a contest over the competency of the alleged testatrix to make it, is not an ordinary suit or action or proceeding *inter partes*. This is so where the contestants are interested and appear personally and raise the issue. This contest in this case was an essential part of the probate procedure in Madison county, N. Y. These words "*inter partes*" in the law and decisions relate only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will. *Farrell v. O'Brien*, 199 U. S. 89, 110, 111, 114, 115, 116, 25 Sup. Ct. 727, 50 L. Ed. 101. An examination and comparison of the procedure, rights, and remedies given by the probate court of the states of New York and Washington demonstrate that they are substantially the same. It follows that the contest in Madison county over the validity of the codicil and the testamentary capacity of Mrs. Eaton to make it was not a suit or action *inter partes*.

In *Thormann v. Frame*, 176 U. S. 350, 20 Sup. Ct. 446, 44 L. Ed. 500, one Fabacher died in the city of New Orleans leaving a will in which he described himself as of Waukesha, Wis., where his will was executed, where he had a residence, and where the most of his personal estate was situated. Frame, the executor named in this will, presented it for probate in Waukesha county, alleging in the petition that Fabacher at the time of his death was an inhabitant of said county. His widow and ten of his children were named as legatees and devisees. Pending this proceeding Antoinette Thormann, a daughter of Fabacher by a first marriage, petitioned the proper court in Louisiana to be appointed administratrix of the estate of Fabacher, asserting that he "was at the time of his death and many years before a citizen of Louisiana domiciled and residing in the city of New Orleans," that he left property in the jurisdiction of the court, and that "your petitioner is the sole surviving heir and legitimate child of said deceased, issue of his marriage," etc. Letters were issued to

her accordingly. All the notice required having been given, later the probate court in Wisconsin proceeded against objections filed by Thormann that Fabacher was a resident and domiciled in Louisiana, etc., to adjudicate that he was a resident of and domiciled in Wisconsin, etc., and the Supreme Court of the state affirmed the decree. On appeal to the Supreme Court of the United States that court said:

"Whatever the effect of the appointment, it must be as a judgment and by way of estoppel. Now, a judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them. This appointment cannot be treated as a judgment *in personam*, and as a judgment *in rem* it merely determined the right to administer the property within the jurisdiction (Louisiana) whether considered as directly operating on the particular things seized or the general status of assets there situated."

"If then, the decree in Madison county was but a decree or judgment *in rem* (notwithstanding the appearance and contest of Mrs. Higgins), it only "determined the right to administer the property within the jurisdiction," and the final distribution, even then, must be according to the law of Michigan and will of Mrs. Eaton as there determined, which law and will control as we have seen.

In *Caujolle v. Ferrie*, 13 Wall. 465, 20 L. Ed. 507, it was held:

"A grant of letters of administration by a court having sole and exclusive power of granting them, and which by statute is obliged to grant them 'to the relatives of the deceased, who would be entitled to succeed to his personal estate,' is conclusive in other courts on a question of legitimacy; the grant having been made on an issue raised on the question of legitimacy alone, and there having been no question of minority, bad habits, alienage, or other disqualification simply personal. *Held*, accordingly, after a grant under such circumstances, that the legitimacy could not be gone into by the complainants on a bill for distribution by the persons who had opposed the grant of letters against the person to whom they had been granted; but, on the contrary, that the complainants were estopped on that subject."

This would seem to be a direct holding by the Supreme Court of the United States that a decision by a probate court on a question necessarily before the court and put in issue and tried and determined estops the party making the contest to deny the fact determined and the legal consequences flowing therefrom. In that case the Revised Statutes of the State of New York provided that the surrogate of each county had sole and exclusive power within the county for which appointed to grant administration on the estate of an intestate who at or immediately previous to his death was an inhabitant of the county of such surrogate. Also, "administration in cases of intestacy shall be granted to the relatives of the deceased who would be entitled to succeed to his personal estate." Jeannie Du Lux died in New York county, intestate, and leaving a large personal estate, and one John Pierre Ferrie applied for letters of administration, claiming he was the only child and sole heir and next of kin to said intestate. Other persons appeared, intervened, and claimed they were of the heirs at law and next of kin and entitled to share in the estate. On the issue whether or not Ferrie was sole heir and next of kin, legitimate, evidence was taken, and it was decided that he was, and letters issued, and this was affirmed by the Court of Appeals. Such contest-

ing parties then filed a bill in the Circuit Court of the United States for their distributive shares seeking to have it adjudicated as against Ferrie that they were entitled to share notwithstanding the decree in Ferrie's favor on the grant of letters that he was the sole heir and next of kin. That adjudication was pleaded in bar and as final and conclusive, and the plea was upheld. That proceeding was in the Surrogate's or Probate Court of New York. True, it was not a proceeding to probate a will, but for the grant of letters of administration. Let us suppose Du Lux had also left a large personal estate in the state of Michigan, and Ferrie had also applied on the same allegations for letters there, and the same contestants had appeared and contested the same question and applied for letters, and it had been held the other way and no appeal taken. The law of the domicile of the testator controls the distribution of the estate of an intestate as well as that of a testator. Assume that the courts of Michigan as do the courts of New York recognize this rule, which is, of course, one of comity, but the law nevertheless when recognized by the courts of a state. How would the courts of Michigan have distributed the estate in Michigan? Or suppose those who contested in New York had applied for letters in Michigan, and Ferrie had contested but without avail, and the question had been decided the other way, and the decision had not been appealed from. Now, suppose that Ferrie with this decision of the New York courts at his back had come into the courts of the United States invoking same, and also the rule of comity by which the law of the state of the domicile of the intestate governs in the distribution of estates asking a decree establishing that he was entitled to the personal property in Michigan, would the courts of the United States have said that Ferrie was estopped by the decree in Michigan as to the personal estate there, and that the other claimants were entitled to it, but to no share in the property in New York? And suppose the other claimants having their alleged rights declared by the decree in Michigan, not appealed from, had come into the United States Circuit Court for a decree adjudging that they were entitled to the personal property in New York, would the court be at liberty to decide that, New York being the domicile of the intestate, its judgments and decrees as the law of the domicile must prevail in all places where the intestate left personal property? Or would it hold the decree first pronounced should control? Or would the United States courts have held that Ferrie was entitled to the property in New York, but the other claimants to that located in Michigan? The courts have said again and again that a judgment in rem binds all the world if the notice required by the laws of the state is given as to the personal property situate in the state where the decree is pronounced. But this means the right to administer and distribute the estate, not the right to distribute it otherwise than as provided by the law of the domicile.

Should not all these controversies yield to the dominant and controlling rule that the law of the domicil of the testator or intestate controls in the distribution of his personal estate, and that, wherever this is recognized as the rule of distribution, judgments or decrees

pronounced by probate courts in a state of the Union not that of the domicile in establishing wills and granting letters, if in direct conflict as to a particular estate, testate or intestate, with those of the state of the domicile, must yield to those of the latter state? If this is not true, then Elizabeth S. Eaton left two wills operative as to her personal estate; for it related to no other as she had no real estate, and as to Susan C. Higgins and the two sisters who contested the codicil with her in New York the codicil is a part of the will, and in Michigan where the testatrix resided, and where all or nearly all the parties in interest reside, it is not. The particular consequences in this case are not to control this question. They might be serious in many cases that may arise. The probate of the will in Michigan (proceeding pending concurrently with that in New York) followed that of the probate in New York, and all parties were cited according to the laws of Michigan. The proof shows that the pendency of the probate in Michigan was known to the parties and Surrogate's Court in New York. The exclusive right of that court to probate the will in the first instance was asserted but overruled. Each court took evidence and by decree established a will (one including the codicil, the other not) as the last will and testament of Elizabeth S. Eaton. Concede that each court had jurisdiction. No appeal was taken in either case. That each court under the statutes of its state had power to prove the will must be conceded.

[11] That the principal and controlling place of administration and execution of the will and distribution under it was Michigan cannot be denied. That the law of that state determines what the will is is equally certain. "In regard to a will of personalty, in an especial manner, the law of the place of the testator's domicile governs the distribution thereof and will govern in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other county in view." *Harrison v. Nixon*, 9 Pet. 483, 9 L. Ed. 201; *Fowler*, Decedent Estate Law, 324; *Story*, Conflict of Laws, § 380; Code of Civil Proc. (N. Y.) § 2694.

These two wills as established by the court in Michigan and the court in New York have a decree to support them. The New York court did not await the action of the Michigan court and the Michigan court at the place of the testator's domicile rightfully refused to be bound by it or to follow and determine what the will of Mrs. Eaton was and her testamentary capacity to make it. This determines the policy and law of the state of Michigan which controls the question of testamentary capacity as to personalty and the establishment and interpretation of the will. Suppose that this codicil had been such as to seriously affect the rights of legatees under the will proper who did not appear in New York and contest or join in the contest if held binding on Mrs. Higgins and enforced accordingly. Would the courts enforce it to the detriment of such others?

In *Sharon v. Terry*, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572, an action had been commenced in the federal court when one of the parties went into the state court (*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131), and commenced an action against his adversary in-

volving the same subject-matter. The state court held its judgment valid, and the federal court on the other hand (see case *supra*) was determined to pay no attention to it. The judgment in the state court was reversed, and this ended the controversy. In 1 Freeman on Judgments (4th Ed.) § 118, he refers to these cases and expresses the opinion that in such a case, if both actions go to judgment, the controlling one will be that of the court first obtaining jurisdiction by the institution of suit. If that be so in the case of the probate of a will, or alleged will of a testator, serious complications and results may follow. For instance, a testator domiciled in Michigan where a large part of his personal estate is situated, the balance being in New York, leaves two papers purporting to be his will both executed in Michigan where the witnesses are and naming different executors, and making a different disposition of his property. The New York executor has one and the Michigan executor the other. It is claimed that the later in date revokes the other, but it is alleged by the executor in New York that the testator had not the mental capacity to make such latter will, and he propounds the earlier will for probate in New York, and the Michigan executor and one or two of the numerous legatees contest and present the later will for probate, but are defeated, and the New York will (we will term it for convenience) is probated in New York. By error or misfortune or neglect no appeal is taken in time, and so the decree stands. In the meantime the Michigan executor propounds the other will in Michigan, gives notice as required by law, and it goes to probate, and no appeal is taken. Is the personal property in New York to be distributed under the (so-called) New York will and the personal property in Michigan under the latter or (so-called) Michigan will? Or is the policy and law of Michigan and the will as actually established by the court of the testator's domicile to govern in the actual distribution of all the property irrespective of the decree of the New York Surrogate's Court? If we leave out the element of contest and assume that none is made in either court, is or is not the will of the testator's actual domicile to control the distribution? I think the policy of the law is that a testator shall have but one will as to his personal estate in whatever state of the United States it may be situated, and that the law of the state of the domicile of the testator determines what that will is, and that, when established by the proper court of such state having jurisdiction and not appealed from, all controversies over it are ended, and that it becomes operative and binding on all whose rights under it are in question, and controls the distribution of the personal estate (save payment of debts) wherever situated, no matter how many contests there may have been in other states on application for probate there over what papers constituted the will made by legatees, or how many different wills may have been established on such contests. A sound public policy demands that this should be the rule. The laws of one state cannot be permitted either on the ground of comity or duty to be overruled by those of another, nor can the judgments of one state be enforced in another on either ground in opposition to its settled policy. This is a question involving more

than the rights of Susan C. Higgins. It involves the due and orderly distribution of the estate and the settlement and determination of the amount each legatee is to receive in the final distribution, and that must be determined, not by what Susan C. Higgins did or did not do in the Madison County Surrogate's Court, but by the terms of the will of Elizabeth S. Eaton, the testatrix, as settled and found to be by the probate court of her actual domicile. The following cases and authorities, while not exactly in point, are pertinent, and demonstrate the law on the subject where judgments in different jurisdictions conflict: 2 Wharton on Conflict of Laws (3d Ed.) 1411, § 656, 1170, § 490; Scoville v. Canfield, 14 Johns. (N. Y.) 338, 7 Am. Dec. 467; Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 299, 11 Sup. Ct. 92, 34 L. Ed. 670; De Brimont v. Penniman, 10 Blatchf. 436, Fed. Cas. No. 3,715. The general rule is that a contract made in a foreign state or the law of such state will not be enforced in another when contrary to its public policy, and it makes no difference that the claim has been reduced to a judgment in a suit between the parties. Says Wharton, § 656:

"Sec. 656. Will not be enforced when overriding home policy, nor when for penalty. We have already seen that a foreign law will not be admitted for the purpose of overriding any rule of distinctive domestic policy. This principle is necessarily applicable to judgments, since, otherwise, all that would be necessary to force the repugnant law upon us would be to formulate it in the shape of a judgment. The fact of the obnoxious prerogative taking shape as a judgment does not make it any the more authoritative. Nor will a judgment entered for a statutory penalty be enforced in a sister or foreign state."

In *Grover, etc., v. Radcliffe*, *supra*, page 299 of 137 U. S., page 95 of 11 Sup. Ct. (34 L. Ed. 670), the court said:

"The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or duty, thereby permitting the law of another state to override their own."

In *De Brimont v. Penniman*, *supra*, where the French Code provides that a father-in-law and a mother-in-law must make an allowance to a son-in-law who is in need so long as a child of the marriage is living, the son-in-law in France, where all the parties then resided, the son-in-law being domiciled there, but the father-in-law and mother-in-law being citizens of and domiciled in the United States (temporarily in France), obtained a decree for an allowance in the courts of France against the father-in-law and mother-in-law which was not paid. The son-in-law thereafter brought suit on that decree in the federal courts of the United States, which court refused to enforce it as contrary to the policy of our laws. Here was no question of jurisdiction in the courts of France over both the subject-matter and persons of the defendants. To enforce the decree of the Madison County Surrogate's Court is not only to violate the policy of the law of the state of Michigan, but of the state of New York and of the courts of the United States, in the recognition of wills and the distribution of estates of decedents thereunder. Not all judgments or decrees rendered in one state are enforceable in another or binding on the parties there. Says Wharton:

"Nor will a judgment entered for a statutory penalty be enforced in a sister or a foreign state"—citing many cases; New York cases with others.

We may look behind the face of the judgment or decree to see what it was for and the grounds upon which based or pronounced.

[12] Taking these two decrees together, it is impossible for this court to give full faith and credit to both. It is called upon to decline to recognize the Michigan decree at all by saying that Mrs. Higgins is estopped to assert it. If she is estopped to assert it here, she must be estopped to assert it anywhere, even in Michigan. And, as all estoppels to be binding must be mutual, all other distributees and legatees who would profit by enforcing the estoppel against Mrs. Higgins must be estopped or bound also. To hold them all bound would be to substitute the action, decree, and will of the New York Surrogate's Court for that of the probate court of Washtenaw county, Mich., the county and state of the conceded domicile of the testatrix, and thus the declared policy of the law of both states would be defeated by the mere act of Mrs. Eaton in coming into New York and contesting the codicil without avail. I think this one of the cases where the ordinary rule as to judgments does not apply.

[13] It is also the settled policy of the law in the states and United States courts that wills of real estate or affecting real estate must be executed in accordance with the law of the state where the real estate is situated, and that the provisions disposing of such real estate must be valid under the laws of such state. It is not enough that such will and the provisions thereof are valid in the state of the testator's domicile. So it was held in *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028, where a will executed by a testator domiciled in South Carolina according to the laws of that state, and valid there and everywhere as to real and personal estate, was construed by the courts of that state as converting all the real estate of the testator, including that situated in the state of Connecticut, into personalty for the purposes of the will, that the courts of Connecticut would not regard or enforce the judgment or decree of the South Carolina court so construing the will. The courts of Connecticut and the Supreme Court of the United States on appeal held that such decree and judgment was not binding, although the general rule is that the construction of a will as to personal estate is for the courts of the testator's domicile. If the real estate in Connecticut was personal estate by virtue of the will, then it was disposed of thereby as personal property; if not so converted, it was not so disposed of. The South Carolina courts had jurisdiction to pronounce a decree construing the will, and ordinarily this decree would be binding everywhere, but as to real estate in Connecticut that state refused to recognize it or hold it binding on the parties to the decree. That decree pronounced in South Carolina was pronounced after contest, appealed from and sustained by its highest court. *Clarke v. Clarke*, 46 S. C. 230, 24 S. E. 202, 57 Am. St. Rep. 675. If we say that decision turned on the point that the court in South Carolina had no jurisdiction over real estate in Connecticut, we may concede that fact, but, if there was an out and out conversion, as equity regards that as done which is

directed to be done and ought to be done, then the real estate in Connecticut was personal property and so to be treated, and the South Carolina court had jurisdiction. But the point is that the Connecticut courts, upheld by the Supreme Court of the United States, refused to give any faith and credit to this decree affirmed by the highest court of South Carolina, and not reversed. It was a probate matter, and the rule of comity which prevails in both Connecticut and South Carolina did not, we will say, authorize the courts of South Carolina to construe its own will made by a domiciled citizen as to real estate in Connecticut which it assumed to do and which its law said it might do. Here the Michigan court, the place of the testator's domicile, has refused to recognize the New York ancillary probate (or assume it to be probate in chief for purposes of mere administration in New York). That decree stands. The New York court has no jurisdiction or power to determine the testamentary capacity of Mrs. Eaton as against the courts of Michigan and establish the codicil as a part of the will against the decrees of that court, and yet it did just that if defendant's contention is correct, and this court is called upon to say that its action must be recognized. In 2 Wharton on Conflict of Laws (3d Ed.) p. 1375, § 618a, it is said:

"In the absence of a local statute substituting the *lex situs* for the *lex domicilii* as the governing law with respect to succession to personal property, the administration granted at the deceased's domicile is everywhere regarded as the administration in chief, while that granted in another country in which assets are found is considered merely as auxiliary or ancillary."

And at page 1318, § 591a:

"The same general principle that refers a will of personal property to the law of the testator's last domicile applies, without qualification or exception—other than such as may be made by local statute or the public policy of the forum—to the general capacity of the testator to make a will and to the formal validity of the will."

And in section 570, p. 1286, the author, citing authority, including *Lawrence v. Kitteridge*, 21 Conn. 582, 56 Am. Dec. 385, *Story, Conflict of Laws*, § 465, *Schultz v. Dambmann*, 3 Bradf. Sur. (N. Y.) 379, *Davison's Will*, 1 Tuck. (N. Y.) 479, and 1 *Jarmin on Wills* (Bigelow's Ed.) 1881, p. 5, and note, says:

"By the English common law, as held both in England and the United States, testamentary capacity, as to personalty, is governed by the law of the domicile of the testator at the time of his death."

And at page 1332, § 595, he says:

"Sec. 595. Judgment of court of domicile has ubiquitous authority. The judgment of the court of the domicile of the deceased at the time of his death is authoritative on the courts of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign court as have been decided by the court of the domicile, and where such judgment does not conflict with positive prescriptions of the *lex situs*."

And at page 1388, § 644, the author says:

"So far as concerns the adequacy of the execution of the will, the rule is that the probate of the testator's last domicile is conclusive"—citing authority.



Rood, on Wills says:

"The law of the testator's domicile determines all questions as to the will so far as personalty is concerned—the testator's capacity; the formality of executing and revoking; the legality of the dispositions; the construction and effect of the provisions. If complying with the law of his domicile, it will be allowed even in the state where he made it without complying with the formalities required by the laws of that state. If not complying with the law of his domicile, it cannot be sustained, though executed in compliance with the law of the state where made and offered for probate and where the property is situated." Rood on Wills, § 409.

In *Newcomb v. Newcomb*, 108 Ky. 582, 57 S. W. 2, 51 L. R. A. 419, E. B. Newcomb, a subject of the kingdom of Great Britain living in the state of Kentucky, died leaving a widow and two children by her and one by a former wife. He left three different executed papers, each purporting to be his last will and testament, one dated July, 1888, one March 1, 1890, and the other March 4, 1890. The widow presented the paper of March 4, 1890, for probate, and it was probated on her motion in the proper probate court, and she was duly appointed executrix. An appeal was taken by W. S. Newcomb and the probate reversed, and such paper held not to be the will of the said E. B. Newcomb. Prior to the appeal the will was presented in England where Newcomb had personal property, and ancillary letters were issued, and the personal estate in England reduced to possession. After the reversal and affirmance thereof, Mrs. Newcomb presented the will of March 1, 1890, for probate in the Kentucky court and finally presented that of July, 1888, also, but subsequently withdrew both and abandoned the proceedings. Subsequently she took these two papers of July, 1888, and March 1, 1890, to England, and offered them for probate there, and that court on notice required by its laws held that the paper of March 1, 1890, was the true will, and it was probated accordingly and the ancillary probate mentioned was revoked. Subsequently the probate court in Kentucky granted administration of the estate of Newcomb to Ohio V. B. & T. Co. Said W. S. Newcomb subsequently brought suit for a settlement of the estate and made the administrator and Mrs. Newcomb and her children parties, she being the principal legatee in the will proved in England, and sought to have her account for and pay over the money that had come to her hands as executrix to the administrator. The only question was whether or not the probate of the will of E. B. Newcomb in England, of which country he was a subject, was good and controlled. There was no question of two wills in this case. Newcomb left a will and left personal property in England, of which country he was a subject. There is a statute in England which provides for such a case, and provides that the will left by a subject of that kingdom who dies abroad may be proved and shall take effect as to the property left by him in England only. Newcomb and his property left in England were clearly subject to the laws of England as against letters of administration in Kentucky where he resided. A foreign country or a state even has the right to pass a statute which will control, not only the administration, but the distribution of the personal property in its juris-

diction of a person domiciled in another country or state. Indeed, at least two of the states of the United States have done so.

[14] It has been held many times that the full faith and credit clauses of the acts of Congress and of the Constitution of the United States (article 4, § 1) do not require that any more force be given to the judgment or decree of a state court (jurisdiction of the parties and subject-matter being conceded) than the law or custom of the state where pronounced give it or demand. *Robertson v. Pickrell*, 109 U. S. 610, 3 Sup. Ct. 407, 27 L. Ed. 1049, where it is said:

"The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several states does not require that they shall have any greater force and efficacy in other courts than in the courts of the states from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia College*, 17 Wall. 521, 529 [21 L. Ed. 687]."

As we have seen, the courts and the statutory law of the state of New York fully recognize and declare (1) that the laws of the domicile of the testator or intestate govern in the actual distribution of the personal estate of the decedent, and (2) that testamentary capacity to make a will is governed by the law of the testator's domicile, and (3) that proof of the will of a testator or the grant of letters of administration of the estate of an intestate, actually domiciled in some other state at the time of his death, within and by the courts of the state of New York who dies leaving personal property only in the state of New York, is for the sole purpose of administering that personal property so situated in New York, paying creditors, taxes, etc., and then either passing it over to the executor or administrator of the testator or intestate, as the case may be, of the state of the domicile for distribution, or retaining and distributing it itself, but in either event the balance of such estate is to be distributed according to the law of the state of the domicile of such testator or intestate. *Matter of Hughes*, 95 N. Y. 55, 60; *Harvey v. Richards*, 1 Mason, 381, Fed. Cas. No. 6,184; *Despard v. Churchill* 53 N. Y. 192; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Fowler's Decedent Estate Law*, 324, who says:

"Wills of Personalty. It was a postulate of the common law, that movable or personal property has no situs or visible locality, but is subject to that law which governs the person of the owner, both with respect to the manner of its disposition and with respect to the transmission of it either by succession or by the act of the owner. This postulate of the common law became the law of this state by the effectual and formal continuation of that law by the Constitution of the state; and it still remains the law of this state, although the exigencies of modern governments tend more and more to give a local situs to personal property for merely local purposes of taxation."

It was not the purpose of the Legislature of the state of New York to substitute its probate courts in place of those of the state of the testator's domicile as arbiter of the testamentary capacity of the testator or the proper execution of the will. To say that this

was its purpose would contradict the very terms of the New York statute. It would also force legatees and devisees or next of kin as the case might be to come from say Oregon to New York to test the mental capacity, etc., of a testator domiciled in Oregon in the New York courts. Now, I take it that the decree of the proper Surrogate's Court in New York, not appealed from, establishing the will of a testator domiciled here, settles the law of the state of New York as to what his will is, and that the decree of the proper probate court in Michigan, not appealed from, determines the law of that state as to what is the last will and testament of a testator domiciled there. New York has not undertaken to say by statute that the personal estate here of a person domiciled in another state shall be distributed according to our law or according to the will as proved here in the case of a testator domiciled abroad, but has said exactly the contrary. Code Civ. Proc. § 2694, reads as follows:

"Sec. 2694. What Laws Govern as to Effect of Testamentary Disposition. The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent. Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident at the time of his death."

"The place of domicile is the place of principal administration and other administrations are merely ancillary. The law of the place of ancillary administration governs as to the payment of debts there; but the distribution is made according to the *lex domicilii*." *Churchill v. Prescott*, 3 Bradf. Sur. (N. Y.) 233; *Suarez v. Mayor*, 2 Sandf. Ch. (N. Y.) 173; *Mills v. Fogal*, 4 Edw. Ch. (N. Y.) 559.

Section 2700 of Code of Civil Procedure, which provides for the disposition of the personal estate here belonging to the estate of a testator or intestate domiciled in other states, reads as follows:

"Sec. 2700. Ancillary Executors and Administrators to Transmit Moneys. The person to whom ancillary letters are issued, as prescribed in this article, must, unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting, or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or country, where the principal letters were granted, to be disposed of pursuant to the laws thereof. Money or other property, so transmitted by him, at any time before he is so directed to retain it, must be allowed to him upon an accounting."

It seems to me very clear that it is the policy of the probate and administration laws of the state of New York, in the case of a testator or intestate domiciled in another state, to respect and conform to the law of that state and either transmit the personal estate located here, after payment of debts and taxes and other charges, if any, to that court for distribution there in accordance with the law of such state which includes the decisions of its courts as to what the

will of the testator is, or to distribute, in certain cases, under and through its own courts in accordance with such law; also that the probate in New York of the will of such testator domiciled in such other state authorized by statutes (Code Civil Proc. §§ 2476, 2611), is for the purpose of fixing the right of administration in New York so far as personal property there is concerned and the rights of heirs and devisees in real estate, and not for the purpose of determining as against the courts of such other state the testamentary capacity of the testator or what his will actually is. If the latter be the purpose and effect of the New York statute, then its courts not only determine what the will is as against the courts of such other state, the state of the testator's domicile, the question of due execution according to the laws of such state and what its laws are, and their true meaning, and also the law of that state as to testamentary capacity and whether the testator possessed it, but enforce it so far as the New York courts have possession of the assets. If this is done, the law of New York, not the law of Michigan, in this case governs in the distribution of substantially the entire personal estate of Elizabeth S. Eaton in the face of the express mandate of section 2694, Code of Civil Procedure, above quoted.

I do not think, in face of the provisions quoted, the New York courts will give any such effect as is contended for to the probate of this codicil in the Madison County Surrogate's Court, but that they will and must recognize the will as probated in Michigan. New York can hardly afford to establish the doctrine contended for against its own domiciled citizens and their estates who have assets in other states at the time of death. If such is its law, California or Oregon or any far distant state may enact a like statute, and, in case of domiciled citizens in New York who happen to have personal estate there prove his will, determine for itself all the questions referred to, determine for itself the New York laws, and, disregarding the decisions of its courts in regard thereto, distribute the personal estate as it says the laws of New York require. If its courts get ahead of those of New York, New York must accord such judgments full faith and credit, regardless of its own. I think, therefore, that so far as the probate in Madison county is concerned it conclusively established the right to administer in New York; that a will existed; that Eaton was executor named therein, and justified the letters testamentary and administration of the property here to the extent stated, but that it did not conclusively establish that Elizabeth S. Eaton had testamentary capacity according to the law of Michigan to execute the codicil on which question the decree of the probate court of that state is conclusive; and that, therefore, the codicil must be held void, and that it forms no part of her last will and testament. This is giving to the decree of the Madison County Surrogate's Court the full faith and credit it is entitled to, and the same force and effect the courts of the state of New York will, or should, give it so far as distribution of the estate is concerned. Again, sections 2695-2704, New York Code of Civil Procedure, provide for the record and execution in New York of wills made by testators domiciled in other states and proved there, and such wills

cannot be proved here at all, having been once proved in the state of the testator's domicile. *Clark v. Poor*, 73 Hun, 143, 25 N. Y. Supp. 908. And in *Cross v. United States Trust Co. of N. Y.*, 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597, it is held:

"Personal property is subject to the law of the owner's domicile both in respect to a disposition of it by act *inter vivos* and to its transmission by will, or by succession on its owners dying intestate."

So in that case a trust of personal estate created by a will in Rhode Island to be executed in New York and which trust was to be executed in New York was held valid, and our courts would not interfere or entertain an action to declare the invalidity of the trust under our laws. All that *Foulke v. Zimmerman*, 14 Wall. 113, 20 L. Ed. 785, decides is that a will proved in New York and then in Louisiana protects a purchaser in good faith and for value in Louisiana, who relied on such probate, although the probate in New York had been reversed.

It is not clear that the courts of New York will refuse to give greater force to the will of a testator domiciled in Michigan and first proved in New York and then in Michigan than they would if such will had been first proved in Michigan, and then recorded in New York. The policy of the New York statutes and decisions is very plain, viz., to recognize and enforce the will of a testator domiciled in another state relating to personal property, and, so far as it relates thereto, as it is finally declared to be by the courts of such state. And I doubt not that the New York courts expect the same rule to be applied by the courts of other states with reference to the wills of the testators domiciled in New York leaving personal property in such states, excepting, of course, those states which have adopted a distinctly different statutory rule and policy. There is conflict of authority as to the effect of a decree admitting or rejecting a will outside the state pronouncing it. *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161, not conclusive; *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49, is only *prima facie* evidence; *Rice v. Jones*, 4 Call. (Va.) 89, decree of one state rejecting a will for incapacity of testator has no effect in probate proceedings in Virginia. See, also, *In re Gaines*, 84 Hun, 520, 32 N. Y. Supp. 398, affirmed 154 N. Y. 747, 49 N. E. 1097, absolute rejection as a forgery did not preclude proof in New York, the state of testatrix's domicile. Also *Williams v. Jones*, 14 Bush. (Ky.) 418, not within the full faith and credit clause; and see *Blount v. Walker*, 134 U. S. 607, 10 Sup. Ct. 606, 33 L. Ed. 1036, question not decided. But see *Ives v. Salisbury*, 56 Vt. 565; and *Crippen v. Dexter*, 13 Gray (Mass.) 330, *contra*. In *Nat. v. Coons*, 10 Mo. 543, and *Stewart v. Pettus*, 10 Mo. 755, it is held that, when the domicile of the testator is in another state than Missouri, the probate in such other state is invalid. So held in *Varner v. Bevil*, 17 Ala. 286; *Brock v. Frank*, 51 Ala. 85; *Sturdivant v. Neill*, 27 Miss. 157; *Wells v. Wells*, 35 Miss. 638; *Manuel v. Manuel*, 13 Ohio St. 458; *Stark v. Parker*, 56 N. H. 481, record, etc., from another state of no effect if domicile was in New Hampshire.

[15] I think the weight of authority and reason is that the probate or rejection of a will of personal property by the courts of a state other than that of the domicile has no effect on distribution as against a decree of the court of the testator's domicile in all states where the distribution is to be according to the law of the testator's domicile. If distribution is to be according to that law and under a will, it seems to me that the will as probated and established in that state is the law of distribution of that estate. If the will as established by the law of the state, a decree of the court of the state, does not furnish the rule for distribution, I am unable to determine where it would be found. This must be so unless New York, pretending to regard the law of the testator's domicile in such cases, has reserved to itself the right and power to determine what the will is and override the courts of the domicile.

It is claimed that the probate court of Washtenaw county, Mich., had no jurisdiction to take proof of the will of Elizabeth S. Eaton and admit it to probate, for the reason the statutes of that state require that the will itself be produced (or its loss or destruction proved), and that this will was never produced in that court. I do not think this point has merit.

[16, 17] First the production of the will was not jurisdictional at all; second, the probate court of Michigan made provision for taking the proofs by deposition, etc., and it was so taken and the will and codicil were produced before the person authorized to take the depositions. This within the statute referred to was a production in court. Estate of Delaplaine, 12 Civ. Proc. R. 401; 9 N. Y. St. Rep. 786.

[18] The statutes of Michigan (Comp. Laws) do not provide for the recognition or record of the alleged will of a person actually domiciled in that state and proved outside the state. The statute reads ([9282] section 21):

"That any will duly admitted to probate without the probate court of any county in this state in which the testator left real or personal estate, and in the place of the testator's domicile, may be duly admitted to probate and recorded in this state by duly filing an exemplified copy of said will and of the record admitting the same to probate; and proceeding in the manner hereinafter provided."

(9283) Section 23:

"If, on hearing the case, it shall appear to the court that the instrument ought to be allowed in this state, as the last will and testament of the deceased, the copy shall be filed and recorded and the will shall have the same force and effect as if it had been originally proved and allowed in the same court."

See *In re Mower*, 48 Mich. 441, 12 N. W. 646. As to the policy of the Michigan courts, see *Glynn v. Corning*, decided February 3, 1910, 159 Mich. 474, 476, 124 N. W. 514-516 (134 Am. St. Rep. 739), where it is held:

"The question presented is whether the will of a person domiciled in another state, who died leaving an estate within this state, may be admitted to probate here before its validity is established in a proceeding in the courts of the domicile of the testator. \* \* \* It is plain that the Legislature has recognized the right of the courts of the domicile of a testator to conclusively

determine the validity of the will, and quite as plain that the courts of the domicile of this testator have made no such determination. It has been repeatedly held that the issue here upon the offering of a domestic will for probate is 'will or no will.' We have then these two methods provided by the Legislature for admitting wills of deceased persons to probate: One, to try out every issue upon which validity of the instrument depends; the other, to accept the determination of all of these issues by the courts of the domicile of the testator. There is no method pointed out for admitting a will here as valid to the extent of appointment of an administrator of the estate, leaving the question of its validity to be determined at the domicile of the testator. It is not conceivable that the courts of this state will inquire about and finally decide that a certain instrument is, or is not, a valid will, subject to having the determination reversed by the courts of any other state. Assuming the right of each state to assert complete jurisdiction in rem over all property of decedents found within the state, including the right to determine, through its tribunals, the validity or nonvalidity of a foreign will, it is equally the right of each state, acting through its Legislature, to accept as conclusive the judgment of the courts of the domicile of the testator as to the validity of his will and to permit his property, found in the state, to be disposed of according to the provisions of the will. I find in the statutes sufficient evidence of a state policy which denies to the probate court of Saginaw county the jurisdiction which it assumed when it admitted the particular will to probate."

In *Matter of Rubens*, 128 App. Div. 626, 112 N. Y. Supp. 941, affirmed by Court of Appeals on opinion below, holds that the will of Rubens, who died in France leaving property in New York, might be proved in New York even if not executed according to the laws of France. That this is the law I do not doubt. It is not a decision, however, that if a will of Rubens had been proved and probated in France as his will, and this one denied probate there on the ground of mental incompetency to make it, that the will proved here and denied probate there would control the distribution of the personal estate here. Neither does the case hold that the will will control the disposition of the personal estate of Rubens in New York. The effect of the will was not passed upon. And the question of testamentary capacity to make the will was not in question. It is not held in the Rubens Case that if Rubens had been shown domiciled in France, and then by the laws of his domicile declared incompetent to execute a will, the will would have been admitted to probate here. Indeed, Judge Clarke quotes with approval Surrogate Rollins in *Matter of McMulkin*, 5 Dem. Sur. (N. Y.) 295:

"There is no inconsistency between section 2611 as thus interpreted and section 2694. \* \* \* A will may be entitled to probate although all its dispositions of property may be discovered to be invalid. It was not intended to overthrow the established law that the law of the domicile of a testator leaving a valid will determines the distribution of all personal property. Indeed, as said Judge Clarke, the will of a testator domiciled in one state relating to both real and personal property, or only real property, must be proved, if duly executed and the testator was competent to make a will, but it would have no effect in the disposition of real property in another state if not executed according to the laws of such state. The law that domicile controls disposition is not changed."

In *Cross et al. v. U. S. T. Co. et al.*, 131 N. Y. 330, 341, 30 N. E. 125, 127, 15 L. R. A. 606, 27 Am. St. Rep. 597, the court said:

"Should our Legislature deem it for the public good to repeal the statute relating to wills, and to provide that all property should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property, actually within the territory of the state, but owned by a person domiciled in another state, would still be valid, providing it was valid by the law which governed the owner. When it is urged that we are bound by foreign law as to all the formal requisites of a will, as a testamentary instrument, the capacity of the testator to make it, and its legal construction, meaning and effect, and not bound by such law with respect to the particular bequests by which the testatrix has distributed her property among her heirs and next of kin, it is not perceived that such a distinction has any sound reason or principle to rest upon."

The will of a person domiciled in New York must be proved in New York, and Michigan recognizes its action as final and conclusive. It would be a violation of all rules of justice and comity for New York to say it will prove the will of a person domiciled in Michigan in its own courts and assert its action against the courts of Michigan and distribute the personal estate as it determines the will to be regardless of the action of the Michigan courts.

It is claimed that Mrs. Higgins has accepted benefits under the codicil as proved in New York, and therefore is estopped to question its validity. I find no evidence establishing such fact. While in the first instance objections were filed to both will and codicil and memorandum, these were abandoned as to the will proper, and the sole question was over the codicil and memorandum. The proof of the will proper was and is valid, and the issue of letters to Hervey E. Eaton was and is valid, and conferred power on him to pay all debts owing by Elizabeth S. Eaton, whether owing to persons in New York state or elsewhere. He has the right to administer the estate, but not to distribute same except according to the law of the state of Michigan. How far he may be protected in making payments to Mrs. and Mr. Jacobs under the codicil can be determined in an appropriate proceeding. If I am correct in my understanding and interpretation of the will and codicil, allowing both to stand, and, if both stand, the executor is fully protected, as the codicil in providing for the care of George A. Storms by Mrs. and Mr. Jacobs simply modifies the condition of the will imposing that duty on Mrs. Higgins, but does not revoke or annul the gift of \$100 per month to her.

My conclusion, therefore, is pursuant to *Waterman v. Canal Louisiana Bank & Trust Co.*, Executor, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80, that the complainant, Susan C. Higgins, is entitled to a decree establishing her interest in the estate of Elizabeth S. Eaton, late of Ann Arbor, Mich., and now in the hands of Hervey E. Eaton, as executor, etc., under the last will and testament of said Elizabeth S. Eaton, viz., that the legacy to her of \$100 per month for and during the term of her natural life is not revoked expressly or by implication or substitution, but is in full force and effect, and is a charge on the income of the personal estate and property of said testatrix to be paid in due course of administration by said executor if distribution is retained in New York, or by the administration with the will annexed in case such property is transmitted to Michigan for



distribution and also fixing the amount now due her. Mrs. and Mr. Jacobs are not before this court, nor was their presence necessary, and the effect of the payment to them pursuant to the codicil on the executor is not determined, although this court is of opinion such payment is fully justified if the codicil is finally held to be a part of the will.

Decree accordingly, with costs to be paid from the estate in due course of administration

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VANDERBILT et al. v. BISHOP et al.

(Circuit Court, D. Oregon. July 31, 1911.)

(No. 3,647.)

1. CANCELLATION OF INSTRUMENTS (§ 45\*)—RESCISSION—FRAUD—EVIDENCE.

A vendee seeking to rescind a contract for the sale of land for fraudulent representations must establish fraud by clear and irrefragable evidence.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45\*]

2. VENDOR AND PURCHASER (§ 33\*)—CONTRACT OF SALE—RESCISSION—FRAUD.

Misrepresentations sufficient to vitiate a contract for the sale of land, must not only relate to a material matter constituting an inducement to the contract, but to a matter respecting which the vendee did not possess means of knowledge, and it must also be a misrepresentation on which he relied and by which he was actually misled to his injury.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38-40; Dec. Dig. § 33.\*]

3. VENDOR AND PURCHASER (§ 44\*)—CONTRACT OF SALE—VACATION—FRAUD—EVIDENCE.

Evidence held to require cancellation of a contract for the sale of an orchard for false representations concerning the age and variety of the trees, and the condition and quality of the soil.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 44.\*]

4. CANCELLATION OF INSTRUMENTS (§ 58\*)—CONTRACT—CANCELLATION—FRAUD—DAMAGES.

Where a contract for the sale of an orchard was canceled for the vendor's fraud, the vendee was entitled to recover the money paid on the contract, with interest from the day of payment, the amount expended in the care and cultivation of the orchard, in addition to costs and disbursements.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 118, 120; Dec. Dig. § 58.\*]

In Equity. Bill by Oscar Vanderbilt and another against Minette Thullen Bishop and another, to foreclose a contract for the sale of real estate, in which defendants filed a cross-bill to cancel the contract and for recovery of the money paid thereon for fraud. Bill dismissed, and relief granted on defendants' cross-bill.

On March 22, 1910, Oscar Vanderbilt and wife entered into a contract with Carrie R. Schmick, acting as the agent of Minette Thullen Bishop and Joseph C. Thullen, whereby Vanderbilt and wife agreed to sell to Bishop and Thullen, and the latter agreed to purchase, a certain orchard, the prop-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erty of Vanderbilt, comprising 30 acres, for the price and consideration of \$43,000, which said sum Bishop and Thullen agreed to pay in manner following: \$1,000 in cash, \$9,000 on or before 30 days, \$5,000 on or before 90 days, the further sum of \$5,000 on December 1, 1910, and the remaining \$23,000 on or before five years from the date of the contract, all deferred payments to draw interest at the rate of 7 per cent. per annum from the termination of a period of 90 days after the signing of the contract. It was further agreed that, upon the payment of the \$5,000 due December 1, 1910, the vendors should execute to the vendees a deed to the premises, and that the vendees should give a mortgage back as security for the payment of the balance remaining due on the contract. Many other stipulations are set forth, but they are not material to the present controversy. The vendees made the first payment of \$9,000, but defaulted on the next following of \$5,000. Thereupon Vanderbilt and wife instituted a suit against Thullen and Bishop for a strict foreclosure of the contract; or, if not agreeable to equity, then they pray that the property be sold and the proceeds applied to the payment of the balance of the purchase price. The defendants, denying plaintiffs' right of foreclosure, set up, by way of cross-bill, misrepresentation and fraud on the part of the plaintiff Oscar Vanderbilt and his agent, John Leland Henderson, whereby the defendants were induced to purchase the premises, and pray a rescission. These allegations, being denied, present the real issues of the controversy.

A. J. Derby and John H. Hall, for plaintiffs.

F. V. Holman and A. A. Hampson, for defendants.

WOLVERTON, District Judge (after stating the facts as above). The special matters of fraud alleged are the following, briefly stated:

That Vanderbilt and Henderson, his agent, represented and stated to Carrie R. Schmick, the agent of defendants, that the parcel of land bargained to be sold contained an orchard, planted with apple trees bearing merchantable fruit, and that it was a first-class commercial orchard; that such trees comprised 14 different varieties, and no more; that the land was composed of first-class soil, entirely suitable for the growing of apple trees and the propagation of an apple orchard, and that there was no hardpan thereon; that the net returns from the orchard during the years in which Vanderbilt was the owner were equal to a net income of 20 to 30 per cent. on \$43,000 for each year; that the net returns for the year 1908 were \$11,332; that the orchard was planted with trees 14 years of age, excepting 50 or 60 trees which had been reset; that said orchard was of the value of \$45,000, and had been greatly benefited by deep plowing—which statements and representations were false, so known to Vanderbilt and Henderson, and were made for the purpose of misleading and overreaching defendants, that the defendants relied upon them, and were thereby induced to enter into the contract of purchase. The falsity of such representations is set forth in these particulars, namely: That the orchard is planted with trees 17 years of age instead of 14; that it comprises 24 to 36 varieties instead of 14 only; that the soil is not first-class, suitable for growing apple trees, and without hardpan, but that it is hard and impervious to moisture, and impenetrable to the roots of the trees, and to a great extent consists of hardpan; that the net returns from the orchard were much less than as represented; that the orchard was not benefited by the deep plowing, but on the contrary was irreparably damaged and injured; that the same is not a first-

class orchard planted with trees bearing merchantable varieties of apples, and is not of the value of \$45,000, or any greater sum than \$20,000.

Reduced to the questions of substance really involved, they are: Was the orchard first-class, and bearing a merchantable commodity? Did it consist in trees of varieties in excess of 14? Were the trees of the age of 17 years instead of 14, and does the soil contain hardpan under any considerable proportion of the area of the orchard? And, if the first of these is to be answered in the negative, or the three latter or any of them in the affirmative, then did Vanderbilt and Henderson knowingly represent to the contrary, and by so doing mislead defendants to their injury?

It is largely a matter of opinion as it respects the estimated value of the property. Also the falsity of the alleged representations touching the profits or net returns previously realized from the orchard has not been shown; nor do I think the issues tendered as to the hurtful results of deep plowing have been sustained. These may therefore be eliminated from further consideration.

There is little dispute in the testimony respecting the merchantable quality of the apples produced, with the exception of some from a few trees only. Not all of them were of choice varieties, but practically all were salable at fair prices. A "standard commercial orchard" has been spoken of in the development of the testimony, but, as defined—it being an orchard with but few varieties of apples, namely, from two to four—the question as to whether the one here is of that class could hardly arise, as it is a thing conceded that it contains 14 varieties and more. It seems that the purchasers, acting through Mrs. Schmick, were in quest of such an orchard, but, on finding this one, purchased it notwithstanding it did not come within the class.

To determine the questions remaining, it will be necessary to review briefly the testimony of the chief witnesses for the parties. Mrs. Schmick was the accredited agent of her father and sister. Of this there is no dispute. John Leland Henderson was the authorized agent for Vanderbilt in the sale of the orchard. Mrs. Schmick, having had some prior dealings with Henderson, came to Hood River in March, 1910, and applied to him (pursuant to an arrangement previously made through correspondence) for a list of the best orchards in the district that he had for sale, and accordingly a list was handed to her. She testifies that her desire so expressed was for a list of "standard commercial orchards." She was without particular or practical knowledge of apple orchards at the time. She subsequently examined all the orchards on the list save the first named (being the one in question here), to which she objected on account of the number of varieties, the list showing 14. Later, however, she made an examination of this orchard also, which, according to her testimony, was brought about by the solicitation of Mr. Allen, who was in business with Henderson, and is referred to as the junior member of the firm. In this connection, it should be stated that Henderson and Allen were associated together as a corporation in the transaction of law business, as well as in real estate. Mrs. Schmick further states that Henderson

represented to her, on numerous occasions, that the Vanderbilt orchard was of the kind indicated by the list. Not only this, but that he discussed with her the advisability of having different varieties, claiming that it was not a detriment to any orchard, the varieties being choice or first-class in quality. He being an orchardist of long experience in that locality, she placed strong reliance upon his statements and judgment. The first time Mrs. Schmick visited the orchard was with a party, Allen having telephoned her that they were going out and asked if she would go along, to which she assented. On the same trip she went to Vanderbilt's home orchard, a half-mile distant, and there talked with him about the orchard in question; in fact, discussed it much in detail. He also said he considered that the fact of numerous varieties was not a detriment, and stated that he had netted \$11,000 from the orchard in 1908. He further represented that the age of the orchard was 14 years, and to her question, "Is there any hardpan in this orchard?" replied, "There is not a foot of hardpan in that orchard," and said, "I will give you a dollar a foot for any you can find." She inquired again, "How deep is the soil?" To which he replied, "Look down the well. You can see how deep the soil is. There is a 50-foot well there." And further remarked, "Why, the trees and the crop would show you that this is perfect soil. I have been an orchardist here for six years, and have a fine orchard of my own, and I certainly know soils of the valley." This was in March, when the trees were dormant, and one could not tell whether they were thrifty or not. The soil looked fine as they were plowing, but Mrs. Schmick claimed to know nothing of soils at the time. Mrs. Schmick wrote at once to her father and sister in California of the favorable representations made by Vanderbilt, but before concluding to close a bargain for the property, she desired to visit the same with Henderson, and so arranged the matter with him. She testifies that she was stopping with Henderson at the time, was confidential with him, and that he took a "fatherly sort of interest" in her, and gave her a great deal of advice about the valley. Henderson's brother became one of the party, at the request of both Mrs. Schmick and Henderson. The brother was from Moscow University, had been in the employ of the United States, and was represented by Henderson to possess a knowledge of orchards. When they arrived out, there was another man in the orchard—Mr. Dethman—and Henderson then said to Mrs. Schmick, "Here is Mr. Dethman, one of the oldest orchardists in the valley, and he cleared this land, rolled the logs, planted the trees; he can tell you anything you want to ask him regarding the orchard—the soil, the trees, anything." On inquiring of Mr. Dethman regarding the trees, and in particular about the soil, he said, "Why, I will give you a dollar a foot for every foot of hardpan in this orchard. I planted these trees myself. I dug the holes. I rolled these logs by hand." Mrs. Schmick asserts that she relied absolutely on his statements. Thereupon she wrote again to her sister, who telegraphed back to make the purchase. In pursuance of the advice, the contract was entered into for a purchase of the orchard at \$43,000. There is a dispute in the testimony as to whether Dethman was in the orchard

at the time Henderson and Mrs. Schmick arrived. Both Henderson and Dethman testify that he was in an adjoining orchard—a Mr. Davidson's—and came over of his own accord. Mrs. Schmick further testifies that just before signing the papers, she said to Mr. Vanderbilt, "Now, this orchard is exactly as you have represented it to me in every detail—the trees, the age, the varieties? You will guarantee that it is just as represented?" And he replied, "It is just as I have represented it, and you will get a fine orchard." The papers were then signed up, and the vendees went into possession.

John Leland Henderson testifies, in effect, that a list was requested of his corporation, through correspondence; that Mr. Allen submitted a list of the properties held for sale, which witness thinks he never saw until in court; that Mrs. Schmick and Mrs. Bishop had written to witness that, should they buy any orchards, they would expect him to represent them as their attorney, and that when Mrs. Schmick came in on the occasion mentioned by her, in March, 1910, with a view to buying, he told her that under no conditions would he have anything to do, either directly or indirectly, in advising her with reference to the purchase of any orchard or any piece of ground; that if he was acting as her attorney, he could only attend to the legal part of it; that after she had decided upon what she wished, if she found something that suited her, he would then tell her whether she had made a wise selection or not, but that he wanted to be entirely foot-loose so as to attend to the duties of an attorney without any bias or anything of that character; that such was the understanding between himself and Mrs. Bishop and Mrs. Schmick, which was acted upon throughout the negotiations. Mrs. Schmick went to Henderson's house, at his wife's invitation, and stayed there with the family until the purchase in question was completed. Henderson further testifies that, after Mrs. Schmick had made her investigations, she said to him, "Well, I think of all the orchards I have seen, that I am the most impressed with the Vanderbilt orchard, and I think I will buy it," and he replied to her:

"I think you had better wait and make a careful examination, and decide certain questions. I have been told that there was hardpan in that orchard. I don't know anything about it, for I have never been in the orchard in my life. I have been told that the varieties, the number of varieties of trees in there, are more than you state there has been represented to you. I don't know anything about it. I have been also told that there was some complaint about some rock or hard ground. Now, Mr. E. L. Smith and Dr. Watt owned those places and planted the trees; that is, they controlled the planting of the trees. Mr. Chris Dethman, so I am informed, actually had the charge of planting the trees. Now, there is my brother here, right from Moscow University, who has been employed by the United States Government for years as a horticulturist. He knows orchards. I would advise you to see him. See these other gentlemen. Have an examination of the ground made—see what the character of this is. And I don't want you to come back afterwards and say that this place, if you decide upon buying it, having been sold through a member of our firm, had been misrepresented. You find these things out for yourself, and do not decide now. Wait till to-morrow."

The next day after this conversation, Henderson, his brother, and Mrs. Schmick drove to the orchard. On arriving there, Henderson

further relates, Dethman came over to where they were from Davidson's orchard; that Dethman was introduced to Mrs. Schmick, and that he (Henderson) then told her that Dethman had planted the orchard, and that she could ascertain from him about it, "as to the kind of soil, and whether there was any hardpan or anything of the kind there." Henderson further relates, in the same connection, that he had previously telephoned to Vanderbilt, and wished he would have a man there with a shovel to dig holes wherever Mrs. Schmick wanted, but that Vanderbilt had replied that there were 50 or more holes that were recently dug in different parts of the orchard, and that Mrs. Schmick could examine those. The parties walked through the orchard. Mrs. Schmick, during the time, inquired of Dethman about the nature of the ground, and whether he had planted the trees, and all about it. She also conversed with Prof. Henderson as to the general condition of the orchard. Dethman assured her that there was no hardpan in the orchard, as he understood hardpan, and Mrs. Schmick examined the holes to determine for herself. On returning to Hood River, Mrs. Schmick expressed herself as satisfied with the orchard, and Henderson told her that he thought she had made a good purchase. She then authorized Henderson to make an offer to Mr. Vanderbilt of \$43,000 in her behalf, which was later accepted, and the negotiations were closed. Henderson affirms that, up to the time she decided to buy, he said not a word to her expressive of his opinion relative to the advisability of her purchasing any particular tract.

On the next day Vanderbilt came over, and after some conference with reference to payments and rate of interest, the contract was signed. In connection with the transaction, Vanderbilt gave to the purchasers a written guarantee that the orchard would produce 10,000 boxes of apples the following season, and that he would pay to them \$1.00 per box for every box falling short of that amount. Some time later Mrs. Schmick and Mrs. Bishop put the orchard into the hands of Henderson for sale, at \$2,000 per acre if sold as a whole, or \$2,250 per acre if sold in 10-acre tracts. Henderson relates that they said at the time that the proposition was too big for them to handle. The property remained in the hands of the agents for sale for 47 days, when it was withdrawn. On cross-examination, Mr. Henderson further testified that he considered the orchard third-class in the sense of first-class, better than good, and good; that he had heard from one or two parties (mentioning Mr. E. L. Smith and Dr. Watt) that there was hardpan in the orchard, and that he heard Dethman say to Mrs. Schmick, "There is no hardpan in here in this orchard, and I will give you a dollar a foot for every foot of hardpan in this orchard," or words to that effect, and witness did not think that there was any hardpan to be found therein.

Vanderbilt testifies that he purchased the orchard from Dr. Watt, practically five years ago this spring, and that Watt told him that the trees were then 11 and 12 years old; that about a year or a year and a half ago he placed the orchard in the hands of Heilborn for sale at \$30,000, and later, the date is not fixed, he placed it in the hands of Henderson for sale at \$1,500 per acre; that Mrs. Schmick came to

his house with Mr. Allen, and she talked with him about the orchard; that he told her he had made money out of it; that the first two crops had paid him back the money he had invested; that orchards about Hood River were rated as an investment on the basis of 30 per cent. on \$1,000 per acre, and that this orchard would pay from 15 to 20 per cent. on the price he was asking. As to the soil, she asked if there was any hardpan in the orchard, and he told her that Mr. Dethman had grubbed the orchard, and he had offered a party, who had made the contention that it contained hardpan, a dollar a foot for every foot of hardpan he could find in there; that witness had plowed the orchard from the first year he bought it, and at one time on an average of from 12 to 14 inches deep, and that he encountered no hardpan; that the top soil or layer is a loam, or what is called red-shot soil, being a little sandy. Below that it is the same as all soil about Hood River, and a clay subsoil, but that this piece of ground has been cultivated for over 20 years, mostly shallow tillage, that would cause a cake to form in a layer below the surface, and until you go under that with a plow it is hard, but not impervious to water or the roots of trees; that hardpan is a hard clay soil, impervious to water, and no vegetation will penetrate it, and that the only hardpan he had seen in Hood River was the blue clay subsoil; that there is a ridge running diagonally through the orchard, which dries sooner than the rest, but that the trees there are as good as any other place in the tract. The witness, continuing, testifies that he next saw Mrs. Schmick in Henderson's office at the time the contract was closed; that he told her again about the earnings of the orchard, and that he had been able to handle the odd varieties for good prices, by selling independently of the union; that the matter of hardpan was mentioned, and he again told her what Dethman had said—also that she could go to any number of people in Hood River, and probably half of them would have a good word to say and the other half would knock the orchard; that the main varieties were noted on the slip he had given to Mr. Allen, and the others came mostly from resets that had been put in to replace trees which had been removed, but he did not state to her the number; that he stated that the orchard was 13 or 14 years old, which he based upon what Dr. Watt had told him. On cross-examination, he testifies that he bought the orchard in the spring of 1906, and as to the hardpan as follows:

"Q. Now, at that time you stated—you did not give the exact words, but did you not say to her that there is no hardpan in this orchard, and that you would give her a dollar a foot for every foot of hardpan in that orchard? A. No, sir. Q. Well, then, what did you mean that you repeated about what Dethman had said? A. I did that to answer her question, because that was the way I understood it. I heard Mr. Dethman make an offer to a party who stated that there was hardpan in there that he would give him a dollar a foot for every foot he could find. Q. When Mrs. Schmick asked you if there was any hardpan, you told her there was not, did you not? A. That was my answer. My answer was, as I stated, in regards to what Mr. Dethman had told. Q. I didn't ask your means of information. You didn't explain to her that Mr. Dethman said that? A. That was the answer I gave her; what Mr. Dethman had said to this other party. Q. You stated that as your own knowledge, when she asked you if there was hardpan, you stated there was no hardpan? A. I did not. I answered her in that indirect way, as I believed

it at the time, and as I now believe it. Q. What did you state? A. I stated in regard to hardpan that Mr. Dethman—a man who had grubbed the orchard, a neighbor of mine—had stated to a party down town who said there was hardpan in there, that he would give him a dollar a foot for every foot of hardpan he found in the orchard. That was my answer."

These are the principal witnesses who tell about the transaction, but there is corroboration both ways. It will be well, therefore, to ascertain what that corroboration is, and how it affects the case.

C. H. Sproat, who was appointed receiver in the case, gathered the fruit and marketed the same. He testifies that 21 varieties of apples off the orchard went through the union for sale, and there were a few other varieties besides. He further states that in cultivating the orchard he found it in very good condition, excepting a few acres, from five to seven, which lie on a ridge running through the orchard from northeast to southwest. As to this, he says the spring-tooth harrow did not make very much impression, which indicated to his mind that the soil was clay, and had become baked by reason of the work not having been done soon enough; that it was not hardpan, as he understood it; that hardpan, as considered in Hood River, is a layer of soil "of blue clay and impervious to water," underneath a top layer of soil; that he had always heard of it in that way, but did not consider himself an expert. Witness was of the further opinion that the orchard was not first-class as compared with other orchards in Hood River, and that if he were to grade the orchards in that section, he would put them into five classes, and would rate this orchard from medium to good, or medium plus.

Roscoe W. Thatcher, who is a chemist and director of the State Experiment Station of Washington and head of the Department of Agriculture in the State College, testifies that on December 29, 1910, at the request of Mrs. Schmick, he made an examination of the soil. This he did by digging holes in the earth, from 18 to 20 inches deep, in different parts of the tract, and obtaining samples. As a result of his analysis, he says:

"I found the entire orchard having a well-defined dividing-line between the surface and the subsoil. This dividing-line varied in depth from four to twelve inches, apparently at the depth at which the soil had been plowed. Below this line, throughout the entire orchard, was a sharply defined layer of soil which I would class as hardpan. I found, throughout the entire orchard, that the roots of the trees were wholly—practically wholly—above this line of subsoil. \* \* \* The soil is different in different parts of the orchard. The ridge of which I have already spoken is a much heavier clay, red clay, and when wet, as it was at this time, much more plastic and sticky than in the south, extreme southeast corner, and very much more so than in the north and west portions of the orchard. But I found the roots of the trees to be all within the surface layer everywhere that I dug throughout the orchard. The subsoil or hardpan is much harder, and has in it a cementing agent on the ridge, and, so far as I can detect, has no cementing agent in the northerly and westerly parts of the orchard. Q. What is that cementing agent? A. Iron hydrate or carbonate in the ridge. Q. What, approximately, was the area of what you speak of as the ridge? A. I didn't make a careful estimate of its area. Q. Approximately. A. But it appeared to me to be perhaps a little less than one-fourth of the entire orchard. Q. Now, from your observation of this soil and of virgin land adjoining it, what would you say as to what was the cause of this blanket of from four to twelve inches over



the soil? That is, as to whether it was that way naturally, or decomposed, disintegrated, or whether it was due to tillage? A. I thought from my observation that it was due to tillage, and so I went outside the orchard into some raw land, that is, uncultivated land, to the east of the orchard, and there I found no such dividing line. The soil was uniform from the surface downward. Q. And all hardpan? A. It would all be of this type which I would class as hardpan."

On redirect examination, witness continued:

"Q. Now, you spoke about digging these holes, and that the ground was very wet? A. I said it was moist—not very wet. Q. Well, moist. You could, by pressure, dig into this hardpan? A. Yes, sir. Q. But if that hardpan had been dry, it would have been a very different matter, would it not, comparatively dry? A. Particularly on that ridge. When I took the samples home and began to dry them out for the purpose of analysis, I found, in order to prevent their drying into a solid mass, I had to stay right with them and keep breaking them down. I spent one whole evening simply breaking the samples down, by pounding them with a club as they dried. Otherwise, they would have dried into a solid chunk. Q. In other words, in the growing season the tendency of this hardpan is to grow hard, so at last the roots don't penetrate into it? A. I should think so, yes, sir. \* \* \* I think that this whole soil would be hardpan if it had not been moistened at the surface. Hardpan is defined by authorities as being any layer of soil made up of clay, either with or without an admixture of sand and gravel, which is impervious to the entrance of plant roots. \* \* \* In this particular instance, the evidence convinces me that the hardpan would extend clear to the surface of the ground if it had never been tilled, because I found it so in adjoining land which had not been tilled."

E. L. Smith testifies that in the fall of 1892 or spring of 1893 he made a contract with Dethman, concerning the land upon which the orchard in dispute is growing, by which witness was to bear all the expense of planting the orchard, and in consideration thereof Dethman was to deed to him an undivided one-half interest in the land, but in 1895 witness bought the entire interest, and became the sole owner, and that 12 acres were planted in the spring of 1893, and the remaining 18 acres in the following spring of 1894. As to the character of the soil, he says:

"The northern part of the orchard I considered very good soil, and the trees made a fine growth there. When we planted the eighteen acres towards the south part of the orchard, we encountered a good deal of difficulty there. It is a different formation entirely. It is a clay formation, and in digging the holes there, over quite an extended area, after spading out the surface soil, we had to use mattocks and picks to loosen the ground up before it could be taken out. Q. Is there any hardpan in that orchard, Mr. Smith? A. I called that hardpan, where we could not spade it out, and had to use a mattock or a pick. I called that hardpan. Q. Do you call that a first-class commercial orchard, Mr. Smith? A. No, sir, I cannot consider it a first-class orchard."

On cross-examination, witness says he planted the trees in April, when the ground had not yet dried out from the winter rains; that as to the 18 acres, he was disappointed in the soil, and for that reason dug the large holes, thinking it would help out considerably.

A. P. Paasch testifies that he helped plant the orchard; that they dug the holes about three feet in diameter, and from 20 to 22 inches in depth; that they used a long handled shovel and a grub hoe; that they spaded as far as they could with the shovel, and the lower part

they loosened up with the grub hoe, to get the soil out, it being too hard to spade—that was on a ridge running from the east and diagonally through the middle of the orchard. When asked if there was any hardpan in the orchard, witness answered:

"I call it hardpan what I can't spade. \* \* \* This is red clay hardpan."

Witness did not consider it a first-class orchard. He testifies that the surface soil varied all the way from six to eight inches in depth, some places not so much. On cross-examination, he asserts that the clay spoken of as hardpan looks like rusted iron, and is so hard that the roots of trees cannot go through it; that he has seen the roots lying very high up on the surface of the ground; that he has a little patch in his own orchard similar to the ridge spoken of; that he dug the trees out of it, and found the roots all on top of the ground; and that there are some good trees on the Vanderbilt orchard—fair trees—on the north end, but that he would not call the average of them good trees.

Mason G. Fifer testifies that he cultivated the orchard in 1904; that it is a very peculiar soil in some parts, one great fault being that it bakes so hard it is difficult to cultivate, which is especially true of the ridge running through the orchard; that he considers the orchard contains hardpan, which lies more or less all over it, the depth of the surface soil being in some places only four or five inches, while in other places it is probably nine or ten inches.

Clay S. Prather, of the Corvallis Experiment Station, who has had experience in apple culture in the Hood River district, testifies that he was employed as foreman of the orchard for about two months; that there is hardpan in all of it, with a covering of soil to a depth on the ridge of from 3 to 4 inches, and elsewhere from 12 to 14 inches, and that the area occupied by the ridge is 12 to 15 acres.

George R. Castner, the county fruit inspector, testifies that he made an inspection of the orchard near the middle of June last, and that, in his language, "Many of the trees you can take hold of them with your hand and give them a pull, and lift the roots, as if a good, strong man could pull the tree out. You can see the roots lift right close to the top of the ground. I have taken hold of a good many in that way, and that is the condition." He also states that the indications were that there was a large area of the orchard showing the shallow-rooted condition of the trees—that is, that they sit nearly on top of the ground—but the condition exists in larger measure on the ridge than elsewhere.

On the other hand, C. Dethman, who once owned the land and sold to E. L. Smith, and who assisted in planting the trees, testifies that he was foreman on the work; that 12 or 13 acres were set out in 1894, and the remainder of the orchard in 1895; that in the northern part of the orchard there was no trouble in digging the holes; that in the other part they got in pretty late in the spring, the ground was dry, and they used a mattock and shovel. When asked if there was hardpan under the soil, he answered, "No, sir; what I call hardpan, there is no hardpan," and that "the roots of the trees penetrate in that

ground." The witness relates, further, that he first met Mrs. Schmick at the orchard, and was introduced to her by Mr. Henderson; that he was at the Davidson orchard when Henderson drove up, and that he went over to where they were, it being but a short distance, to talk with him; that on being introduced to Mrs. Schmick, she inquired of him about the character of the soil, whether there was any hardpan in the orchard, and also wanted to know about the trees, their variety, etc., and he says:

"I told her that I offered a dollar for every foot that they could find in that orchard, as far as hardpan was concerned—what I understood to be hardpan."

Witness further says that he believed at the time, and now believes, that there is no hardpan in the orchard; that he showed her the trees, and explained to her the several varieties. He further relates that he dug postholes around the place for fencing, and encountered no hardpan. On cross-examination, he affirms that hardpan is found on low, wet land, where the water cannot penetrate through—that that was what he called hardpan.

Dr. J. F. Watt, who owned the orchard for a while, testifies that he had it cultivated shallow, because that was considered the proper method of cultivation at the time; that he did not consider there was any hardpan under this cultivation, and that there is no soil in the orchard that the roots of trees will not penetrate.

Prof. L. F. Henderson testifies that he went to the orchard at the request of Mrs. Schmick, and acted rather for the protection of her interest; that hardpan was mentioned to Mr. Dethman, and he said, "I think there is no hardpan on this place. Look in those holes;" that Mrs. Schmick and witness did look in the holes, which were about two feet in depth, and the soil looked very good; that in his judgment it would not be impervious to either water or the roots of trees. Witness further explained that if holes of the kind referred to were left through the winter, there would be a breaking up of the hardpan into more or less little pieces—a dropping off from it.

William Ehrck testifies that he owns an orchard adjoining the one in question; that the soil is the same, and that there is no hardpan on his place that he knows of.

Frank C. Dethman testifies that, during the trial of the case, he investigated six trees in the orchard, by digging under to ascertain the nature of the roots, and found that the main roots extended downward into the soil from two to four feet, which was as far as he dug, and beyond. Some of the trees examined were on the ridge spoken of.

The evidence shows that Vanderbilt does not really claim that the orchard is first class, but he does insist that it is a good and prontable orchard, and under proper management would yield a profit of from 15 to 20 per cent. on an investment of \$45,000. It is quite probable that his representations in this particular do not go beyond the facts as they exist. Nor am I disposed to place much emphasis upon the specification that Vanderbilt represented the orchard to be first-class. It runs so near along the borderline of opinion, when made with ref-

erence to an orchard under the conditions found to be prevailing in the district, that one cannot be clear in rating it as a statement of an issuable fact upon which alone to predicate a cause for canceling the contract. The alleged representation and the testimony respecting it may, however, be considered along with other alleged misrepresentations, which seem more material to the controversy.

That Vanderbilt represented that the orchard contained but 14 varieties of apple trees appears satisfactorily from the proofs. The list handed to Mrs. Schmick upon her inquiry for a description of the orchards the Henderson Company had for sale shows this. It is of small importance whether the list was handed to her by Henderson, or by Allen or some clerk in the office. It was done with the entire approval of Henderson, who was the agent of Vanderbilt. Not only this, but it was with the express personal approval of Vanderbilt himself, for he made out the list when he put the property in the hands of his agents for sale. So that nothing could be plainer than that this paper containing the list was an apt representation respecting the varieties of the apple trees contained in the orchard. The information was very material to the purchaser, because it bore directly upon the value and utility of the orchard as a business venture. Now, it is conclusively proven that the orchard contains 21 varieties, and more. Such is the testimony of Sproat, the receiver, who gathered and marketed the apples, and it is not seriously disputed. The numerous varieties are accounted for somewhat by reason of the resets put in to replace trees removed; but, however accounted for, the fact remains that the orchard contains many more varieties than as represented, and no plausible, valid or substantial excuse is afforded for making the misrepresentation. Again, this in itself would not be sufficient cause for disturbing the contractual relations between the parties. While material, and somewhat vital, it is not of that especial significance in all its bearings that the court could therefore say that the orchard is not such a one as was bargained for.

Respecting the age of the trees, it is clearly proven that they were 16 and 17 years old at the time of the sale. Vanderbilt's positive representation was that they were 14 years old. This is verified by the list submitted, which was made up by him. There may be a question as to whether Vanderbilt knew their age when he made the representation. However that may be, he made it as though of a fact known to him, and the legal effect is the same. The representation was of a fact essential to the negotiations, and one which was not apparent from an inspection of the trees themselves. It required inquiry beyond that to arrive at the truth—inquiry of persons who had knowledge of the fact. This Mrs. Schmick made no pretense of making.

By far the most serious specification of misrepresentation is respecting the hardpan. I am convinced that the allegations of the cross-bill in this particular are sustained by a clear preponderance of the proof. The testimony of E. L. Smith and of Paasch shows that the hardpan existed on the ridge—much spoken of at the time the orchard was planted; and that of Thatcher, Prather, Fifer and Castner that it exists at the present time. True, Dethman, who superintended setting

the orchard, contradicts Smith and Paasch, and claims that no hardpan exists, but he qualifies that by adding, "as he understands hardpan." It is significant, however, that he relates that it was necessary to use a mattock to break up the ground on the ridge after the top soil had been removed. The time of year was in April when, as Smith says, the moisture had not left the soil. The manner in which the roots of the trees have grown is corroborative of the existence of hardpan. A tree that had been taken out, which shows to a demonstration that the roots could not have run far below the surface, was offered in evidence, and such is the testimony of some of the witnesses. One witness, Mr. Fifer, relates that, while spraying at one time, the wagon was drawn against two of the trees and tipped them over, thus uprooting them. The most convincing testimony is that of Thatcher, who carefully selected samples of the soil, and as carefully analyzed it, and was of the opinion that hardpan existed all over the orchard. While it may not exist so extensively as that, there seems to be little question that it does exist on the ridge described. This occupies a considerable portion of the orchard—from five or six acres, as testified by Dethman, to one-half the area, as asserted by other witnesses. The truth of young Dethman's testimony may be conceded, that he found roots of trees as low in the ground as four feet and still running down. Yet it does not disprove the facts as deposed by other witnesses. Many of the trees, doubtless, rest but slightly below the surface of the ground. Hardpan is defined as a layer of earth near the surface, which is more or less impervious to water and the roots of trees. This is Prof. Henderson's idea of it, with the words "more or less" emphasized. Hilgard says:

"By hardpan is understood a dense and more or less hardened layer in the subsoil, which obstructs the penetration of both roots and water, thus materially limiting the range of the former, both for plant food and moisture." Hilgard on Soils, p. 183.

Whether the strata found especially on the ridge described in this orchard may technically be termed hardpan or not is not very material. It constitutes a serious, if not grievous fault in the soil, and it was a fault known to Vanderbilt. He must have known of it. It was known and talked of in the neighborhood. Of this he was aware, for he cautioned Mrs. Schmick that she would find people who would disparage the orchard, as well as persons who were ready to speak favorably of it. The quality of the strata was in the nature of hardpan; it was more or less impervious to the roots of trees, and would not take the moisture as it ought, as was demonstrated by the experience with the irrigation attempted. So that, technical definition aside, the fault partakes so largely of the characteristics of hardpan as that it may be so termed.

Vanderbilt denies that he represented to Mrs. Schmick that there was no hardpan in the orchard, while Mrs. Schmick testifies positively that he made such a representation. He says in refutation thereof that he told her that Dethman had offered a party who had made the contention a dollar a foot for every foot of hardpan that could be found in the orchard. When Dethman comes to testify, he employs

almost the identical language in relating what he said to Mrs. Schmick on the subject, while he evades saying that he told Mrs. Schmick that the orchard contained no hardpan. Henderson says, however, that Dethman assured her there was no hardpan in the orchard, and Prof. Henderson says he said he thought there was no hardpan.

It will be remembered that Dethman was introduced to Mrs. Schmick by Henderson, who advised her that Dethman could tell her all about the orchard. In this wise, Dethman was made the mouth-piece of both Vanderbilt and Henderson, as they, to all intents and purposes, vouched for his representations. The circumstances lead me to place the greater credence in Mrs. Schmick's testimony on this subject. At any rate, what Vanderbilt and Dethman said to Mrs. Schmick was calculated and intended to lead her to believe there was no hardpan in the orchard, and the consequence was the same as though they had assured her in so many words of the fact. That she relied upon the representation and was misled is asserted by Mrs. Schmick, and I am convinced that such is the case.

When the parties came to close the transaction, Mrs. Schmick insisted upon the execution by Vanderbilt of the guarantee of the production of 10,000 boxes of apples from the orchard. This signifies nothing as to the representations. Vanderbilt declared by the list submitted that he would so guarantee, and the execution of the paper was only in pursuance of that representation.

[1] The law requires of a party seeking the rescission of a contract on the ground of misrepresentation that he establish the same by clear and irrefragable evidence. *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931.

[2] As to the character of misrepresentations that will render nugatory a contract of sale, the law is also well settled. A few excerpts from the authorities will suffice. Says the court in *Slaughter's Administrator v. Gerson*, 13 Wall. 379, 383, 20 L. Ed. 627:

"The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. \* \* \* Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. \* \* \* And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained."

Again, says Mr. Justice Brewer, in *Farnsworth v. Duffner*, *supra*, quoting from *Ludington v. Renick*, 7 W. Va. 273:

"If it appears that he (the purchaser) has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied."

The distinguished jurist then alludes to Pomeroy's analysis of the circumstances under which a party will not be justified in relying upon representations made to him, as follows:

"1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties."

See, also, *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246.

[3] Now, to apply these rules to the present controversy. It is strongly urged that Mrs. Schmick not only had all the means at her command for ascertaining the true facts pertaining to the orchard, but that she made full and ample investigation thereof upon her own account, and that she cannot now be heard to say that Vanderbilt made the misrepresentations complained of. But is this sustained by the evidence?

Mrs. Schmick, when she came to purchase, had no practical knowledge of the apple industry, nor of the soil suitable for its profitable propagation. True, she says she examined many orchards in Yakima, and in the course of her purchase examined several in Hood River, but she did not thereby obtain either the practical or technical information to make her fairly competent to determine for herself the questions arising as to the quality of the orchard, the variety of the trees growing therein (they being in their dormant state, without foliage or fruit), or the nature, adaptability and productiveness for apple culture of the soil. Touching these three special matters she was constantly seeking information, and her source of inquiry was through Vanderbilt, Henderson, his agent, Prof. Henderson, and Dethman, to the latter of whom both Vanderbilt and Henderson referred her, commending him as the person who could give her the particular information she was seeking. According to Mrs. Schmick's testimony, both Vanderbilt and Dethman assured her that there was not a foot of hardpan in the orchard, the former reassuring her immediately before the transaction was closed. Mrs. Schmick made no independent investigation, outside of the persons mentioned. Prof. Henderson went to the orchard at her request, but it was not until John Leland Henderson had told her that his brother would be a competent person to advise with. Prof. Henderson's investigation consisted in looking into the holes that had been dug upon the premises for the presence of hardpan, and in this he seemed to be at a disadvantage, as the frost, he says, in effect, would cause the clay to disintegrate. In this connection, it may be noted that, when the two Hendersons and Mrs. Schmick were preparing to ride out to see the orchard, Henderson telephoned to Vanderbilt to send over a man with a shovel for digging holes, by which to make the investigation, and Vanderbilt replied that it would not be necessary, as there were holes already excavated in every part of the orchard. These had been excavated for planting trees. Prof. Henderson con-

cluded that the clay or subsoil was not impervious to water or the roots of trees, and therefore that there was no hardpan present. If there was any independent investigation by Mrs. Schmick, it was through the assistance of Prof. Henderson, and yet this was evidently not such an investigation as one relying wholly upon his own judgment would naturally have been prompted to make, and it is reasonable to believe that Mrs. Schmick was depending upon the representations of those concerned in making the sale for the facts upon which to direct her conclusion to purchase. It was not a case where the means of knowledge were available to both parties and the subject of purchase alike open to their inspection, the hardpan being of a nature, and hidden beneath the top soil, that it was not readily discernible; its presence could be verified only by a special and careful examination for that particular purpose, and that by persons familiar with the objectionable soil. Henderson told Mrs. Schmick, according to his own testimony, after the investigation had been made through his brother, that she had made a good selection or "purchase," thereby confirming, if need be, her acquisition of an orchard free from the especial defect she was inquiring about. Henderson claimed, contrary to the testimony of Mrs. Schmick, that he refused absolutely to give her any information as to quality of the orchard, or to advise her at any time whether to buy, and that he was only to pronounce judgment after she had made up her mind as to her choice, and to attend to the legal part of the transaction. He (that is, the Henderson Company, a corporation) was, however, accepting a fee from her for his opinion on the character of purchase and legal advice, while the company was at the same time taking a commission from the vendor for selling the property, and it was through his suggestion that the advice of his brother was sought.

Vanderbilt doubtless knew that the defect was one constituting a serious impediment to a sale, and while it was desirable to dispose of the property—a thing that was his right—yet I think open and fair dealing on his part required of him and his agents, when specific and pointed inquiry was made as to the presence of any hardpan, a frank disclosure of the true condition. Such a course on his part would probably have defeated the sale, and it is for this very reason we must predicate the conclusion that the purchasers were misled to their injury. There were palpable misrepresentations in the three particulars, namely, touching age, variety, and condition and quality of the soil, and, taken as a whole, they were so flagrant and vital as to vitiate the contract.

[4] The decree of the court will be that plaintiffs' complaint be dismissed, and that defendants have judgment, under their cross-bill, for a cancellation of the contract, and that the money advanced by them to plaintiffs under the contract be repaid to them, with interest at the rate of 6 per cent. per annum from the time or times the same was paid to plaintiffs; that defendants further recover from plaintiffs the sum of \$1,736.26, being the amount expended in the care and cultivation of the orchard, and their costs and disbursements of this suit to be taxed; and that defendants have a lien upon the premises for the demands found due them.



## HUBBARD et al. v. FORT et al.

(Circuit Court, D. New Jersey. August 2, 1911.)

**1. NAVIGABLE WATERS (§ 2\*)—PIPE LINE CROSSING—CONSENT OF STATE.**

Where a navigable stream forms the boundary line between two states, state consent to the crossing of the stream with a pipe line laid under the bed to be used in interstate commerce is not necessary if authority has been obtained from Congress.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63; Dec. Dig. § 2.\*]

**2. NAVIGABLE WATERS (§ 19\*)—CROSSING STREAM—PERMIT BY SECRETARY OF WAR—EFFECT.**

Act Cong. March 3, 1899, c. 425, § 10, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3541), prohibits the creation of any obstruction to the navigable capacity of any waters in the United States unless affirmatively authorized by Congress, and declares that it shall be unlawful to build any structure in a navigable water in the United States except on plans recommended by the chief of engineers and authorized by the Secretary of War; that it shall not be lawful to excavate or fill the channel of any navigable water in the United States unless such work is recommended by such engineer and authorized by the Secretary of War prior to beginning the same. *Held*, that a license executed by the Secretary of War under such section authorizing a corporation to carry water pipe lines under a navigable stream separating two states was a mere finding and declaration that the pipes, structure, or excavation would not interfere with or be detrimental to navigation, and was not equivalent to a positive declaration by authority of Congress that the licensee might make such obstruction or excavation without first obtaining authority from the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59-72; Dec. Dig. § 19.\*]

**3. NAVIGABLE WATERS (§ 2\*)—OBSTRUCTIONS—CONTROL—STATUTES.**

Act Cong. Sept. 19, 1890, c. 907, §§ 7, 10, 26 Stat. 454, and Act March 3, 1899, c. 425, § 9, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3540), relating to the obstruction of navigable waters, and providing for the construction of wharves, dams, weirs, bridges, etc., are not limited to waters wholly within a state, but apply to interstate waters as well.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 2, 63; Dec. Dig. § 2.\*]

**4. NAVIGABLE WATERS (§ 19\*)—OBSTRUCTION—STATUTES—CONSTRUCTION—"AFFIRMATIVELY AUTHORIZED."**

Act Cong. March 3, 1899, c. 425, § 10, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3541), regulating the obstruction of navigable waters, provides that the creation of any obstruction not "affirmatively authorized by Congress" to the navigable capacity of any waters in respect of which the United States has jurisdiction is prohibited, and then declares that the building of certain structures and the performing of certain work with reference to navigable waters are forbidden without authority of the Secretary of War. *Held*, that the word "affirmatively" was used to distinguish the two kinds of authority referred to, and that the section should be construed to require that the initial authorization to create an obstruction must rest on affirmative congressional authority, and not on a mere permit of the Secretary of War.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59-72; Dec. Dig. § 19.\*]

For other definitions, see Words and Phrases, vol. 1, p. 249.]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. NAVIGABLE WATERS (§ 1\*)—"NAVIGABLE CAPACITY."

A stream has "navigable capacity" when it is capable of being navigated over any part of the waters in their normal condition.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5-16; Dec. Dig. § 1.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4675-4684; vol. 8, p. 7728.]

6. NAVIGABLE WATERS (§ 19\*)—"OBSTRUCTION"—STATUTES.

Act Cong. March 3, 1899, c. 425, § 9, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3540), relating to the obstruction of navigable streams, declares that it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States, unless the consent of Congress to such structures shall have been obtained, and until the plans for the same shall have been approved by the chief of engineers and the Secretary of War, with certain provisos. Section 10 prohibits the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. *Held*, that section 10 not only includes the kind of structures specifically referred to in section 9, but all others that may be an obstruction to the navigable capacity of the waters of the United States, without reference to whether the obstruction is but slight, and only temporary.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59-72; Dec. Dig. § 19.\*

For other definitions, see Words and Phrases, vol. 6, pp. 4890-4894.]

7. NAVIGABLE WATERS (§ 19\*)—OBSTRUCTIONS—"AUTHORIZE."

Act Cong. March 3, 1899, c. 425, § 10, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3541), provides that the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of the waters of the United States is prohibited, except on plans recommended by the chief of engineers and authorized by the Secretary of War. *Held*, that the word "authorize" was used in such section in the sense of to approve of and formally sanction, and did not confer on the Secretary of War authority to grant original authorization for the construction of any work constituting an obstruction of the navigable waters of the United States.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59-72; Dec. Dig. § 19.\*

For other definitions, see Words and Phrases, vol. 1, pp. 646-648.]

In Equity. Bill by Harry Hubbard and another, as receivers of the Hudson County Water Company, against John Franklin Fort and others. Dismissed on demurrer.

McCarter & English and Bennett Van Syckel, for complainants.  
Edmund Wilson, Atty. Gen., for defendants.

RELLSTAB, District Judge. The bill is filed by the receivers of the Hudson County Water Company, a New Jersey corporation (hereinafter called the Water Company), and attacks the constitutionality of certain acts of the New Jersey Legislature, and seeks to have the defendants, certain state officers, enjoined from enforcing such acts, and from interfering with complainants in carrying out certain contracts and engaging in interstate commerce in water.

The bill, so far as is necessary for present consideration, alleges, in

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

substance: The incorporation of such Water Company by the state of New Jersey, the appointment of complainants as receivers with power to institute suits for the protection and enforcement of the lawful rights and contracts of such Water Company. That among the objects stated in such Water Company's certificate of incorporation were "the acquisition of water from either surface or subterranean sources or by purchase and the storage, sale, and delivery of the same; the acquisition, construction, operation, and sale of waterworks and reservoirs, wells, pipe lines, and all other property, real and personal, pertaining to the collection, sale and distribution of water," the making of contracts by the Water Company with the city of New York to supply subterranean water for use and consumption on Staten Island in the state of New York. That Staten Island is separated from the state of New Jersey by a navigable tidewater stream known as Kill von Kull. That the boundary line between the state of New York and the state of New Jersey is located in the center of said Kill. That the Water Company acquired lands in New Jersey, sunk wells therein, and under municipal authority laid pipe lines therefrom to such stream, with the purpose of laying pipe lines in the bed of such stream to conduct the water from such wells to said island, to carry out its said contracts; that by grant contained in an ordinance of the city of Bayonne the Water Company holds the right to lay water pipes "southerly through Ingham avenue, and under the property of the city at the foot of said Ingham avenue, to the southerly boundary line of said city, being the center of the said Kill von Kull \* \* \* and that by grant made by the J. M. Guffey Petroleum Company to the Water Company \* \* \* said Water Company purchased from the Petroleum Company a right of way to lay, maintain, and operate its pipes upon a strip of land twenty feet in width on the easterly side of Ingham avenue, and succeeded thereunder to the rights of the Petroleum Company, as owner of the upland and as grantee of the lands under water by grant from the riparian board of the state of New Jersey." That all of said constructions and contracts are interstate commerce. That the Water Company obtained from the Secretary of War of the United States, under section 10 of the act of Congress approved March 3, 1899 (Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541]), known as the "River and Harbor Bill," authority to lay its pipes in the bed of said stream, the following being a copy of such authority:

"War Department, Washington.

"November 17, 1909.

"45716 Engs.

"Sir: In answer to your application of the 4th instant, permission, revocable at will by the Secretary of War, is hereby granted the Hudson County Water Company (successor to the Richmond Water Company), its successors or assigns, in accordance with the recommendation of the Chief of Engineers, U. S. Army, to lay, maintain and operate two water mains across the Kill von Kull, from Bayonne, N. J., to Staten Island, N. Y., as shown on map attached hereto, subject to the following conditions:

"(1) That if at any time in the future it shall be made to appear to the Secretary of War that the structures herein authorized are unreasonable obstructions to the free navigation of said waters, said licensee will be re-

quired, upon notice from the Secretary of War, to remove or alter the same so as to render navigation through said waters reasonably free, easy, and unobstructed.

"(2) That the highest part of said pipes shall be at least thirty (30) feet below the plane of mean low water.

"(3) This permit is given in lieu of instrument dated December 9, 1904, authorizing the Richmond Water Company to lay two water mains across the Kill von Kull from Bayonne, N. J., to Staten Island, N. Y., at the location shown on plans attached to said instrument, which is hereby revoked.

"(4) That the work herein permitted to be done shall be subject to the supervision and approval of the local officer of the Corps of Engineers, U. S. Army, whose address is Army Building, New York City.

"Very respectfully,

"Robert Shaw Oliver, Assistant Secretary of War.

"Mr. T. A. Beall, President.

"Hudson County Water Company,

"100 Broadway, New York City.

"(Map 45716-28 Engs. hereto attached.)"

That by virtue of said authority "and of other grants hereinbefore set forth the said Water Company was authorized and possesses the full right to lay and maintain said pipes in the bed of said Kill von Kull. That by virtue of the authority bestowed by the United States Constitution upon Congress to regulate commerce between the states the Congress of the United States was authorized to enact section 10 of the act of March 3, 1899, above (hereafter) quoted, and the Secretary of War, upon the recommendation of the chief of engineers, was likewise authorized and empowered to give the licenses above mentioned, and that said Water Company, after securing such licenses, was justified in having dredging done in the bed of said Kill von Kull for the purpose of laying therein the said pipes as aforesaid, without the sanction or permission and in spite of the objection of the state of New Jersey, and that there was expended by the Water Company and its contractors a sum in excess of thirty thousand (\$30,000) dollars in such work and dredging, extending over a period of about six months, before any interference or objection thereto by the state of New Jersey or any official thereof." That such work in the bed of said stream was forcibly stopped by defendants acting under the following state enactments:

"An act to prevent the diversion of well, subsurface, or percolating waters of this state by means of pipes, conduits, ditches or canals into other states for use therein.

"Be it enacted by the Senate and General Assembly of the State of New Jersey:

"(1) It shall be unlawful for any person or corporation to transport or carry through pipes, conduits, ditches or canals any well, subsurface or percolating waters of this state into any other state for use therein.

"(2) This act to take effect immediately.

"Approved April 7, 1910." Laws 1910, c. 98.

"A supplement to an act entitled, 'An act to ascertain the rights of the state and of the riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in the state,' approved April eleventh, one thousand eight hundred and sixty-four.

"Be it enacted by the Senate and General Assembly of the State of New Jersey:

"(1) It shall be unlawful for any person or corporation to lay any pipe or pipes on any of the lands of the state lying under tidal waters without the

consent or permission of the Governor and the Board of Riparian Commissioners of this state first had and obtained in writing; provided, that nothing in this act contained shall be construed to apply to lands under the waters of the Atlantic Ocean.

"(2) This act shall take effect immediately.

"Approved April 7, 1910." Laws 1910, c. 103.

That the defendants "have interfered with and prevented the construction and completion of said pipe lines which were to be used wholly and solely for the interstate carriage and transportation of subterranean water, and caused the construction of the same to be discontinued and the material therefore removed and the contractors of said Water Company to be driven from said work." That it is the avowed purpose of the defendants to prevent the transportation of subterranean water from the lands of the company beyond the limits of the state of New Jersey, to the destruction of the rights of said company under its contracts. That prior to the enactment of said state legislation such company was enjoined by the state Court of Chancery from prosecuting said work in crossing said stream upon the alleged insufficiency of the title of said company, and the insufficiency of the authority obtained from the War Department of the United States permitting the laying and operation of said pipe line. "That the subterranean water which the said Water Company and your orators as its receivers purpose to transport from the lands of said Water Company in the state of New Jersey to Staten Island is the property of and owned solely by the said Water Company, and that in said water the state of New Jersey has no right, title, or interest, nor any control thereof, and that the state of New Jersey cannot take and appropriate the same nor prohibit or prevent the use or sale thereof by the said Hudson County Water Company or your orators as receivers without the exercise of the right of eminent domain and compensation therefor, and that the so-called 'Laws' above referred to were really and solely designed for, and are now being used by the defendants for, the purpose of taking and destroying the property of the Water Company, without compensation, by preventing the use thereof."

The bill charges that said statutes of New Jersey, so far as they apply to the Water Company in the interstate carriage and piping of subterranean waters out of the state of New Jersey to Staten Island, are unconstitutional and void because they conflict with clause 3, § 8, art. 1, of the Constitution of the United States, granting to Congress the power to regulate commerce among the several states, in that they are an absolute inhibition upon the exportation of an article of commerce; that the state of New Jersey and the defendants have no "power, authority, dominion, control or jurisdiction over persons, firms or corporations engaged like said Water Company and your orators as receivers thereof, in the transportation and carriage of subterranean waters between states, such persons, firms or corporations so engaged, being wholly within the control, power, authority, jurisdiction and protection of the laws and Constitution and courts and government of the United States of America, and no other."

The grounds of demurrer are several; but from the conclusion I

have reached it will not be necessary to consider more than one, viz., that the permit of the Secretary of War to cross the Kill von Kull amounts to no authority, and that the state may forbid the crossing regardless of the permit. It is conceded that the state of New Jersey is the owner in fee of the lands in the Kill von Kull, in which the said Water Company intends to lay the said pipe lines, and that no grant or permit has been obtained by the Water Company from the state to excavate the bed of that stream, or to lay its pipe therein.

[1] No such permit is necessary, however, if authority has been obtained from the United States Congress to make such crossing. It is well-settled law that state authority is not necessary to cross a navigable stream between states with instrumentalities engaged in interstate commerce; that such crossing may be made by authority of the Congress in spite of the state's protest. *Decker v. Baltimore & N. Y. R. R.* (C. C.) 30 Fed. 723; *Stockton v. Baltimore & N. Y. R. R. Co.* (C. C.) 32 Fed. 9; *United States v. Rio Grande Nav. Co.*, 174 U. S. 690-708, 19 Sup. Ct. 770, 43 L. Ed. 1136.

No act of Congress specifically authorizing the Water Company to so cross the Kill von Kull exists, nor is there any legislation which empowers generally the crossing of any navigable interstate water. Complainants claim, however, that such congressional authority was secured by the permit already referred to from the Secretary of War. This authority, as already noted, was a "permission revocable at will by the Secretary of War" to lay water mains under such Kill in accordance with the recommendations of the chief of engineers of the United States army upon certain conditions. Section 10 of the act of Congress approved March 3, 1899 (30 Stat. c. 425, pp. 1121-1151), the basis for such permit or license, reads as follows:

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established except on plans recommended by the chief of engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to beginning the same."

[2] Upon the only ground of demurrer considered, the question is thus reduced: Is this authority from the Secretary of War plenary or merely permissive? So far as applicable to the present question, such section may be summarized thus: First, the creation of any obstruction to the navigable capacity of any waters of the United States is prohibited unless affirmatively authorized by Congress; second, it shall not be lawful to build any structure in a navigable river or water of the United States, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and, third, it shall not be lawful to excavate or fill the channel of any navigable

water of the United States unless such work is recommended by said Secretary of War prior to beginning the same.

This section was construed in *Cobb v. Lincoln Park*, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264, 95 Am. St. Rep. 258, and *Wilson v. Hudson County Water Co.*, 76 N. J. Eq. 543, 76 Atl. 560 (the defendant in the last case being the Water Company in the case at bar, and the question there considered being the same as raised here). In both of these it was held that the Secretary of War's authorization was a mere license to do the work and not a grant of power to do it. In the latter case *V. C. Walker*, adopting the view of the Illinois court, said:

"The doctrine of *Cobb v. Lincoln Park* as applicable to the case under consideration may be paraphrased as follows: The provisions of section 10 of the river and harbor act of March 3, 1899, were designed to protect the navigable waters of the United States (including the Kill von Kull) from encroachment and from obstructions to navigation, and to commit the duty of their protection to an officer of the general government without whose permission no such obstructions can be made; that the act is a mere regulation for the benefit of commerce and navigation, and that the license or permission of the Secretary of War is only a finding and declaration that a proposed structure or excavation would not interfere with or be detrimental to navigation, and is not equivalent to a positive declaration by the authority of Congress that the licensee may make such obstruction or excavation without first obtaining the consent of the owner of the submerged land; that the Water Company, not having by the law of this state the right to excavate on the submerged lands without the state's consent, could not acquire that right by obtaining a license from the Secretary of War; that the act is not a declaration touching the rights of the owner of the submerged lands in question, and, assuming that the permission of the general government to the excavation and laying of the proposed pipe line is necessary, such permission is not given to override the rights of the owner of the submerged lands, namely, the state of New Jersey, and it is, as said, the declaration by the guardian of the interests of the public at large that the proposed work will not interfere with navigation, and is strictly permissive, and not an authorization by paramount authority to do the work proposed. Thus it appears that the cases in principle are parallel. The Water Company contends for the right to lay its pipe line across the Kill von Kull in lands under water belonging to this state because it alleges that it is engaged in interstate commerce, which may be conceded (*Kansas City Natural Gas Co. v. Haskell* [C. C.] 172 Fed. 545), and relies upon the language of Mr. Justice Bradley, speaking for the Circuit Court, in *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. 20, where he says: 'We think that the power to regulate commerce between the states extends not only to the control of the navigable waters of the country and the lands under them for the purpose of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce, which, in the judgment of Congress, may be necessary or expedient.' Conceding to this language all that is claimed for it, it is nevertheless perfectly apparent that nowhere in the tenth section of the river and harbor act of 1899 is there any intention, expressed or implied, to grant to any person or corporation the right to lay a pipe line under navigable waters in lands belonging to a state or individual for the purpose of transporting any merchantable commodity whatever. The only intention discoverable is, as already said, the authorization of such a work if it may be lawfully done, and the intention is to authorize it to be done only in such way as to prevent its being any obstruction to navigation. Congress may some day be induced to enact a law under the commerce clause of the federal Constitution which will make a grant of power such as is contended for by the Water Company in this case, but up to the present time it has not done so, and the Water Company, without a grant of power, is seeking to prosecute

an unlawful work—a work not unlawful in and of itself, but unlawful so far as it appropriates the land and invades the rights of the state of New Jersey, and this by obtaining a mere license from a supervisory power, a license to do the thing desired, efficacious only if and when lawful authority to prosecute the work shall have been obtained. In this connection it may be observed that the tenth section of the river and harbor act does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable waters of the United States, but only that it shall not be lawful to do the work without the authorization of the Secretary, had before beginning the work. The section as worded clearly contemplates that the consent of the Secretary shall merely be permissive of the doing of work for which authority already exists."

While these decisions are not binding upon this court, they should not be disregarded unless it clearly appears that they are founded in error. In the New Jersey case will be found a critical review of the authorities relied upon by the complainants in this case. The complainants contend that such case does not give due effect to the cited authorities; but I have carefully considered such authorities, and I concur with the conclusion reached by V. C. Walker that they do not support the contention of complainants' counsel that a license obtained by the Water Company from the Secretary of War is plenary in its character. It is further contended, however, that the construction thus placed upon section 10 of the act of 1899 is erroneous, and that, first, unless such section be so construed as to empower the Secretary of War to authorize the excavation and filling, etc., of interstate waters in the first instance without resort to Congress, violence will be done to the word "authorize" as used in that section, in view of the use by Congress of the word "approve" in section 9, where permission only was intended to be expressed; and, second, that, unless such construction be given, it was unnecessary to change or modify the seventh section of the act of 1890 (Act Sept. 19, 1890, c. 907, 26 Stat. 454).

[3] Considering the question from the viewpoint of these criticisms, an extended examination of the pertinent sections of the acts of 1890 and 1899 is necessary. Section 7 of the earlier act is as follows:

"Sec. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: Provided, that this section shall not apply to any bridge, bridge draw, bridge piers, and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the Legislature of any state, over



or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state."

And the first sentence of section 10 (the only part necessary to be considered) is as follows:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited."

It will be observed that section 7 consists of three distinct prohibitions followed by a proviso in the nature of a limitation. Complainants concede that this section was permissive, but contend that it applies exclusively to intrastate waters. This contention in my judgment is ill founded. Without the proviso this section would be applicable to all structures and other works in all navigable waters. 21 Ops. Atty. Gen. 41. And the exception in favor of intrastate waters contained in such proviso is limited to bridges and similar constructions authorized by state law. 22 Ops. Atty. Gen. 332. So far as wharves and the other structures mentioned in the first part of this section are concerned, the prohibition, without the Secretary of War's permission, applied only if they obstructed or impaired the navigation, commerce, or anchorage of said waters. The third prohibition contains no reference to state authority, and seemingly was not subject to such limitation. 22 Ops. Atty. Gen. 332. This section, therefore, did not deal exclusively with intrastate waters. Neither does section 9 of the act of 1899, as contended by complainants, apply exclusively to intrastate waters. This section is as follows:

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the chief of engineers and by the Secretary of War: Provided, that such structures may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the chief of engineers and by the Secretary of War before construction is commenced: And provided further, that when plans for any bridge or other structure have been approved by the chief of engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the chief of engineers and of the Secretary of War."

It will be noted that this section applies to all navigable waters of the United States; that it does not embrace all the structures and works embraced by section 7 of the earlier act, but is limited to bridges, dams, dikes, and causeways; and that the construction of these are prohibited without the consent of Congress, except such as cross waters the navigable portions of which are wholly within the limits of a single state, and which are to be built by state legislative authority. Congressional consent to the building of such structures in all other navigable waters is still

necessary by this section. Nor, as contended by complainants, does section 10 of the 1899 act apply only to interstate waters. There is nothing in this section that restricts it to interstate waters. The first part which prohibits "the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States" not only comprehends the kind of structures specifically referred to by section 9, but all others that may be an obstruction to the navigable capacity of the waters of the United States, regardless of whether they are interstate or intrastate.

Manifestly bridges, dams, dikes, and causeways are not the only structures that obstruct the navigable capacity of such waters, and the prohibition with which section 10 begins would be utterly unnecessary and meaningless if the same were limited to the character of structures dealt with in the preceding section. Such meaningless legislation is not to be imputed unless there is no escape from such result. The remainder of this section shows other structures and works, any of which may prove an obstruction to the navigable capacity of such waters. These are the same as are mentioned in section 7 of the earlier act, and which are not found in section 9 of the act of 1899, and of necessity are included within the prohibition of the first part of such section, if it is to have any meaning or operation.

[4] What is affirmative authorization? Affirmative is the antithesis of negative. The use of the word "affirmatively" with "authorized" would be difficult to understand except for the use of the word "authorize" in the latter part of this section where the building of certain structures and the performing of certain works are forbidden without the authority of the Secretary of War. As pointed out by V. C. Walker in the New Jersey case, this section "does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable water of the United States, but only that it shall not be lawful to do the work without the authorization of the Secretary and before beginning the work." In view of the context, the word "affirmatively" was legislatively used to distinguish the two kinds of authority referred to, and to make it plain that the initial authorization to create an obstruction was not to rest on implied, but express—affirmative—congressional authority.

[5] What is navigable capacity? Does it not mean the capability of being navigated over any part of the waters when in their normal condition?

And how can it be said that the structures or the works subsequently referred to in this section may not amount to an obstruction to such navigable capacity? It is to be noted that "excavate or fill" is associated with "alter or modify the course, location, condition, or capacity of any" navigable water, all of which may be so performed as to become serious obstructions to navigation. That such obstructions may be but slight, and that some will be of only temporary duration, would not make them any less obstructions, and within the prohibition.

Any less comprehensive interpretation of the first part of section 10 would do violence to its language, and, as already said, be meaningless. If Congress intended that as to all other obstructions not prohibited by section 9, no affirmative action by Congress should be necessary, but that they might be constructed upon obtaining the permission of the Secretary of War it used singularly inapt and ambiguous language in expressing such intention.

The use of the word "authorize" instead of "approve" does not change the Secretary of War's act from permissive to plenary. Two of the definitions of the word "authorize" are to approve of; to formally sanction. Cent. Dict. & Cyc. What does the Secretary of War authorize? Not the building of the structures mentioned in the second part of this section, but the plans to which such construction is to conform. And what does he authorize as to excavating, filling, altering, etc., of the channel of navigable waters, but the commencement, the character, and the manner of doing such work? While the language here employed is not as felicitous and clear as it might be, yet, when it is considered that Congress was here revising and amending, any other interpretation than that such official action by the designated executive officer was to be had only after the initial power to do such works shall have been procured from Congress would be to unnecessarily limit the plain and unambiguous language used in the first part of this section by which full control over all the works in interstate waters was kept in Congress itself.

Authority to excavate and lay a pipe line in the bed of the Kill von Kull is one thing, and authority relating to the time when and the plans in conformity to which the work is to be done is another. The Secretary of War's authorization is supervisory, and relates to the character and performance of the work, and not the directing or authorizing it to be done in the first instance. Section 9 clearly evinces that Congress intended to keep to itself the initial authorization of the crossing of interstate waters by bridges, dams, etc., and section 10 affords no presumption that in respect to the structures and works specifically referred to therein it intended to delegate such initial authorization to the Secretary of War. The first part of such section unambiguously embraces them, and the remainder does not disclose an intent to effect an exception.

[6] Something more than a mere change of expression, particularly when the different word is not different in all its meanings, is therefore necessary to show a legislative intent to effect a so radically different purpose. It is also to be noted that this requirement in the first part of section 10 of the act of 1899 effects a radical change in the legislative purpose of the earlier act. As noted, section 10 of the act of 1890 prohibited the creation of any obstruction to the navigable capacity of any water not affirmatively authorized by *law*, while the first part of section 10 of the later enactment required this affirmative authorization to be made by an *act of Congress*.

In *United States v. Bellingham Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437, this clause of section 10 of the act of 1890, contrary to the contention of the government, was held not to re-

strict the authorization by law to laws enacted by Congress, but that it included authorization by state legislation, where the obstruction was in a navigable stream confined wholly within a single state; the court saying in this behalf:

"Congress, it must be assumed, was aware of the fact that until it acted upon the subject of navigable streams, which were entirely within the confines of a single state, although connecting with waters beyond its boundaries, such state had plenary power over the subject of that navigation, and it knew that, when in the absence of any statute of Congress on the subject an obstruction to such a navigable river had been built under the authority of an act of the Legislature of the state, such obstruction was legal and affirmatively authorized by law, because it was so authorized by the law of a state at a time when Congress had passed no act upon the subject. When Congress in 1890 passed the river and harbor bill, we think the expression contained in section 10 in regard to obstructions 'not affirmatively authorized by law' meant not only a law of Congress, but a law of the state in which the river was situated, which had been passed before Congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances we cannot doubt was an obstruction 'affirmatively authorized by law.'"

In that case the government sought to have removed from an intrastate stream a boom authorized by the law of the state, and it is significant that, while the appeal from the Circuit Court of Appeals' decision (81 Fed. 658, 26 C. C. A. 547) was pending in the Supreme Court, the law was changed and made to require affirmative congressional action in all cases where the navigable capacity of any United States water was obstructed. The act of 1899 produced radical changes in the matter of constructing works in both intra and inter state waters.

[7] As the law stood immediately before the act of 1899 was passed, the initial authorization of the Congress to create obstructions to the navigable capacity of an intrastate water was not necessary if state legislative authority for such construction had been obtained, and the building of wharves and other structures mentioned in the first part of section 7 of the act of 1890, in any United States navigable water, was only prohibited without the permission of the Secretary of War, if they obstructed or impaired navigation, commerce, or anchorage. The erection of bridges and their appurtenances over intrastate waters was permitted without the need of the approval of the Secretary of War, if authorized by law before the passage of said act. The excavating, filling, altering, etc., the channel of navigable waters was permitted if approved and authorized by the Secretary of War.

Among the changes effected by the act of 1899 was to require the affirmative authorization by Congress to create any obstruction to the navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state was permitted if authorized by state legislation and the location and plans of such structure were approved by the chief of engineers and of the Secretary of War. Perhaps without the change from "authorized by law" to "authorized by Congress" no obstruction to the navigable capacity of interstate waters without affirmative congressional enactment

would have been lawful, but a present reading of the law in the light of the history of its enactment clearly evinces to my mind a legislative purpose to require affirmative action on the part of Congress before such a crossing of interstate streams as contemplated by complainants in this suit shall be permitted, and that only when such congressional action shall have been taken can the powers delegated to the Secretary of War be put into operation.

This is not a case of the United States government seeking to make a crossing of this interstate stream in the exercise of its governmental powers, but an attempt to override a sovereign state's opposition to the use of its submerged land by a corporation of its own creation, under the claim of being engaged in interstate commerce. This can only be successfully accomplished when it shall be shown that Congress in the assertion of its superior rights under the interstate commerce clause of the United States Constitution has clearly and definitely authorized such crossing. Until then the state of New Jersey as against every comer is sovereign master of the situation.

The complainants' equities as set up in this suit being dependent upon the Water Company having obtained from Congress the right to enter upon and cross the lands of the state of New Jersey submerged by the waters of the Kill von Kull, and no such authority appearing, the bill is dismissed.

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CLARK v. NORWALK STEEL & IRON CO. et al.

(Circuit Court, N. D. Ohio, W. D. October 19, 1908.)

No. 2,083.

**BANKRUPTCY (§ 213\*)—PENDENCY OF PROCEEDINGS—EFFECT.**

Pendency of bankruptcy proceedings, prosecution of which is delayed, is no defense to petitions by interveners to foreclose mortgages covering land taken possession of in the receivership suit in which the intervening petitions are filed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 213.\*]

In Equity. Suit by Arthur Clark against the Norwalk Steel & Iron Company and others. On demurrers to answers to intervening petitions. Demurrers sustained.

Ford, Snyder & Tilden, for complainant.

A. M. Beattie, for defendants.

Judge Malcolm Kelly, for Citizens' Bank and T. B. Taylor.

TAYLER, District Judge. The complainant, on the 7th day of January, 1908, filed his original bill in equity against the defendants, with the result that receivers were appointed, who, on the 9th day of January, under the order of the court, took possession of all the property of the Norwalk Steel & Iron Company. Whatever the fact may have

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

been, the alleged ground upon which the receivership was sought was not insolvency of the corporation. On the 10th of January an involuntary petition in bankruptcy was filed against the Iron Company, alleging, among other things, that it had committed an act of bankruptcy in having receivers appointed on account of insolvency. To this bankruptcy petition the defendant replied, denying the allegation as to the acts of bankruptcy. May 26, 1908, Truman B. Taylor and the Citizens' Banking Company, of Sandusky, Ohio, were allowed, on application made to the court, to file their several petitions in intervention in this suit, setting up certain mortgages which they severally held against some of the real estate of the Iron Company, the possession of which had been taken by the receivers on the 9th day of January. In the meantime, nothing more had been done with the bankruptcy case. The Iron Company answered both of these intervening petitions, setting up the bankruptcy proceedings as a defense to the foreclosure of the mortgages in this suit in equity in the circuit court, and to these answers Taylor and the Banking Company demurred.

I see no reason why these demurrers ought not to be sustained. The Circuit Court has jurisdiction of this property. It is the only court into which any person may come to assert any rights which he has against the property.

The argument is made by counsel who filed these answers to the cross-petitions that the appointment of the receivers in this case is the very act of bankruptcy which they allege justified the filing of the petition in bankruptcy, and that, therefore, this court has no jurisdiction to foreclose the mortgage.

This contention may be answered in many ways. It is enough to say, in the first place, that at least until there is a determination by the bankruptcy court that the appointment of the receivers in this court constituted an act of bankruptcy by the alleged bankrupt, this court has unassailable jurisdiction; and, in the next place, that even if it was an act of bankruptcy, the Circuit Court, having had jurisdiction when the bill was filed and when the cross-petitions were filed, held the jurisdiction for all proper purposes for which the cross-petitions were filed and might proceed with the foreclosure of the mortgages.

The facts in this particular case illustrate the manifest impropriety of any other rule being asserted. Here are mortgage creditors, with claims not provable under the bankruptcy law if they intend, as these parties do, to stand upon their rights as mortgagees. The parties interested in the bankruptcy proceedings, for reasons of their own—and very proper reasons they may be—desire to postpone somewhat indefinitely the further prosecution of the bankruptcy case, in order that some arrangement may, if possible, be made among the parties interested. In the meantime, what is to become of these persons who have independent rights which are not to be affected in any sense by the bankruptcy proceedings? A court of equity having taken jurisdiction of the property itself, the mortgagees are not permitted to enter any other court, into which otherwise they might go, for their remedy, but must proceed in the court which has jurisdiction of and

has taken possession of the mortgaged property. Therefore, they have done the only thing that they could do, and are entitled here to have their rights enforced.

Both demurrers are sustained.

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In re DONNELLY.

(District Court, N. D. Ohio, W. D. November 12, 1910.)

No. 1,534.

**BANKRUPTCY (§ 217\*)—RESTRAINING PROCEEDINGS IN STATE COURT—JURISDICTION.**

A federal district court has jurisdiction in a bankruptcy proceeding to enjoin prosecution in a state court of suit to foreclose a mortgage, the giving of which, while insolvent, is relied upon as an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.\*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

In the matter of Michael Donnelly, bankrupt. On motion to dissolve a temporary injunction. Motion overruled.

Potter & Potter, for petitioners.

E. N. Warden and Doyle & Lewis, for bankrupt.

KILLITS, District Judge. In March, 1909, Louis Becker, claiming to be a creditor of Michael Donnelly, filed a petition in involuntary bankruptcy against Donnelly in this court, and, among other alleged acts of bankruptcy, charged in the petition that within four months prior to the filing of the petition, while insolvent, and for the purpose of defrauding, hindering, and delaying his creditors, and with intent to prefer the creditor hereinafter named over his other creditors, said Donnelly conveyed 100 acres of land in Henry county, Ohio, by mortgage, to one J. D. Groll, to secure the sum of \$15,000, which mortgage was recorded on the 9th of December, 1908. Donnelly answered the petition, taking issue with the allegations asserting him to be a bankrupt and demanding a trial by jury, and that question is yet to be tried. In August last, the petitioning creditor, Becker, filed a petition in this case for an injunction, alleging that one Dennis D. Donovan, assignee of the Citizens' State Banking Company, of Napoleon, Ohio, has begun an action in the common pleas court of Henry county, Ohio, against said Donnelly and others, to foreclose the mortgage above described, and asking for a writ of injunction forbidding said assignee Donovan or any person under him from further prosecuting the foreclosure suit in the state court, and asking for the appointment of a receiver in this proceeding. Upon this petition a restraining order was issued without notice, and the matter is now before the court upon the motion of the assignee

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Donovan to dissolve the temporary injunction upon three grounds; the principal one and the only one which the court cares to consider being that this court in this case is without jurisdiction in the premises. The motion is overruled as to the other grounds without comment.

Counsel for the assignee, in arguing the motion, relies principally upon the cases of *In re Wells* (D. C.) 114 Fed. 222, *In re Brown* (D. C.) 104 Fed. 762, and an opinion by Judge Tayler, of the Circuit Court of this district and division, in the case of *Arthur Clark v. Norwalk Steel & Iron Company*, 188 Fed. 999.

Collier, in the eighth edition of his work on Bankruptcy, on page 32, note 88, suggests that the court in *Re Wells* carries the doctrine of comity too far, and in note 174 on page 50 suggests that this case cannot be considered of much authority outside of its own district. Whether or not this comment is just, the facts of the case are so different from the facts of the case at bar as to make it easily possible to distinguish the propositions involved in the respective cases, for, to use the language of the court in the *Wells Case*, the situation there was this:

"After the petition in bankruptcy was filed, but before the receiver was appointed, and before the adjudication of bankruptcy, the state court took possession of the property now in controversy. The trustee, by direction of the referee, appeared in the state court, and asked leave (which was granted) to defend against the action in replevin. He filed his answer therein a year or more ago. The trustee now filed in this court his bill in equity, asking that the carriage company, by writ of injunction, be enjoined from the further prosecution of the replevin action in the state court."

The *Brown Case*, in 104 Fed., was a case in which the bankrupt had no possession of the property at the time of the filing of the petition in bankruptcy, but it was in the possession of a creditor, who held it on pledge with power of sale, and the case simply decides that the court may not enjoin the exercise of such power where there is no claim that the same will be exercised in a fraudulent or oppressive manner, and the case is one of those cited by Remington on Bankruptcy, p. 1089, as authority for this rule, depicting the summary jurisdiction of the bankruptcy court:

"If the possession, actual or constructive, is in the bankrupt or in his agent or in some one not claiming a beneficial interest in it, or is in the receiver, marshal, or trustee in bankruptcy, the bankruptcy court has summary jurisdiction over it by orders made in the bankruptcy proceedings themselves, and may summarily order its surrender or delivery, may bring all parties claiming interests in it into court, and may determine all rights to it. If, on the other hand, some third party claiming some beneficial interest in the property has possession, \* \* \* then such third party need not come into the bankruptcy proceedings for his rights."

In the *Clark Case*, in this district, the facts were that the property was in the hands of the Circuit Court through a receiver before an involuntary petition in bankruptcy was filed, which alleged, among other things, that the obtaining of the appointment of a receiver was in itself an act of bankruptcy. In the case in the Circuit Court certain parties were allowed, upon their application, to file intervening petitions setting up mortgages against real estate in the posses-



sion of the receiver, and asking to have the mortgage foreclosed. In the meantime, nothing more had been done with the bankruptcy case, but the alleged bankrupt answered the intervening petitions, setting up the bankruptcy proceedings as a defense to the foreclosure of the mortgages, and the matter was before the court upon the demurrers of the mortgagees to these answers, and the court held that the property was in the jurisdiction and custody of the Circuit Court, and that it was the only court in which any person under the circumstances could come to assert any rights which he had against the property.

The great distinction between the Wells Case, and the Clark Case, on the one hand, and the case at bar, lies in the fact that in those cases the property in question was actually in the custody of the other court, whereas in this case the property is not in the custody of any court, but is in the possession of the bankrupt subject to the determination of these bankruptcy proceedings, and the relief sought is to restrain a creditor from enforcing an alleged lien, the creation of which is before this court for consideration upon a claim that it was of itself an act of bankruptcy. This court regards this distinction between the facts as vital.

The court finds, for the exercise of the power attacked in this motion, authority in subdivision 15 of section 2 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]), wherein jurisdiction is given "to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." Collier, in commenting on this provision (8th Ed. pp. 49, 50), says:

"Generally speaking, it may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against, the enforcement of the law; provided the court of bankruptcy has jurisdiction of the person or the subject matter. \* \* \* Early in the administration of the present law, the injunction was frequently used to prevent the dissipation of assets to which the bankrupt had title. \* \* \* The power to enjoin is inherent in the court of bankruptcy as a court of equity. \* \* \* That the broad phrasing of subdivision 15 amounts to an express ratification of this inherent power has not been doubted. The exercise of it, like the quasi criminal remedy of contempt, is essential to the due enforcement of the act."

And cases are numerous in which this power has been exercised as broadly as here expressed by Collier.

The question primarily is: What is the effect upon the bankrupt's property as a result of the filing of the petition?

In the case of *Mueller v. Nugent*, 184 U. S. 1 (quoting from page 14), 22 Sup. Ct. 269, 275 (46 L. Ed. 405), the court says:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world and in effect an attachment and injunction."

The Circuit Court of Appeals for the Eighth Circuit in *Re Dempster*, 172 Fed. 353, says, on page 355, 97 C. C. A. 51, on page 53:

"The court in which the petition is filed has plenary jurisdiction in bankruptcy throughout the United States. Within that limit all the estate in the

possession of the bankrupt or held by another as his property is brought immediately within the custody of the court and made subject to its protection. The filing of the petition is an attachment of the estate, and an injunction restraining any act which will interfere with its administration in bankruptcy. This jurisdiction is national, and takes no account of districts or states."

In the case of *In re Weinger, Bergman & Co.* (D. C.) 126 Fed. 875, Judge Holt said on page 876:

"I think that, when a petition is filed before a state court acts, the state court cannot by any subsequent action claim to have first taken possession of the res. The fact that the bankruptcy court may not have yet made an adjudication, and that no receiver or trustee has yet been appointed, in my opinion, is immaterial. The bankrupt's property is within the jurisdiction of the bankruptcy court as soon as the petition is filed, so far as to prevent a state court which subsequently seizes the property from being held to have first obtained exclusive jurisdiction."

In 148 Fed. page 464, in *Re Duncan*, the court says (page 468):

"The filing of a petition against him (the bankrupt) is a caveat to all the world, and all persons dealing with him during the interval from that date to the date of final adjudication do so at their peril. The property of the bankrupt, after the filing of the petition against him and before adjudication thereon is in *custodio legis*. It is subject to the prehensory power of the court, and the person against whom such petition has been filed cannot make any legal disposition of it. No creditor can lay hands on it, and no court, state or federal, can attach it. It is under the sole and exclusive jurisdiction and control of the bankruptcy court."

In the case of *In re Briskman*, 132 Fed. 201, Judge Hazel, of the District Court of the Western district of New York, said on page 202:

"That the property of the bankrupt comes within the jurisdiction of the bankruptcy court upon the filing of either a voluntary or an involuntary petition is not controverted. Neither is it disputed that this court has the power to prevent a state court from exercising exclusive jurisdiction over property of a bankrupt seized subsequent to the filing of a petition in bankruptcy."

Almost the exact action of this court attacked in this case has been sustained in numerous cases, of which we cite but a few.

In the case of *In re Jersey Island Packing Co.*, 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560, on a petition for revision of an order of the District Court of the United States for the Northern District of California, the Circuit Court of Appeals denied the petition. In that case there was a trust deed to secure debts not due at the time of the filing of the petition in involuntary bankruptcy. The District Court enjoined the grantees under this trust deed from selling the property therein conveyed, holding that subdivision 15 of section 2 granted such power to the District Court. In this case the petition for injunction, as in the case at bar, was filed by unsecured creditors of the alleged bankrupt.

In the case of *In re Dana*, 167 Fed. 529, 93 C. C. A. 238, wherein the Circuit Court of Appeals of the Eighth Circuit denied a petition to revise, this question was before the court, as stated in the opinion of the Circuit Court of Appeals, on page 529:

"The principal question arising on this petition to revise is whether a District Court of the United States, in which proceedings in bankruptcy are

pending, and which is in the actual possession of certain real property conceded to belong to the bankrupt, has jurisdiction to determine the amount and order of priority of liens thereon, and to liquidate such liens, to the end that the property may be sold free of incumbrances, and in aid thereof to enjoin the lienholders from prosecuting the foreclosure of their liens in a suit brought in a state court before the commencement of the bankruptcy proceedings, but within four months thereof; and this, though the lienholders object to such jurisdiction, and it is not contended that their liens are preferential or fraudulent, or invalid for any other reason."

This question the Circuit Court of Appeals, following the District Court, answers in the affirmative, and the case has peculiar strength because of its very differences in facts from the case at bar. In it, the action to foreclose was brought before the filing of the petition in involuntary bankruptcy, and the lien was not attacked as fraudulent or preferential, and yet, under the authority on which that court relies, it was held that foreclosure might be restrained.

The case of *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 91 C. C. A. 559, in which the Circuit Court of Appeals of the Fourth Circuit denied a petition to revise may also be cited.

The case of *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, is also instructive. In that case, a bankrupt, nine days before the filing of a petition in bankruptcy against him, made a general assignment, which was alleged to be an act of bankruptcy. After the filing of the petition, the assignee sold the property. After the adjudication and before the appointment of a trustee the petitioning creditors applied to the District Court for an order to seize the property sold by the assignee. The property was taken through the marshal, notice being given to the purchaser of the property to appear and propound his claim. The purchaser came in and alleged that he bought the property for cash in good faith, and asked for protection and that the creditors be remitted to their claim against the assignee for the price. The court held that the purchaser had no title whatever to the property superior to the bankrupt's estate, and that the equities between him and the creditors should be determined by the District Court.

It appears from the facts involved in the cases cited that the power now questioned has been upheld on the theory that the bankruptcy court should be allowed full sway in attempting to conserve the bankrupt's equity of redemption, that the most might be made thereof for the unsecured creditors. The mortgagee is as completely protected in this court as he could be in the state court, and here is the only forum in which the contingent interests of the general creditors may be fully protected. If the power exists to stop the foreclosure of an unquestioned lien, as the fact appears, a fortiori it is present under circumstances such as those here, wherein an attack on the validity of the lien is one of the supports of the petition in bankruptcy.

The fact that the lien is in the hands of an officer of a state court is a mere incident; to all intents, as far as this case is concerned, the status of the assignee is just that of a private creditor, or what that of the original mortgagee would have been, and no more.

The motion should be disallowed.

## MANHATTAN TRUST CO. et al. v. CHICAGO ELECTRIC TRACTION CO.

In re WILCKE.

(Circuit Court, N. D. Illinois, E. D. July 20, 1910)

No. 25,595.

## 1. EQUITY (§ 214\*)—PLEADING—EXCEPTIONS.

Whether an affirmative defense of fraud is sufficiently pleaded, or whether, if sufficiently stated, is a defense, can only be considered on demurrer, and cannot be raised by exception.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 487; Dec. Dig. § 214.\*]

## 2. EQUITY (§ 253\*)—PLEADING—IMPERTINENT AND SCANDALOUS MATTER.

Where a judgment in a state court against the receiver of a street railroad company for injuries was filed as a claim against the company's property in the hands of the receiver, an answer alleging that the judgment was fraudulent and had been obtained by false and perjured testimony was not subject to exception as impertinent and scandalous.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 525; Dec. Dig. § 253.\*]

## 3. PLEADING (§ 23\*)—IMPERTINENT MATTER.

No matter is to be deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 46; Dec. Dig. § 23.\*]

## 4. PLEADING (§ 23\*)—"SCANDAL."

Scandal is impertinent matter which is also criminary or which otherwise reflects on the character of an individual, and no matter which is not also impertinent will constitute scandal, however strong its aspersions or reflections.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 46; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6341; vol. 8, p. 7795.]

## 5. RECEIVERS (§ 54\*)—INSOLVENCY—CLAIMS—ESTABLISHMENT—CONCLUSIVE-NESS OF JUDGMENT.

Where a decree appointing a receiver for an insolvent street railway company provided that the court should determine and fix claims, costs, charges of administration, etc., such provision did not mean that the court in which the receivership proceedings were pending would try de novo a claim which had been reduced to judgment against the receiver in a state court, since the decree did not specify the kind of evidence which the court should receive in determining whether the claim should be allowed.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 91; Dec. Dig. § 54.\*]

## 6. JUDGMENT (§ 678\*)—RECEIVERS—CONCLUSIVENESS.

Since a receiver of a street railroad company is an arm of the court and his official acts those of the court, a judgment recovered against him in his official capacity as to any act or transaction of his in carrying on the business connected with the property is the establishment of a liability against the assets in his hands, and is conclusive as against lienors or purchasers of such assets in the absence of fraud, and this, notwithstanding the statute providing that such a receiver shall be sub-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ject to the general jurisdiction of the court in which the receiver was appointed so far as necessary to the ends of justice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195-1199; Dec. Dig. § 678.\*]

7. JUDGMENT (§ 828\*)—COMITY—STATE COURTS—JUDGMENT AGAINST FEDERAL COURT RECEIVER.

The judgment of a state court having jurisdiction of the parties and subject-matter against a federal court receiver in his official capacity in respect of any act or transaction of his in carrying on the business connected with the receivership property is final and conclusive as to the existence and amount of the liability.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.\*]

Conclusiveness as between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

8. RECEIVERS (§ 150\*)—CLAIMS—PROOF—JUDGMENT—FRAUD.

Where a judgment against a federal court receiver in a state court is filed as a claim in the receivership proceedings, an objection that it was obtained by fraud and false swearing would not authorize a retrial of the cause and the weighing of the same evidence on which the judgment was based, nor could it be proved by evidence merely cumulative, impeaching, or contradicting the former evidence produced.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 267, 268; Dec. Dig. § 150.\*]

In Equity. Bill by the Manhattan Trust Company and others against the Chicago Electric Traction Company. In the matter of petitions of William Wilcke. On exceptions to answer of interveners. Overruled.

Wing & Wing and Fred W. Bentley, for petitioner William Wilcke.

Mayer, Meyer, Austrian & Platt and Isaac H. Mayer, for purchasers, trustees, and bondholders.

KOHLSAAT, Circuit Judge. Petitioner sets up judgment recovered against the receiver herein for \$10,000 and costs taxed at \$74.85 on July 16, 1907, for which no execution was awarded; that the judgment order directed that the same be paid in due course of administration out of the funds of said receivership; that said judgment was affirmed by the Appellate and Supreme Courts, and now stands in full force and effect and unsatisfied. The petition further states that said judgment was filed with the master on August 16, 1907, and asks that the receiver show cause why said judgment should not be allowed and paid out of the proceeds of foreclosure sale herein. To this petition the receiver, the reorganization committee of the bondholders, the owners of the receiver's certificates, and the Chicago & Southern Traction Company, purchaser under said mortgage sale, make answer, alleging that by the decrees of June 11, 1907, and May 27, 1908, in said cause, it was ordered that all claims not presented to the master for allowance by September 8, 1908, should be barred, of which order petitioner had notice; that petitioner's claim was not so presented and is barred. The answer further charges that said judgment is not binding against the respondents; that respondents, other

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

than the receiver, were not parties to said proceeding; that judgment was procured by fraud, and by false and perjured testimony.

The answer further alleges that the injury complained of in said suit of Wilcke, upon which said judgment is based, was caused by his own negligence alone; that he produced false testimony as to the extent of his injury; that he is not entitled to any damages; that the judgment is excessive and inequitable; and that before the petition be granted the facts should be fully inquired into. The answer further charges that the sale made in said cause under the foreclosure proceedings has been confirmed and deed delivered, and that the property is in the possession of the purchaser.

To this answer petitioner files exceptions, which exceptions are now before the court.

No reason is perceived why exceptions 1, 2, 3, 4, 5, and 6 should lie to the answer, and they are overruled.

[1, 2] The seventh and last exception is to the fourth paragraph of the original answer of respondent, which alleges that Wilcke secured said judgment by means of fraud and by false and perjured testimony.

This is excepted to as scandalous and impertinent. It is very clear that the only question before the court on this exception is: Is the paragraph properly a part of the answer? Should it be expunged? Whether the affirmative defense of fraud here set up is sufficiently alleged, or whether if properly alleged it is a sufficient defense, are not matters in issue upon this exception. These questions could only be raised by demurrer (2 Bates on Federal Practice, p. 667), or, perhaps, by analogy to the method of testing the sufficiency as a matter of law of an answer or plea to an original bill, by setting down for argument.

Of course, fraud may be set up at any stage of the proceedings. It vitiates all transactions, and is always pertinent if it relates to the matter in controversy. To be sure, one may sometimes be precluded from establishing such a defense, as where, for instance, the principle of *res adjudicata* is applicable, but even in such a case it would not be impertinent.

[3] "No matter is to be deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted." *Mechanics' Bank v. Levy*, 3 Paige, Ch. (N. Y.) 606; 12 Beav. 44; 10 Sim. 345.

[4] "Scandal is impertinent matter which is also criminatory, or which otherwise reflects on the character of an individual. \* \* \* No matter which is not also impertinence will constitute scandal however strong its aspersions or reflections may be. \* \* \*" 19 Ency Pl. & Pr. 195 et seq. Tested by these rules, it is clear that the exception must be overruled.

The court finds itself somewhat embarrassed in administering appropriate relief by reason of the fact that counsel have ignored the issues raised by the exceptions; i. e., questions of whether the allegations of the answer are impertinent, scandalous, and an insufficient response to the petition. The main question submitted in the briefs is as to the weight to be accorded the judgment as proof of petitioner's

claim, petitioner contending that the judgment is conclusive as to the right as well as the amount of his recovery, and respondents insisting that they are entitled to a hearing de novo on the original cause of action; i. e., that the judgment is not even prima facie evidence in favor of Wilcke. Adhering strictly to the record, an order overruling the exceptions would dispose of all questions properly in issue; but perhaps the court is warranted by this departure from the issues raised by the exception to treat the submission as a demurrer or as the setting of the matter down for argument on petition and answer, and to thus consider the sufficiency as a matter of law of the proposed defense of fraud, which would involve the question submitted as to the conclusiveness of Wilcke's judgment.

[5] Respondents deny the conclusiveness of the judgment against bondholders, certificate holders, and purchasers: (1) Because the decree provides that the court shall determine and fix claims, costs, charges of administration, etc.; (2) because bondholders, certificate holders, and purchasers were not parties to Wilcke's suit, and therefore had no chance to be heard in defense thereof.

The first point may be briefly disposed of by saying that the court may determine, fix, and allow the claim solely upon proof of the judgment, without ignoring these provisions of the decree. The decree does not provide what kind and how much evidence shall be required to convince the court that the claim should be allowed.

[6] As to the second point: Respondents do not contend that the judgment is not entitled to some weight against the receiver. Their contention is that it is of no weight against purchasers, bondholders, and certificate holders.

Now, a receiver is simply a representative of the estate being administered by the court of his appointment. He is an arm of the court—an officer appointed to conserve the property and manage it under the direction of the court for the benefit of all those who may be adjudged ultimately entitled thereto. The receiver's official acts are those of the court, and any liability incurred while in the performance of his judicial duties is a part of the cost of administration, and necessarily given priority over all other classes of creditors. 24 Am. & Eng. Ency. of Law, 31. A suit against a receiver in his official capacity in respect to any act or transaction of his in carrying on the business connected with such property is nothing less than an attempt to establish a liability against assets in his hands. It is idle to say that a judgment in such a suit is conclusive against a receiver in his official capacity, but yet of no weight against those ultimately entitled to those assets. That bondholders and trustees in a foreclosure proceeding are bound by the judgment rendered against the receiver therein in a court of competent jurisdiction, see *Turner v. Indianapolis, etc., R. Co.*, Fed. Cas. No. 14,260. "It is also generally held that the assignee or receiver represents the whole body of creditors, so that all of them are bound by the result of the proceedings by or against him, whether joined as parties or not." 23 Cyc. 1248, and cases cited. The appearance of the receiver, therefore, in the state court proceeding is, in effect, the court's appearance, and binds parties interested

in the receivership proceeding as fully as though the claim was set up and adjudicated against the receiver in the court of his appointment. It is therefore important to consider what weight should be given the judgment as against the receiver.

If respondent's proposition is law, it is pertinent to inquire: What use could there be of ever suing a federal receiver in a state court? Would it not be a waste of time and expense? The statute (Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582]) provides that:

"Every receiver \* \* \* appointed by any court of the United States may be sued in respect to any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver \* \* \* was appointed. \* \* \*"

As stated by Beach on Receivers (Alderson's Ed.) § 721:

"It is apparent that if a judgment against a receiver, when presented to the court having jurisdiction of the receivership proceeding for payment, may be modified, changed, or rejected, the trial of the cause in which it was rendered would be but an empty and useless formality."

And, it may be added, the statute permitting such suit without any meaning, force, or effect—"a very useless act," to use the expression of the court in *Dillingham v. Hawk*, 60 Fed. 497, 9 C. C. A. 104 (23 L. R. A. 517). "It is presumed that the Legislature intends to impart to its enactments such a meaning as will render them operative and effective," and "when different constructions may be put upon an act, one of which will accomplish the objects of the Legislature and the other render the act nugatory, the former should be adopted," are very elementary maxims of interpretation of statutes which respondent's theory seems entirely to overlook.

There seems to be no reason nor authority for holding that the clause of the statute, "but such suit shall be subject to the general equity jurisdiction of the court in which such receiver \* \* \* was appointed, so far as the same shall be necessary to the ends of justice," means that the solemn adjudication of a state court vested with power and having jurisdiction over parties and subject-matter may be laid aside as of no weight, especially in a case like the one before us, where the receiver under the sanction of the court of his appointment has tested the validity of the judgment by proper proceedings in the highest tribunals of the state. In the first place, the words of the statute are, "such suit shall be subject. \* \* \*" Now after judgment there is no suit to be subject, etc; the cause of action has merged in the judgment, which is a contract of record. In the second place, such suits are only subject to the general equity jurisdiction "so far as the same shall be necessary to the ends of justice," and certainly the ends of justice do not require a hearing *de novo* after the fact of liability has once been judicially determined by a competent court. The construction of this clause of the statute by the court in *Dillingham v. Hawk*, *supra*, "as applying only to suits which seek to interfere with the receiver's possession of property," is a reasonable construction, gives effect to all parts of the statute, and seems to be all that justice requires.



[7] The soundness of the rule that a judgment of a state court having jurisdiction of the parties and subject-matter against a federal receiver in his official capacity in respect of any act or transaction of his in carrying on the business connected with the receivership property is final and conclusive as to the existence and amount of the liability is attested by almost unanimous authority. 34 Cyc. 445; 23 Cyc. 1248; 23 Am. & Eng. Ency. of Law, 1126; Central Trust Co. v. St. Louis, etc., R. Co., 41 Fed. 551; St. Louis S. W. Ry. Co. v. Holbrook, 73 Fed. 112, 19 C. C. A. 385; Jones on Corporate Bonds and Mortgages, § 493a; Beach on Receivers (Alderson's Ed.) §§ 659, 721. In Missouri Pac. R. R. Co. v. Texas & Pacific R. R. Co., 41 Fed. 311, Judge Pardee decided that such a judgment was not conclusive, but later, in the case of Dillingham v. Hawk, *supra*, concurred in the opinion of the Court of Appeals of which he was a member, thereby reversing his former holding.

Counsel's argument, apparently granting that the judgment may have some weight against the receiver, but denying its conclusiveness against bondholders and others, because, as counsel says, "not one of these persons was a party to Wilcke's suit or judgment," manifestly leads to absurdity. At the time of the alleged injury upon which the judgment here sought to be collected was rendered some one was liable. It certainly was not the holders of receiver's certificates or bondholders, for they were not in possession of the property or in any way responsible for the operation of the road. The purchasers were not yet in existence. A joinder of any of these parties would have been a misjoinder. If respondent's theory is correct, Wilcke, at the time of his injury, faced this dilemma: It was useless to sue the receiver because any judgment he might obtain against him would be of no force or effect as against the assets in the receiver's hands or those to be realized upon foreclosure sale, or, as counsel puts it, not even *prima facie* evidence against those ultimately entitled thereto. He could not sue bondholders and certificate holders because they were not in possession or control of the road. The purchasers were not yet ascertained. If he did not sue some one, the statute of limitations would run against him. It follows of necessity that the judgment must be of some weight; for, if petitioner is relying upon his original cause of action in disregard of the judgment, his claim is barred by the statute of limitations. But Wilcke's claim herein is not based upon his original cause of action; it is based upon the judgment. If a duly authenticated record of the judgment is not evidence of the judgment and pertinent evidence in support of his petition, how could the claim ever be proved? Surely not by evidence of the injury upon which the cause of action was based, for that cause of action is merged in the judgment.

The cases cited by respondents do not sustain their position. *Hasall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001, is clearly distinguishable from this case, in that it was not a suit against a receiver for liability incurred by him while acting in his official capacity. At the time Wilcox obtained his judgment in the state court, the railroad property was not in process of foreclosure and in

the hands of an officer of the court. There the trustees and bondholders were not represented in the suit in which judgment was recovered. Here they were represented by the court's receiver. The same is true of *Central Trust Co. v. Hennen*, 90 Fed. 593, 33 C. C. A. 189. The judgment in that case was against the railroad before the appointment of a receiver, and could not therefore be part of the costs of administration. *Central Trust Co. v. Bridges*, 57 Fed. 753, 6 C. C. A. 539, likewise was not a suit against a receiver for his official acts in relation to the property. So, also, of *Central Trust Co. v. Condon*, 67 Fed. 84, 88, 14 C. C. A. 314, and *Keokuk & Western R. Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450. In short, this distinction seems to run through every authority that has been cited on behalf of respondents on this question. It will not be presumed that defense to Wilcke's action was not fully and ably presented, and, as said in *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, supra, "the court will not entertain the suggestion that its receiver will not obtain justice in the state courts."

[8] If respondents can produce any clear evidence of fraud or perjury, which by the exercise of due diligence could not have been brought to the attention of the state courts, the matter might be referred on this question only. But such a hearing would not permit a retrial of the cause—the weighing of the same evidence upon which the judgment was based, and the passing anew upon the same questions which were decided by the state courts. Something more than evidence merely cumulative to the former evidence, or merely impeaching or contradicting the former evidence, must be produced. Unless this can be done the claim must be allowed.

### HILLS v. F. D. McKINNISS CO.

(District Court, N. D. Ohio, W. D. October 28, 1910.)

No. 1,329.

#### 1. BANKRUPTCY (§ 52\*)—NATURE OF PROCEEDINGS.

The proceeding contemplated by the bankruptcy act of 1898 is not a mere personal action against the bankrupt for the collection of debts, but is also a proceeding in rem to impound all of his nonexempt property, to distribute it equitably among his creditors, and the court must, if possible, so construe the act as to secure uniformity in its administration.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 52.\*]

#### 2. BANKRUPTCY (§§ 14, 297\*)—JURISDICTION—STATUTES.

Under Bankruptcy Act 1898, § 2,† giving courts of bankruptcy jurisdiction to adjudge persons bankrupt who have had their principal place of business or residence or domicile, for the greater part of six months preceding the filing of the petition, within the territorial jurisdiction of the court, and section 18, providing that personal service shall be made as process is served in suits in equity, and, where personal service cannot be made, notice must be given by publication as provided by law for notice by publication, and Rev. St. § 629, subd. 8 (U. S. Comp. St. 1901, p. 504), authorizing service by publication, a person who is beyond the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Act July 1, 1898, c. 541, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420).

territorial limits of a bankruptcy court at the time of the filing of a petition, but who has for more than a year prior to a few days before the filing of a petition resided within the district, may be adjudged a bankrupt on personal service and publication without the district, though he does not appear in the proceedings, and the trustee may go outside of the district and avoid, as authorized by sections 60b, 67e, preferential transfers, notwithstanding Rev. St. § 740 (U. S. Comp. St. 1901, p. 587), providing that suits not of a local nature against a single defendant must be brought in the district in which he resides.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 14, 297.\*]

**3. STATUTES (§§ 174, 175\*)—CONSTRUCTION—LEGISLATIVE INTENT.**

The court in construing a statute must avoid a construction that will lead to absurdity, if that may be done without violating either the language of the statute or its manifest intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 254; Dec. Dig. §§ 174, 175.\*]

Action by R. E. Hills, trustee in bankruptcy of L. C. Hatcher, against the F. D. McKinniss Company. Judgment for plaintiff.

H. W. Crist and C. W. Everett, for plaintiff.

Crissinger & Guthery, for defendant.

KILLITS, District Judge. This case is before the court upon the complaint of the trustee and the plea of the defendant thereto and stipulations as to facts entered into by the parties. The facts as thus agreed on and which are not controverted by the plea are as follows:

Hatcher was for more than a year prior to June 1, 1908, a resident of, and doing business in, Delaware county, Ohio, a county without this district. On the 14th of February, 1908, he gave the defendant, a corporation doing business in Marion county, Ohio, which county is within this district, a chattel mortgage on his stock of goods in Delaware county, and in April, 1908, the defendant took possession of this merchandise, and between that time and the 1st of June disposed of the same or removed it out of the jurisdiction of the Southern district of Ohio, in which Delaware county is located.

At the time of giving the chattel mortgage, Hatcher was insolvent. The defendant company was a creditor, and the mortgage was given for the purpose of preferring the defendant company.

Hatcher moved from Delaware county into Marion county about the 1st day of June, or, at least, prior to the 10th of June, when the petition in involuntary bankruptcy was filed against him in the Southern district of Ohio. He was not found within the Southern district, but was served personally and by publication without the district, conformably to section 18 of the bankruptcy law. He never at any time entered appearance to the proceedings, in which, on the 23d of April, 1909, he was adjudged a bankrupt in the Southern district. Subsequently Hills was appointed trustee.

The plaintiff trustee, in the proceedings in this court, seeks to avoid the transfer to the defendant company as a preference and to require the defendant company to answer and account for the disposition of Hatcher's property. It appears also that no property of Hatcher was found within the Southern district after the filing of the petition.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No question is made as to the jurisdiction of this court to entertain a complaint of this character made by a trustee appointed in another district. It is conceded that, barring other considerations to be hereafter alluded to, sections 60b and 67e, one or both of them, confer jurisdiction upon this court to entertain this sort of a suit.

The exact question attempted to be raised is whether, under the facts here, the trustee, by virtue of the adjudication in the Southern district, has authority to attempt recovery of property found in another district.

The position that is taken by the defendant company is that, because neither personal service within the Southern district nor entry of appearance of the bankrupt is shown by the record, the trustee cannot go outside of the district to take advantage of the provisions of either sections 60b or 67e of the bankruptcy act, and that the adjudication attaches to only such effects of the bankrupt as may be found within the district.

Although this position is apparently supported by some authority and the question has not otherwise been discussed in any precedent found by counsel or the court, we feel that we would make sport of the evident purpose of the bankruptcy act, if not its terms, should we accept it as valid.

[1] The title of the act of 1898 expresses its purpose to be to create a uniform system of bankruptcy in the United States and territories, and Congress has seen fit in the body of the act to confer jurisdiction not only over persons and property of persons domiciled or residing within the United States, but over property within the United States owned by nonresidents thereof, and, as was said by the Circuit Court of Appeals of the Eighth Circuit, in *Shute v. Patterson*, 147 Fed. 509, 78 C. C. A. 75, the proceeding contemplated by this act "is not a mere personal action against the bankrupt for the collection of debts," but that its purpose is "to impound all of his nonexempt property, to distribute it equitably among his creditors, and to release him from further liability," being both a proceeding in personam and a proceeding in rem.

It seems to us that this act must be construed, if the language reasonably permits such construction, to secure uniformity in the fullest measure and to avoid an interpretation, unless the same be compelled by the language of the statute, which permits a dishonest or tricky debtor to easily escape its provisions.

[2] It was competent for Congress, of course, to determine what should be the locus of the forum in which the adjudication should be had. It might have said that the jurisdiction in which the bankrupt is found at the time of the filing of the petition should determine the forum. What it did say was that the location of the bankrupt's principal place of business or of his residence or of his domicile for the greater portion of the six months preceding the filing of the petition should be the jurisdiction in which proceedings should be begun, and the language of this second section of the act contemplates clearly the possibility of a person being adjudged a bankrupt who was beyond the territorial limits of the court at the time of the filing of the petition;

and, in order to preserve the uniformity of the law's operation, it seems clear to us that we must assume that Congress intended the same jurisdiction over, and as complete and full an administration upon, the property of a bankrupt who was without the jurisdiction of the district when the petition was filed, but whose domicile, residence, or place of business otherwise conformed to the provisions of this second section, as in a case where the bankrupt was at the time within the territorial limits of the court.

This view is strengthened by a consideration of the terms of that section of the act which provides for service (section 18), which is that personal service "shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, \* \* \* but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication," etc.

This language undoubtedly refers to Act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), being section 629, subd. 8, of the Compiled Statutes, and, of course, it suffices to bring all referred to provisions of that act into the bankruptcy law as completely as if they were fully written therein.

Referring, then, to this portion of section 629, we may read section 18 as if it contained substantially this: That when the alleged bankrupt shall not be an inhabitant of, or found within, the district, or shall not voluntarily appear, it shall be lawful for the court to make an order directing such alleged bankrupt to appear to answer the petition by a day to be fixed, which order shall be served on such absent alleged bankrupt "if practicable, wherever found."

It seems inevitable that, by directing this manner of service in a case such as we have before us, the statute aims to clothe the court with as complete a power of adjudication and administration upon the bankrupt's property as if he had either been served within the district or had voluntarily appeared.

[3] In construing a statute, the court's first duty is to avoid a construction that will lead to absurdity, if that may be done without violating either the language of the statute or its manifest intent.

The construction asked for by defendant involves the assumption that Congress left unguarded a very obvious way to avoid the law and the uniformity of its operation, which such acts as these of Hatcher and defendant create, if the law is indeed as defendant claims.

It is clearly not within the language of the law that a bankrupt may weaken or narrow the power of the court which alone has jurisdiction over his case, by simply keeping without the district and avoiding the entry of appearance to the petition. The fact that the act so plainly makes residence, domicile, or conduct of business for something less than the whole time immediately before the filing of the petition the sole criterion of jurisdiction suggests that the personal movements of the bankrupt are immaterial.

We are referred by defendant to section 740 of the Revised Statutes

(U. S. Comp. St. 1901, p. 587), providing that suits not of a local nature against a single defendant must be brought in the district in which such defendant resides, and it is urged that section 2 of the bankruptcy act does not in any way change or modify this general provision.

We are not willing to agree with defendant that the bankruptcy act is in entire harmony with this general provision, for, as we have seen, the former omits the question of the present residence of the bankrupt altogether from the consideration of jurisdiction.

A system of bankruptcy national in its character to be uniform in its operation must of necessity be unique in its method of administration, and, when one of its provisions involving the very policy of the law is deemed inconsistent with the general law, the special provision must control.

Defendant's main reliance is upon the case of *In re Appel* (D. C.) 103 Fed. 931. The question before the court in that case was to determine whether, for jurisdictional purposes, touching the application of periods of limitation, proceedings in involuntary bankruptcy are commenced by the filing of the original petition without reference to the time of service of the order on the defendant. In the opinion the court uses this language, which does not appear necessary to a determination of the question before it:

"Without an appearance on the part of the defendant, no order can be made which will apply to the bankrupt in person. It can only proceed as a proceeding against the property of the bankrupt, if any, within the jurisdiction of the court and which can come into the possession of the trustee."

If we may agree with defendant that this language of the court in the Appel Case supports defendant's contention, we should disregard it, not only as mere dictum, but because it seems clearly improvident.

Subdivision 8 of section 629, Revised Statutes, which, as we have seen, is referred to in section 18 of the bankruptcy act, contains a provision applicable to Circuit Courts alone, that the adjudication regarding defendants without appearance shall affect only the property under the jurisdiction of the court within the district and which shall have been the subject of the suit. Congress had this subdivision in mind, evidently, when enacting section 18, and, if it had intended that this particular provision of the subdivision should be applicable, it certainly would have referred to it in as apt language as it employed in referring to those which direct the manner of service.

The failure of section 18 to refer to the limitations upon the effect of service without the district written into section 629, subd. 8, while making the manner of service there provided for generally applicable in bankruptcy proceedings, is significant. It seems clear that every consideration of the policy involved in a law providing for a uniform system of bankruptcy dictated the omission. The policy of a law permitting administration upon the effects of an absconding debtor for the benefit of all his creditors is as important, at least, as any other consideration moving the law's enactment.

But we do not regard this language of the court in *Re Appel* as

necessarily out of harmony with the position that we take, for the trustee in this very proceeding is attempting to acquire possession of the property of a bankrupt, or its equivalent, in the manner accorded him by the law.

The conclusion is that the prayer of the complaint should be granted, and the defendant be required to account for the property conveyed to it by the chattel mortgage.

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**S. S. WHITE DENTAL MFG. CO. v. MITCHELL.**

(Circuit Court, E. D. New York. July 8, 1911.)

**1. INJUNCTION (§ 56\*)—TERMINATION OF EMPLOYMENT—TRADE SECRETS—DISCLOSURE—INJUNCTION.**

In a suit to enjoin a servant from disclosing trade secrets, consisting of specific methods or secret processes for the manufacture of commercial oxygen, it was no objection to the issuance of an injunction that plaintiff failed to point out any specific methods or secret processes which it was proposed to enjoin defendant from disclosing, since the general provision of the order prohibiting action in violation of defendant's contract of employment would be no more indefinite than was the threatened injury, and, if the injunction were enforceable at all, it would be enforceable as well against any disclosure as against any particular process or device.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. § 56.\*]

**2. INJUNCTION (§ 56\*)—DISCLOSURE OF TRADE SECRETS—DEFENSES—ULTRA VIRES.**

In a suit to enjoin a servant from disclosing trade secrets pursuant to his contract of employment after the termination thereof, it was no defense that the manufacture of the article of commerce to which the secrets related, by plaintiff, was ultra vires.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 56.\*]

**3. INJUNCTION (§ 56\*)—THREATS—DISCLOSURE OF TRADE SECRETS.**

Where a servant, having agreed not to disclose trade secrets learned while in complainant's employ, had terminated his contract and taken employment with another concern in the same line beyond the court's jurisdiction, and denied that he intended to violate his contract, an injunction restraining him from doing so would not be granted as a threat; defendant being as much bound by his contract not to disclose after taking up his new employment as before, and subject to suit for the violation thereof in the jurisdiction in which such breach, if any, might occur.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 56.\*]

In Equity. Bill by S. S. White Dental Manufacturing Company against George D. H. Mitchell to restrain defendant from communicating trade secrets after the termination of his employment by complainant. Dismissed.

Alfred T. Davison, for complainant.

Edward S. Brownson, Jr. (De Witt V. D. Reiley, of counsel), for defendant.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CHATFIELD, District Judge. The defendant has been for a number of years in the employ of the complainant company. Some months since he gave notice of terminating that employment, and exhibited a contract under which he was to enter the employment of a firm in a Western city, to build, put in operation, and conduct a plant for the making of oxygen for commercial use. The complainant, in connection with its manufacture of dental supplies, has been making oxygen for medical purposes, and has sold some of that product for ordinary commercial uses, some of which are not within medical lines.

There is a grave dispute between the complainant and the defendant as to whether or not the defendant had knowledge of processes for making oxygen prior to his employment by complainant. The complainant alleges in its complaint and affidavits that it has a number of secret processes, and particularly of secret machines, developed partly by the defendant and partly by other employes of the complainant, and that the defendant is threatening to disclose and make use of these in such a way as to publish or furnish to competitors such secret processes and secret machinery for getting profitable results in the manufacture of oxygen.

The defendant, like other employes, had made a contract to give to the complainant the advantage of anything which he might discover while in their employ, and to keep secret whatever he learned during or by means of such employment. The complainant alleges in its bill of complaint that, if the defendant is allowed to make use of anything in violation of this contract, the injury will be irreparable, because of the loss of secrecy thereby caused. The defendant alleges an attempt merely to use a method of producing oxygen made known in this country by the inventors, Du Motay and Marechal, by United States letters patent No. 70,705, on November 12, 1867.

The defendant points to a clause in the contract which he has made with his new employers, under the provisions of which he is to install a plant, using this old patented, but now freely available, process. The complainant answers this by calling attention to a provision in the contract that this old patented process (the Tessie du Motay and Marechal process) is to be used, "or any other process devised and put into successful operation by Mitchell," and "unless the parties hereto shall agree in writing upon such other process."

[1] The defendant further objects that the complainant does not point out any specific methods or secret process which this court is in a position to enjoin the defendant from disclosing, and hence that the injunction order would be so indefinite as to be void. But if an injunction order were possible, or a situation shown in which it should be granted, this objection would fail, inasmuch as the general provision of the order prohibiting action in violation of a contract would be no more indefinite than is the threatened injury; and if such an injunction were enforceable, it would be enforceable against any disclosure, as well as against the disclosure of some particular process or device.

[2] The defendant also alleges that the complainant is not entitled under its charter to manufacture oxygen for commercial purposes outside of the dental trade. But it does not seem that the doctrine of



ultra vires is applicable in this situation. A man can be restrained from breaking a contract, even though the state might have an interest in the transactions of one of the parties to the contract (unless the subject-matter had to do with an illegal transaction); and whether a contract with the company with relation to the sale of the product might or might not be avoided, if the defense of ultra vires be interposed, nevertheless, a person cannot justify his own breach of contract as to a matter entirely within the authority of the corporation, because incidentally something outside of its charter powers might at the same time be going on. In other words, the complainant company might have secret processes which it did not use, and which it could not use, but yet which the defendant would not have the right to disclose; and he could not defend himself by saying that the complainant would not be allowed to put these processes to profitable use and that for this reason saw fit to appropriate to himself their property.

[3] The question therefore comes back on this application for a preliminary injunction (which has been pending with a restraining order against the defendant for some time) to the general question of whether the complainant shows any action violative of his contract right from which irreparable injury is likely to result, and which is actually threatened or is about to occur within this court's jurisdiction by the defendant's actions.

As to this, it must be held that the complainant does not, either by his complaint, treated as an affidavit, nor the other affidavits submitted, show a situation upon which an injunction should issue. The defendant is bound, just as much as if he were enjoined by this court, to respect the legal rights of the complainant. He is bound to keep secret any processes which he learned while in complainant's employ, and which he agreed should be their property and not disclosed by him. An injunction (as has been suggested) would do him no harm, in the sense of not interfering with what he had a legal right to do. But, on the other hand, an injunction would not enlarge the complainant's rights, and would not protect them in the least; for the defendant would still have the right to enter into his new employment, and, inasmuch as the papers show that the new contract is to be performed outside of the territorial jurisdiction of this court, the only effect of an injunction would be that if the defendant at any time returned into the court, or appeared as a party or witness at final hearing, he could be punished, but the disclosure would have been made and the damage would have been done.

Under such circumstances, the court is not willing to grant an injunction order purely as a threat, or to hold that a man is intending to do what he says he is not intending to do, when there is nothing to determine the matter other than the contradictory statements of the parties.

The complainant is perfectly free to apply for an injunction at the place where the defendant begins his work if he attempts anything there which will be violative of his contract rights. The relief asked by the complaint in this action, namely, a permanent injunction, is

substantially equivalent to that which is asked on preliminary motion; but up to the present time no action or attempted action on the part of the defendant is shown which will be a violation of any contract right that the court can definitely ascertain. Whether or not, at final hearing, the fact that the parties are present before the court and that some injury is imminent may make an action in this jurisdiction more effective than in some other, need not be considered now. The injunction asked for would seem to be of no benefit, and it does not seem that the court should issue an order merely requiring a man in terms to avoid doing anything which he ought not to do, because, if he did begin the illegal or wrongful act, he would then and there be subject to injunction.

Motion denied.

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In re HAMMOND.

(District Court, N. D. Ohio, W. D. March 15, 1911.)

No. 1,759.

**BANKRUPTCY (§ 188\*)—TITLE OF TRUSTEE—LIEN OF EXISTING MORTGAGE.**

A chattel mortgage, permitting the mortgagor to retain possession with power of sale, and subjecting accretions to the stock to the lien of the mortgage, was, under the laws of Ohio, good between the parties, though void as to creditors, and would formerly have given the mortgagee a lien, as against the mortgagor's trustee in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vesting in the trustee the title of the bankrupt as of the date he was adjudged a bankrupt; but section 70 is to be construed with the amendment by Act June 25, 1910, c. 412, § 8, 36 Stat. 840, of section 47a (2), by which the trustee is vested with the rights, remedies, and powers of a creditor holding a lien; and, subsequent to the amendment, such mortgagee would have no lien against the trustee, although the mortgage was executed prior to the amendment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286-295; Dec. Dig. § 188.\*]

In the matter of Clarence S. Hammond, bankrupt. On petition to review the order of the referee disregarding a claim to a lien. Petition denied.

L. B. Hall and B. F. James, for petitioner.

J. W. Grabel and D. R. Jones, opposed.

KILLITS, District Judge. September 21, 1909, John J. Fee filed with the recorder of Wood county, Ohio, a chattel mortgage upon a stock of fixtures and merchandise in said county, executed and made to him by the bankrupt, Hammond, and wife, to secure the payment of a note dated on or before the 18th of September, 1910, for the sum of \$934.60. The mortgage permitted the mortgagor, Hammond, to remain in possession with power of sale, and provided that all accretions to the stock made to replace the goods sold in gen-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eral trade by the mortgagor should come within the lien of the mortgage. There can be no question but that, as to creditors, this mortgage was void, although good between the parties, upon the authority of *Collins et al. v. Myers*, 16 Ohio, 547; *Freeman v. Rawson*, 5 Ohio St. 1; *Harman v. Abbey*, 7 Ohio St. 218; *Francisco v. Ryan*, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711.

On September 17, 1910, Hammond filed a voluntary petition in bankruptcy, a receiver was appointed, who took possession of his store, and subsequently a trustee was elected, and Fee was cited to set up his claim. On the hearing before the referee Fee's claim to a lien upon the merchandise against the trustee was disallowed, the property was offered for sale and purchased by Fee, who tendered his note and mortgage in payment, which was refused. The matter is now before the court on petition to review the order of the referee disregarding Fee's claim to a lien on the merchandise.

As the bankruptcy law stood prior to the amendment of June 25, 1910, on the authority of *York v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, Fee should have been allowed the lien he claimed. The question before the court, in its essence, is whether the amendment of 1910 affects Fee's mortgage rights held under a mortgage made prior to the amendment. If it were not for the amendment of 1910, we would be referred for determination of the question before us to section 70 of the bankruptcy act, which read then, as now:

"The trustee of the estate of a bankrupt \* \* \* shall \* \* \* be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt."

And, following the authority of *York v. Cassell*, it would transpire that, none of the creditors of Hammond having reduced his claim to judgment, the decisions cited above from the Ohio authorities would have no application, and Fee could enforce his lien as if the bankruptcy petition had not been filed; for, under the Ohio authorities, the mortgage was good between the parties, and, by the language of the bankruptcy act just quoted, manifestly the trustee stood in the shoes of the bankrupt; *York v. Cassell* being to the effect that only creditors who have reduced their claims to judgment or who have levied by attachment may assert rights against the mortgagee of a mortgage void in the particulars referred to.

But the act of June 25, 1910, amending the bankruptcy law, adds to section 47, par. "a," these words:

"And such trustees, as to all properties in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

It seems that this language might have found a more appropriate place in section 70 of the act; but, however that may be, it is plain that the two sections must now be construed together, and that the

trustee can no longer be said to have the limited title of the bankrupt. Wherefore it need not be argued further that, if this mortgage had been made after the amendment, Fee would have had no lien against the trustee. And we think that the amendment effects the same result in this case, although the mortgage is prior in time.

At any time before or after the adoption of the amendment, any creditor, by reducing his claim to judgment and levying, or by suing out an attachment, could have defeated Fee's mortgage. At all times it was in peril of the individual action of Hammond's creditors in this way. The amendment of 1910 does nothing more under these circumstances than to collectively put these creditors into the position of judgment or attaching creditors by representation. It simply offers another method of effecting a remedy against the mortgage, which already existed, in behalf of the creditors.

In that respect the case before us is not unlike that of *Rairden v. Holden*, 15 Ohio St. 207. There Holden, as administrator de bonis non, brought an action against the defendants Rairden and Burnet on the administration bond of one for whom they were sureties. At the time the bond was executed, an administrator de bonis non was without power to commence such an action; the only remedy under such circumstances being by action by creditors, legatees, or distributees. Between the date of the execution of the bond and the commencement of Holden's action the Legislature of Ohio enacted a law providing that any succeeding administrator might maintain an action on the bond of an administrator whose powers had ceased against any of the obligors thereof or their legal representatives. The contention against Holden's right of action in the Supreme Court of Ohio was that this statute, as applied in the particular case, was inoperative, as being retroactive, and the inquiry was: What are retroactive laws? The court quotes Judge Story's definition of retrospective laws, in *Society for Propagation of Gospel v. Wheeler*, 2 Gall. 139, Fed. Cas. No. 13,156, as follows:

"Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Applying that definition as a test to the facts before it, the Supreme Court of Ohio says:

"It seems to us that the statute now in question before us is free from constitutional objection. It neither 'takes away nor impairs vested rights acquired under pre-existing laws.' The rights of creditors, legatees, and distributees of the estate, and those of the sureties on the bond remain the same as before. It creates no 'new obligation, imposes' no 'new duty,' and 'attaches' no 'new disability.' The amount of the liability, and the extent of the duty, of the obligors in the bond, is the same as before; the only difference being that, before the statute, they were liable to a multiplicity of suits by a multiplicity of creditors, legatees, and distributees, and now they are liable to a single suit upon the same obligation and for the same amount, brought by a trustee for the benefit of all creditors, legatees, and distributees of the estate."

It seems to us that the amendment of 1910 very properly applies to this mortgage, and that, as the law in its operation has the same

practical effect as if the creditors of Hammond had severally levied, the appointment of the trustee gives him priority.

Other questions have been raised by Fee, which we have not considered, for the reason that the record does not appear to have saved them. Our conclusion is that the trustee was right in his insistence that the merchandise went into the general estate, and Fee's petition for review is denied.

The trustee petitions for a review of the order of the referee awarding to Fee a lien on the fixtures. The mortgage, although invalid as to creditors on the merchandise, for the reasons given in the authorities cited, was clearly valid as to the fixtures, and the only point made in the case in regard to this feature is that the mortgage appears to have been canceled on the files of the recorder prior to the filing of the voluntary petition. It seems very plain, however, from the testimony, that this cancellation was an inadvertence of the recorder, for which Fee was not responsible, and it also appears that no creditor was deceived by the mistake. We agree with the referee that the equities in this matter are clearly with Mr. Fee, and the trustee's petition for review will be denied.